TOWARDS UNMASKING THE TRUE EMPLOYEE IN SOUTH AFRICA'S CONTEMPORARY WORK ENVIRONMENT: THE PERENNIAL PROBLEM OF LABOUR LAW

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ABSTRACT

The enormously intricate task of unmasking the true employee in contemporary work environment reveals the dilemmas and complexities embedded in the beguilingly simple but intractable question: who is an employee? The hallmarks of a true employee are shaded in modern work environment given that the actual differences between the categories of "employee" and "independent contractor" are diminishing. The conception of self-employment that links being self-employed inextricably with entrepreneurship, ownership, and autonomy has more to do with ideology than reality.

In addressing the opacities of form engendered by "Work on demand via app" and the "Uberisation of work", the study also attends to the significant and neglected component of labour law's traditional dilemma. Put simply, how the law identifies an "employer" as a counterparty with an "employee". Certain features of modern business organisation such as vertical disintegration of production, and their link to the rise of precarious employment underscore the extent to which the concept of employer plays a central role in defining the contours of labour protection.

The problems of precarity are deep-seated, long-term and even escalating, especially in compelled and dependent self-employment. Re-appraisal South Africa's black box of precarious self-employment through the lens of Canadian dependent contractor jurisprudence points to key limitations that should be addressed for a more robust and effective vision of labour regulation.

If the definition of "employee" in section 213 of the Labour Relations Act 66 of 1995 is amended to redefine an "employee" to include a "dependent contractor", this will represent a leap forward in tackling the interlinked problems of disguised employment and precarious self-employment. This statutory redefinition of the employee serves two purposes. First, the dependent contractor category solves the broader challenge for labour regulation of how to extend protection to persons who have some of the trappings of the independent contractor, but, in reality, are in a position of

economic dependence, resembling that of an employee. In essence, the intermediate category recognises that, as a matter of fairness persons in economic positions that are closely analogous should be given the same legislative treatment.

The second purpose, and one no less important, is to fill in the missing piece of the puzzle in the judicially endorsed three-tiered *SITA* test for identifying employment relationship. If the dependent contractor category is adopted, the lacuna in the three-fold *SITA* test that has so far escaped scholarly, judicial and legislative will be resolved. In this regard, the study contributes to a line of legal scholarship that has tracked the regulatory trajectory for reforming South Africa's labour laws. It is hoped that this thesis will provoke a sustained, and more curious engagement with the complexities and capacities of labour regulation.

DECLARATION

I **TUMO CHARLES MALOKA** declare that this dissertation which is hereby submitted for the award of Doctor of Laws (LLD), Faculty of Law, at the University of Fort Hare, is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references. I further declare that this thesis has not been previously submitted for the award of a degree at this or any other tertiary institution and that this thesis represents the state of law as at 30 November 2018.

Signed……

Date……

DEDICATION

In loving memory of my parents Mahlasinyane Meshack and Ntombizodwa Aletta and Brother Letjheko Shadrack Maloka.

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CONTENTS

CONCEPTUALISATION AND FRAMEWORK OF THE STUDY

List of Abbreviations

ABA J. Lab & Emp. Law	ABA Journal Labour & Employment Law
ABLR	Australian Business Law Review
AJ	Acta Juridica
ACLN	Australian Construction Law Newsletter
Arizona LR	Arizona Law Review
ASQ	African Studies Quarterly
AHRLJ	African Human Rights Law Journal
AJICL	African Journal of International and Comparative Law
AJLL	Australian Journal of Labour Law
AJL&S	Australian Journal of Law & Sociology
Am. J. Legal Hist.	American Journal of Legal History
Am. LR	American Law Review
Am. J of Sociology	American Journal of Sociology
Am. Sociological Rev	American Sociological Review
Arizona LR	Arizona Law Review
Austral J. of Law & Soc	Australian Journal of Law & Sociology
BCEA	Basic Conditions of Employment Act 75 of 1997
Berkeley J Emp. & Lab	Berkeley Journal of Employment & Labor Law
BJPS	British Journal of Political Science
Boston College LR	Boston College Law Review
Boston U LR	Boston University Law Review
Brook J Int. L	Brooklyn Journal of International Law

Buffalo LR	Buffalo Law Review
Bulletin of Comp. Lab. R.	Bulletin of Comparative Labour Relations
Cal. LR	California Law Review
Can Bar Rev	Canadian Bar Review
Can JL E	Canadian Journal of Economics
Can JL & Jur	Canadian Journal of Law and Jurisprudence
Can Soc. S	Canadian Social Science
Catholic U LR	Catholic University Law Review
CEDAW	Convention on the Elimination of Discrimination Against Women
Chi-Kent LR	Chicago-Kent Law Review
CILSA	Comparative and International Law Journal of Southern Africa
CLELJ	Canadian Labour & Employment Law Journal
Clearinghouse LR	Clearinghouse Law Review
CCR	Constitutional Court Review
CLJ	Cambridge Law Journal
CLP	Current Legal Problems
CLL	Contemporary Labour Law
CMLR	Common Market Law Review
COIDA	Compensation for Occupational Injuries and Disease Act 130 of 1993
Colum Business LR	Columbia Business Law Review
Columbia J. Env. L.	Columbia Journal Enviromental Law

Colum LR	Columbia Law Review
Comp Lab L & Pol J	Comparative Labour Law & Policy Journal
Conne LR	Connecticut Law Review
Cornell L R	Cornell Law Review
Cornell JL & Pub Pol'y	Cornell Journal of Law and Public Policy
Corp. & Bus LJ	Corporate & Business Law Journal
Crim L Rev	Criminal Law Review
Critical Sociology	Critical Sociology
Dal. LJ	Dalhousie Law Journal
DDA	Disability Discrimination Act 1995
De Jure	De Jure
Deakin LR	Deakin Law Review
DePaul LR	DePaul Law Review
DSA	Development Southern Africa
Duke LJ	Duke Law Journal
Eccl LJ	Ecclesiastical Law Journal
Economica	Economica
Econ. & Lab. Re. Rev.	Economics & Labour Relations Review
Economics of Transition	Economics of Transition
EL	Employment Law
Electronic J of Comp. L	Electronic Journal of Comparative Law
Emp. Rts & Emp. Pol'y J	Employee Rights & Employment Policy Journal
Env. Law	Environmental Law
Envtl L. Rep.	Environtal Law Report

Ephemera	Ephemera – Theory & Politics in Organisation
ERA	Employment Relations Act 1996/1999
ERJ	Entrepreneurship Research Journal
Eur J. WS	European Journal of Women's Studies
FLSA	Fair Labour Standards Act of 1938 29 U.S.C.
Fla. LR	Florida Law Review
Fordham LR	Fordham Law Review
Fordham Urb LJ	Fordham Urban Law Journal
Franchise LJ	Franchise Law Journal
Fundamina	Fundamina
Harv. Envtl LR	Harvard Enviromental Law Review
Harv Hum Rts J	Harvard Human Rights Journal
Harvard LR	Harvard Law Review
HLE	Harvard Legal Essays
Hastings Comm & Ent LJ	Hastings Communications & Entertainment Law Journal
Hasting Women's LJ	Hasting Women's Law Journal
Hofstra Lab & Emp. LJ	Hofstra Labour & Employment Law Journal
Howard LJ	Howard Law Journal
Human Relations	Human Relations
Ga. LR	Georgia Law Review
Idaho LR	Idaho Law Review
ICESCR	International Covenant on Economic, Social and Cultural Rights

IJCLLIR	International Journal of Comparative Labour Law & Industrial Relations
ILJ	Industrial Law Journal
ILJ (UK)	Industrial Law Journal (United Kingdom)
ILR	International Labour Review
Indiana LR	Indiana Law Review
IQS	International Studies Quarterly
IRJ	Industrial Relations Law Journal
Iowa LR	Iowa Law Review
JCLA	Journal of Comparative Law in Africa
JJS	Journal of Juridical Science
JL Econ & Org	Journal of Law, Economics & Organization
JLP	Journal of Legal Pluralism
JAN	Journal of Advanced Nursing
JHDC	Journal of Human Development & Capabilities
JL & Econ	Journal of Law and Economics
JL Econ & Org	Journal of Law, Economics & Organization
JMS	Journal of Management Studies
JOB	Journal Organizational Behaviour
J. Small & Emerging Bus. L.	Journal Small & Emerging Business Law
JLIA	Penn State Journal of Law & International Affairs
JPC	Journal of Popular Culture
JR	Judicial Review
Kansas LR	Kansas Law Review

Labour	Labour
Law and Inequality	Law and Inequality
Lesotho LJ	Lesotho Law Journal
LDD	Law, Democracy & Development
Loy. U. Chi. LJ	Loyola University of Chicago Law Journal
LQR	Law Quarterly Review
LRA	Labour Relations Act 66 of 1995
Maryland LR	Maryland Law Review
McGill LJ	McGill Law Journal
Michigan LR	Michigan Law Review
Mich J Int'l L	Michigan Journal of International Law
Minn LR	Minnesota Law Review
Mo LR	Missouri Law Review
MLR	Modern Law Review
MULR	Melbourne University Law Review
NALEDI	National Labour & Economic Development Institute
Nebraska LR	Nebraska Law Review
NLRA	National Labour Relations Act 1935 (4.9 Stat. 449) 29 U.S.C.
Northwestern U LR	Northwestern University Law Review
NZULR	New Zealand University Law Review
Ohio St J Disp Resol	Ohio State Journal on Dispute Resolution
Ohio St. LJ	Ohio State Law Journal

Okla City U LR	Oklahoma City University Law Review
OJLS	Oxford Journal of Legal Studies
OLRA	Ontario Labour Relations Act, SO. 1995, (Can.)
Oregon LR	Oregon Law Review
OS	Organisation Studies
Osgoode Hall Law Journal	Osgoode Hall Law Journal
Penn State LR	Penn State Law Review
PER/PELJ	Potchestroomse Elektroniese Regsblad Potchefstroom Electronic Journal
PL & PR	Privacy Law & Policy Reporter
PSR	Political Studies Review
QJE	Quarterly Journal of Economics
QUT LR	Queensland University of Technology Law Review
RSE	Review of Social Economy
RRA	Race Relations Act 1976
Rutgers LR	Rutgers Law Review
San Diego J. Clim. & Energy L	San Diego Journal of Climate & Energy Law
S. Texas LR	Texas Law Review
SALB	South African Labour Bulletin
SAJHR	South African Journal on Human Rights
SA MERC LJ	South African Mercantile Law Journal
SALJ	South African Law Journal
Santa Clara LR	Santa Clara Law Review

SAPL	Southern African Public Law
SAQ	South Atlantic Quarterly
Sci. Tech. & Hum. Values	Science Technology & Human Values
Seattle U LR	Seattle University Law Review
Security Dialogue	Security Dialogue
SDA	Sex Discrimination Act 1975
Signs	Signs
SJ	Speculum Juris
Social Indicators Research	Social Indicators Research
Social Forces	Social Forces
Socioecon Rev	Socio Economic Review
Sociol. Health Illn.	Sociology of Health & Illness
Sociology	Sociology
SASR	Sociological Review
Span. Lab. L & Emp. RJ	Spanish Labour Law & Employment Relations Journal
Sri Lanka J. Int'l L	Sri Lanka Journal of International Law
Stan LR	Stanford Law Review
Stan. Tech. LR	Stanford Technology Law Review
Stell LR	Stellenbosch Law Review
SR	Sociological Review
ST	Sociological Theory
Suffolk J. Trial & App. Advoc	Suffolk Journal of Trial & Appellate Advocacy
Syd LR	Sydney Law Review

Texas LR	Texas Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
Title VII	Civil Rights Act of 1964
Torts LJ	Torts Law Journal
Torts Tomorrow	Torts Tomorrow
TJPC	Journal of Popular Culture
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
Tulane LR	Tulane Law Review
Turf LR	Turf Law Review
UCLA LR	UCLA Law Review
UDHR	Universal Declaration of Human Rights
U Chicago LR	University of Chicago Law Review
U Chicago LF	University of Chicago Legal Forum
U Cin LR	University of Cincinnati Law Review
UC Davis LR	University California Davis Law Review
U Det LR	University of Detroit Law Review
U. Fla. JL & Pub. Pol'y	University of Florida Journal of Law & Public Policy
U Mich JL Ref	University of Michigan J.L. Reform
U. Pa. J. Bus. L	University Pennsylvania Journal of Business
U Pa J Lab & Empl. L	University of Pennsylvania Journal of Labor and Employment Law
U Pa L Rev	University of Pennsylvania Law Review
U Pitt L Rev	University of Pittsburgh Law Review

Utah Emp. LL	Utah Employment Law Letter
UTLR	University of Tasmania Law Review
UTLJ	University of Toronto Law Journal
UTLR	University of Tasmania LR
Val U L Rev	Valparaiso Law Review
Vand LR	Vanderbilt Law Review
W E & S	Work, Employment & Society
Wash. & Lee LR	Washington & Lee Law Review
Willamette LR	Willamette Law Review
Wisconsin LR	Wisconsin Law Review
Wm & Mary J Women & L	William & Mary Journal of Women and the Law
Yale LJ	Yale Law Journal
Yale Int'l L	Yale Journal of International Law
Yale L & Pol'y Rev	Yale Law & Policy Review
Yale J.L. & Tech	Yale Journal of Law & Technology

CONCEPTUALISATION AND FRAMEWORK OF THE STUDY

1. Description of the Study

It is well known that the labour market has undergone a rapid and continuous evolution. There has been a discernible trend towards modes of labouring (of productive relations) outside the complementary paradigm form of employment in a vertically integrated production: employment which is full-time, stable and open-ended.[1] Among the salient developments in contemporary labour market worldwide, two stand out: the rise of contingent work[2] and the concomitant proliferation in highly variegated service arrangements[3] or contractual relations between workers and employing entities.[4] Rather than hiring workers as employees, employers acquire personnel in the form of subcontracting, employee leasing and franchising. The vertical disintegration of production has placed many vulnerable workers beyond the protective ambit of labour and social security legislation. Alain Supiot sums up this dilemma nicely: [5]

> "These developments are having serious consequences for worker protection under labour and social security law. The first of these is often increased insecurity for

[1] Cf Marsden *A Theory of Employment Systems: Micro-Foundations of Societal Diversity* (1999) 4 arguing that "despite the sometimes rapid growth in contingent employment, there is no evidence that the open-ended employment relationship is about to lose its pre-eminence."

[2] See generally; Delsen "Atypical employment relations and government policy in Europe"1991 *Labour* 123; Owens "Women, "atypical" work relationships and the law" 1993 *MULR* 399 and "Decent work for the contingent workforce in the new economy" 2002 *AJLL* 209; Schroeder "Does the growth in the contingent work force demand a change in federal policy?" 1995 *Washington & Lee LR* 731;; De Grip *et al* 'Atypical in the European Union' 1997 *ILR* 49; Dupper *et al* "Eroding the core: Flexibility and the re-segmentation of the South African labour market 1999 C*ritical Sociology* 216; "Part-time employees and the pursuit of (substantive) equality: A comparative study of the potential and limitations of discrimination law" 2002 *SA Mer LJ* 221.

[3] See e.g. Arthurs "The dependent contractor: A study of the legal problems of countervailing power" 1965 *UTLJ* 89; Bendel "The dependent contractor: An unnecessary and flawed development in Canadian labour law" 1982 *UTLJ* 374; Mills "The situation of the elusive independent contractor and other forms of atypical employment in South Africa: Balancing equity and flexibility?" 2004 25 *ILJ* 1203 (Balancing equity and flexibility).

[4] See generally Finkin & Jacoby "An introduction to the regulation of leasing and employment agencies" 2001 *Comp. Lab. L. & Pol'y J* 1; O'Donnell & Mitchell "The regulation of public and private employment agencies in Australia: An historical perspective" 2001 *Comp. Lab. L. & Pol'y J* 7; Vigneau "Temporary agency work in France" 2001 *Comp. Lab. L. & Pol'y J* 45; Schruren "Employee leasing in Germany: The hiring out of an employee as a temporary worker" 2001 *Comp. Lab. L. & Pol'y J* 67; Sol "Targeting transitions: Employment services in the Netherlands" 2001 *Comp. Lab. L. & Pol'y J* 81; Servais "Labour and employment agencies: Public or private management?" in Belllace & Rood (eds), *Labour Law At The Crossroads: Changing Employment Relations – Studies in honour of Benjamin Aaron*, (1997), 183-179.

[5] "The transformation of work and the future of labour law in Europe" 1999 *ILR* 31, 34.

individuals, as in the case of economically dependent self-employment or in the case of workers in precarious employment who are "invited" to refrain from joining a trade union. The second consequence is an expanding grey area between wage employment and self-employment. Indeed, legally independent subcontractors – including both individuals and enterprises – can be economically dependent upon a single client or prime contractor or on a very small number of clients. Conversely, some workers who are technically in wage employment are becoming increasingly autonomous in practice. Lastly, the third consequence is that employment relationships need to be seen within the context of a network of enterprises, particularly as regards a prime contract's ability for the safety and health of a subcontractor's workers, or the protection of contract labour, or yet the joint liability of such enterprises as may be answerable for observance of statutory working time, for example."

2. Literature Review

The transformation of work is attributed in the main to the shift away from industrial production to a service economy in developed countries, compounded by unemployment,[6] globalisation of the market economy,[7] international migration,[8] and information and communication technology.[9]

The extent to which climate change is engendering radical changes on society is a significant factor matter warranting further reorientation and adaptation of labour law. Grappling with the complexities of climate change has drawn environmental law scholars into discomfiting directions.[10] In common parlance, "*Udada*".[11] Unique nomenclature and new fields under different aliases such as "Climate Change Law",[12]

[6] In the words of the ILO's Director-General, "the global job crisis is putting security, development, open economies and open societies all at risk. This is not a sustainable course." Cited in 'World of work: Migrants in a globalising labour market'–'Migration in an interconnected world: New directions for action' *Report of the Global Commission on International Migration*, October 2005, chap. 4 at 11.

[7] For more details on this very widespread unstoppable phenomenon of globalisation and its social impact: a series of articles in 'Special Issue More Equitable Globalisation' (2004) 143(2) *International Labour Review* 1-185. See also ILO: *A Fair Globalisation: Creating Opportunities for All*, Report of the World Commission on the Social Dimension of Globalisation, Geneva, 2004.

[8] See Global Commission on International Migration (GCIM) –'Migration in an interconnected world: New directions for action' *Report of the Global Commission on International Migration*, October 2995.

[9] Stone *From Widgets to Digits: Employment Regulation for the Changing Workplace* (2004) and "Legal protection for atypical employees: Employment law for workers without workplaces and employees without employers" 2006 *Berkeley J. Emp. Lab. L* 25.

[10] See generally, Schwartz "The law of environmental justice: A research pathfinder" 1995 *Envtl L. Rep.* 10543; Aagaard "Environmental law as a legal field: An inquiry in legal taxonomy" 2010 *Cornell LJ* 221.

[11] Tshivenda expression meaning people are confused.

[12] Peel "Climate change law: The emergence of a new legal discipline" 2008 *MULR* 922.

"Climate Adaptation Law"[13] or "Just Transition Law"[14] have been deployed to address the complex legal issues emerging as a result of climate change. Absent from South African labour law transformation of work calculus is climate change, despite ILO's *Green Jobs Initiative* locating Just Transition as a core aspect of its Decent Work Agenda.[15] The apathy of labour law community towards the role of law in climate change and adaptation provides a false sense of comfort because climate change seismic shifts are precipitating profound effects on work and labour markets throughout the world. Some extraction industries and skills will become obsolete; others will emerge or gain prominence. The transition from fossils to renewables will inevitably cast many workers into the ranks of the unemployed.

The entry into the environmental-labour law lexicon and discourse of the concept Just Transition is traceable to the initiatives by the labour movement to countervail the adverse impacts of climate change on the livelihoods of workers.[16] An underlying theme of Just Transition is an attempt to bridge the 'jobs versus environment' dichotomy by demonstrating that through effective planning and policy, it is feasible to distribute the benefits and risks associated with transitions in an equitable manner.

How is South Africa responding to the exceedingly complex issues imposed by Just Transition? Is the unfolding transition to renewable energy likely to balance and reconcile the impossible duality: minimising job dislocation and ensuring sustainable clean environment? The abortive court application by NUMSA and coal producers lobby group, Transform SA to interdict the power utility from signing contracts with

[13] Doremus "Adaptation to climate change with law that bends without braking" 2010 *San Diego J. Clim. & Energy L.* 45; Craig "Stationary is dead – Long live transformation: Five principles for climate adaptation" 2010 *Harv. Envtl LR* 9

[14] Doorey "A transitional law of just transitions for climate change and labour" in Blackett & Trebilock (eds) *Research Handbook on Transitional Labour Law* (2015) 1 and "Just transition law: Putting labour law to work on climate change"2017 *Journal of Environmental Law and Practice* 201 ; Regan "The case for enhancing climate change negotiations with a labour rights perspective" 2010 *Columbia J. Env. L* 249

[15] United Nations Environmental Programme, Green Jobs: Towards Decent Work in a Sustainable, Low-Carbon World (2008), http://www.une.org/PDF/UNEPGreenjobs report08.pdf. 278 (accessed 16-06-2018).

[16] Rosemberg "Building a just transition: The linkages between climate change and employment"2010 *Int. J. Lab. Res.* 125; Sean "Jobs, justice, climate: Conflicting State obligations in the international human rights and climate change regimes" 2010 *OLJ* 155.

Independent Power Producers (IPPs) have thrust into the public domain the jobs versus renewables dilemma.[17] The Eskom imbroglio also illustrates that employment displacement is embedded in the transition to clean energy. It remains to be seen whether just transition mitigate let alone prevent a slide into precarity.

Larger trends, however, have correlated with accumulating assault on the pro-regulatory stance of labour law[18] as protectionism, and even its continuing value as a specialist field of study.[19] What has emerged and attested in the various pages of specialist labour law journals is a more introspective and critical review of the scope of labour law,[20] its regulative nature and its impact.[21] This process has led to some extent to the decentring of labour law while simultaneously calling into question its traditional and avowed vocation of protecting workers within an inherently asymmetric contractual relation with the employer.

How valid is this seamless extrapolation to South Africa in the afterglow of a successful constitutional transition? Has commitment to constitutional democracy, social justice and equality in the labour market, bolstered by the enactment of a new labour code been able to overcome the artefact of apartheid socio-economic exclusion? What about the *fragmentation* of central categories of workers which have been main

[17] Citizen Reporter "NUMSA, Transform RSA obtain interdict to block Eskom from signing IPP contracts" *The Citizen* 13 March 2018, available: https://citizen.co.za/news/south-africa/1853720/numsa-transform-rsa-obtsain-interdict-to-block-eskom-from-signing-ipp-contracts/ (accessed 13-03-2018).Van Niekerk "A different Eskom: Achieving a just energy transition for South Africa" https://dailymaverick.co.za.cdn.ampproject.org (accessed 12-07-2019).

[18] Archibald "The significance of the systemic relative autonomy of labour law" 2017 *Dal. LJ* 1.

[19] Epstein "A common law for labour relations: A critique of the New Deal legislation" 1983 *Yale LJ* 1357; Mitchell (ed) *Redefining Labour Law: New Perspectives on the Future of Teaching Research*, Centre for Employment and Labour Relations, Melbourne 1995; Hepple "The future of labour law" 1995 24 *ILJ (UK)* 303.

[20] For general of overview see, Barnard *et al* (eds), *The Future of Labour Law: Liber Amicorum Bob Hepple QC* (2004).

[21] For an overview of range of sources exploring this theme, see generally, Klare K, 'Countervailing workers' power as a regulatory strategy' in Collins *et al* (eds), *Legal Regulation of Employment Relations* (2000) 63; Collin "Regulating the employment relation for competitiveness" 2001 30 *ILJ* (UK) 17,18; Deakin "Labour law as market regulation: The economic foundations of European social policy" in Davies *et al* (eds), *European Community Labour Law* (1996); Deakin & Wilkinson *The Law of the Labour Market* (2004).

foci of labour law and determination of rights and obligations? Mills sets South African experience in its wider context: [22]

> "South Africa's entry into the global market economy has coincided with its transition to a constitutional democracy, leading to a tension between political/social and economic reform. The apartheid labour market was highly regulated and racially segmented, with high unemployment and low investment levels. The post-apartheid government was thus tasked with eradicating race and gender inequality in the labour market, and promoting economic growth inter alia through attracting foreign investment, in the context of unacceptably high levels of poverty amongst its black majority. After tinkering briefly with the idea of redistribution as called for by the Reconstruction and Development Plan (RDP), it opted instead in 1996 for a neo-liberal macro-economic policy, the Growth, Employment and Redistribution (GEAR) strategy, a market oriented strategy which emphasizes trade liberalisation and flexibility, aimed at attaining macro-economic stability to attract investment."

Like its counterparts elsewhere, South Africa's labour legislation has proved unequal to the task of preventing a rift from opening between workers enjoying extensive protection under a contract of employment, on the one hand, and those working under some other type of contract on account of which they enjoy less protection, on the other. At the same time, labour law has not been adapted to cope with the variety of employment situations (eg conventional wage employment, economically dependent self-employment).[23] It is not surprising that labour law has arrived at a position needing an agonizing reappraisal and remodelling to adjust to the "new economy" in the broadest sense of the term.[24] The concept of decent thus embodies the expression of the ILO's resolve to bring together all the components of harmonious economic and social development, of which regulations for the protection of labour are a key feature.[25]

The net result of all these very important and complex developments was the failure of labour law to adequately account for these new demands or to incorporate

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[22] Mills "Balancing equity and flexibility?"1210. See also Kalula "Beyond Borrowing and Bending: Labour Market Regulation and the Future of Labour Law in Southern Africa" in Barnard *et al* (eds), *The Future of Labour Law: Liber Amicorum Bob Hepple QC* (2004) 275.

[23] Le Roux "The meaning of 'Worker' and the Road Towards Diversification: Reflecting on *Discovery, SITA* and *Kylie*" 2009 30 *ILJ* 49.

[24] Servais "Globalisation and decent work policy: Reflections upon a new legal approach" 2004 *ILR* 185.

[25] For elaboration of the concept of decent work see ILO: *Decent Work*, Report of the Director-General to the International Labour Conference, 87th Session, Geneva, 1999, 3: "The primary goal of the ILO today is to promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity. This main purpose of the Organisation today. Decent work is the converging focus of all its four strategic objectives: the promotion of rights at work; employment; social protection; and social protection; and social dialogue. It must guide its international role in the future."

them into existing traditions drawn from sociology of work and industrial relations. As Hugh Collins has astutely observed, enormous changes in the world of work account for "a subtle disintegrative pressure on the labour law discourse":

> "The subject remains contextual, but discussions proceed by engaging with insights supplied by diverse interpretation of context. *In a sense we are left with four labour law discourses*: the original one engaged with the sociological analysis … the next which describes and evaluates the legal regulation in the context of macro-economic policies aimed at improving the labour market, another which restates labour law as a set of individual rights analogous to the rights of civil liberties of public law, and finally (though perhaps less distinctly) a labour law which fits into a social policy concerned ultimately with distributive justice."[26]

Davies and Freedland have drawn attention to the wider implications of the phenomenon of external disintegration for the way in which it turns employees into ostensibly independent contractors:

> "It may well be that we need to reflect upon a parallel transformation whereby workers are placed in a situation which is much more like the reality of independent contracting while continuing to be styled and categorised as dependent employees. The cumulative effect of both external and internal disintegration is to present an ever deeper challenge than has hitherto been perceived to a system of employment law essentially premised upon a deep and fundamental distinction between the dependent employee and the independent contractor, and targeted almost exclusively upon the dependent employment relationship."[27]

Viewed in this way, labour law as a mode of inquiry becomes essentially moribund discipline, not because its protagonists suffer false nostalgia for bygone epochs, nor because it has outlived its usefulness, but simply because the juridical discipline does not always follow the dynamics of the development of socio-economic phenomena. Very often new work arrangements are governed by old rules and in their scope, contents and cultural inspiration they cannot correspond to the new realities. The "crisis in fundamental concepts"[28] in the crucial area of the legal definition of employment is very emblematic of the conceptual morass in labour law.

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[26] "The productive disintegration of labour law" 1997 26 *ILJ* (UK) 295, 308 (emphasis added).

[27] "Changing Perspectives Upon the Employment Relationship in British Labour Law" in Barnard *et al* (eds), *The Future of Labour Law: Liber Amicorum Bob Hepple QC* (2004) 129, 132.

[28] See Hepple "Restructuring employment rights" 1986 15 *ILJ* (UK) 69, arguing against the use of the contract of service, suggesting instead a broad concept of the 'employment'; and Davis & Freedland "Labour markets, welfare and the personal scope of employment law" 1999 *Comp. Lab, L. & Pol'y J* 233, exploring, *inter alia*, the conceptual and practical difficulties dogging the concept of employment., sections 10-13; and Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, Reg 1. In this regard see also Anderman "The interpretation of protective employment statutes and contracts of employment" 2000 30 *ILJ* (UK) 138; Davidov "The three axes of employment relationships:

The proliferation of non-standard working arrangements[29] and the breaching of the boundaries within which 'work' has been physically and conceptually confined have drawn labour law academy into discomfiting directions. At the same time (and partly as a result), becoming the primary lens through which ongoing debate and discussion of the future development of labour law are framed, considered, assessed, rejected, or embraced. Redefining labour law protagonists anxious to halt 'productive disintegration' have turned to alternative approaches in an attempt to interpret and prescribe appropriate modes of regulation. Labour law scholarship has become inherently unstable enterprise, in which scholars must currently negotiate shifting terrain.[30]

Alternative methods and narratives have been deployed to challenge or subvert reigning paradigms in labour law discourse.[31] At the heart of this sense of transition is the perceived collapse of classical labour law, understood in primarily *redistributive* terms, and the corresponding rise of alternative regulatory agenda that is overridingly *economic*, concerning itself with goals such as the allocative efficiency and the promotion of competitiveness.[32] However, some scholars have stoutly

A characterisation of workers in need of protection" 2002 *UTLJ* 357 and "Who is a worker?" 34 *ILJ* (UK) 228.

[29] See the collection of essays in Blanpain *et al* (eds), *Special Issue: Flexible Work Patterns and their Impact on Industrial Relations*, Bulletin of Comparative Labour Relations 22-1999 (1999); Rodgers "Precarious work in Western Europe: The state of the debate" in Rodgers & Rodgers (eds), *Precarious Jobs in Labour Market Regulation* (1989); Burchell *et al The Employment Status of Individuals in Non-standards Employment*, Employment Relations Research Series No. 6 URB/99/770 (London, Department of Trade and Industry, 1999 available at www.dti.gov.uk/IR/inform.htm) .

[30] See generally Brassey "Fixing the laws that govern the Labour Market" 2012 33 *ILJ* 1; Benjamin "Decent work and non-standard employees: Options for legislative reform in South Africa: A discussion document" 2010 31 *ILJ* 845.

[31] Gahan & Mitchell 'The limits of labour law discourse: Some reflections on *London Underground v Edwards*" in Mitchell (ed) *Redefining Labour Law: New Perspective on the Future of Teaching and Research* (1995) 62 have suggested that: "The principle of purpose of labour market regulation is to regulate capital and labour for the broad purpose of maximising opportunity for employment, recognising that all forms of work are socially valuable, and providing a working environment and conditions of employment which are respectful of the preferences and needs of the participants." Stone's work "the new psychological contract engages with the question of what it is the employees are bargaining for, in the new global business environment where the long term job security is dissolving under acidic influence of the flexibilisation. Employees are not bargaining for long-term job security and orderly promotional opportunities, but for expectations of employability, training, human capital development, and networking opportunities. "The new psychological contract: implications of the changing workplace for labour and employment" 2001 *UCLALR* 519.

[32] Conaghan "Labour law and 'new economy' discourses" 2003 *AJLL* 9, 20; Deakin & Wilkinson "Labour law and economic theory: A reappraisal" in Collins (eds), *Legal Regulation of the Employment Relation* (2000) 29.

contested the talismanic powers of counter narratives of the new economy and their applicability or relevance in a labour law context.[33] On reflection, the current soul searching in the labour law discourse is not surprising. Moreover, the same fields of study from which these alternative approaches are derived are subject to the same time of internal scrutiny by scholars and, perhaps more importantly, consists of various conflicting schools of thought.

The preceding safari through the doctrinal and theoretical landscape has sought to place the thesis in the context of the wider re-evaluation of labour law as a field of study – a re-evaluation evident in debates both here and overseas. Some of the processes that produce disturbances in the field – (that inverts or scrambles familiar narratives of countervailing workers' power are being displaced by rival perspectives such of those neo-classical economics which favour greater abstentionism, market regulation or self-regulation, and new economy discourse for appraising developments) are central to the questions that this thesis pursues. These large-scale developments have created a challenge for legislatures, courts, and labour law scholars. Armed with these insights, the thesis examines the employee/independent contractor dichotomy in South African labour law. Hence the thesis will be titled Towards unmasking the true employee in contemporary work environment: The perennial problem of labour law.

3. Problem Statement

This title gives recognition to the fact that the issue of who is an employee as opposed to an independent contractor remains a notoriously difficult question in labour law. No single legal system seems to have been able to clearly define the concept of employee, beyond providing broad definition. Equally, courts have been unable to develop a clear and consistently applicable test for distinguishing employee from independent contractor in order to deal with the highly variable patterns of service arrangements is of this disintegrative tendency.

[33] See generally; Arthurs "Reinventing labour law for the global economy" 1991 *Berkeley J. Emp. & Lab.* 271 and 'Labour law without the State' 1996 *UTLJ* 1; Conaghan "Labour law and 'new economy' discourses" 2003 *AJLL* 9.

Recent developments in labour market regulation confirm this view as well as it confirms the idea that the traditional concept of employee – built on dependent subordinated work – has become both more difficult to uphold and less relevant as a definition of the personal scope of labour law. For instance, recourse to self-employment, subcontracting or outsourcing may reflect a simple strategy of working around labour law in an attempt to reduce labour costs in traditional, low-value-added sectors of the economy.

The underlying concern is that the dominant assumptions about the employment relationship embodied in labour law are not capable of embracing the kinds of employment relationships which will become more prominent in the knowledge economy. Somewhere in between genuinely subordinated workers and genuinely independent entrepreneurs, a third category is emerging – that of workers who are legally independent (i.e. self-employed) but economically dependent.[34] This lack of clarity becomes more complicated once one adds the jurisprudence relating to parties who characterised themselves as independent contractors for purpose of income tax, but later sought to reassert their status as "employees" for the purposes taking advantage of the modern law of unfair dismissal.[35] Today one can no longer just speak about simple, uniform employer/employee relations. Denying this reality means denying the contemporary world of work.

4. Aims of the Study

The very nature of waged labour is changing in South Africa, as is elsewhere in the world. To what extent does the current South African labour law reflect this transformation? Does it portend future 'labour law'?

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[34] See generally, *Mandlanya v Forster* 1999 20 *ILJ* 585 (LAC); *Shezi v Gees Shoes CC* 2001 22 *ILJ* 1707 (CCMA); *Bargaining Council for the Contract Cleaning Industry and Gedeza Cleaning Services & Another* 2003 24 *ILJ* 2019 (BCA); *De Grieve/Old Mutual Employee Benefits/Life Benefits Assurance Co (SA) Ltd* 2004 2 BALR 184 (CCMA); *Le Roux/Afribund CC* 2004 4 BALR 469 (CCMA) *Hanyane/Urban Protection Services* 2005 10 BALR 1086 (CCMA).

[35] See generally *Denel (Pty) Ltd v Gerber* 2005 9 BLLR 849 (LAC); *Madingoane v Fibrous Plant* 2004 25 *ILJ* 347 (LC); *Swissport SA (Pty) Ltd v Smith NO* 2003 24 *ILJ* 618 (LC); *Bezer v Cruise International CC* 2003 24 *ILJ* 1372 (LC); *SABC v McKenzie* 1999 20 *ILJ* 585 (LAC); *CMS Support Services (Pty) Ltd v Briggs* 1998 19 *ILJ* 271 (LAC); *Apsey v Babcock Engineering Contractors (Pty) Ltd* 1995 5 BLLR 17 (IC); *Callan v Tee-Kee Borehole Castings (Pty) Ltd* 1992 13 *ILJ* 1544 (IC).

The overarching objective of this study is to inquire into the categorisation of employment relationships in South African law. The study not only confines its analysis of the employee/independent contractor divide, but also probes the question of regulation of employment and the diversification of employment forms in contemporary labour market. In pith and substance, it is a disquisition into the changes in the nature of employment and resulting legal issues.

5. Scope and Limitations of the Study

The core preoccupation of this work is the categorisation of employment relationships. And a crucial postulate of such a study is that it warrants a look beyond the core labour law institutions of individual employment relationship and collective bargaining. In line with redefining labour law discourse, the scope will incorporate into the analysis some aspects of social security, globalisation and active labour market structure. Certain features of commercial, competition and company law will be relevant since they serve to define the legal nature of business enterprise.

It is not the aim of this thesis to chart, in detail, all areas of law which may have a bearing on the labour market; although reference to certain aspects of those just cited will be at various points in the study. Nor does it aim to cover every facet of 'core' labour law. It will focus instead on those aspects of legal doctrine which have had a particularly prominent role in determining the juridical nature and structure of the employment relationship as the core institution of the labour market.

6. Design and Layout of the Study

Chapter one takes up the amorphous issue of the shifting frontiers of work, globalisation and the interrelated problems of precarity shaping the contours of contemporary work environment in South Africa and elsewhere.

Chapters two starts within an analysis of the legal institution of the common law contract of employment. It then grapples with the definitional quandaries of who is an employee and who is an independent contractor against the backdrop of fragile boundary between disguised employment, genuine entrepreneurial self-employment and dependent self-employment.

Building upon chapter two, chapter three confronts the enormously complex challenge of dissecting the elusive troika of disguised employment, genuine entrepreneurial self-employment, and precarious/dependent self-employment.

Chapter for considers the significant and neglected component of labour law's traditional dilemma, that of identifying the real employer.

The opacities of form midwifed by 'on-demand/platform economy', or 'gig economy' embedded in the legal wrangling over employment status of e-hailing drivers are the focal point of discussion in chapter five.

Chapter six revisits the binary distinction between employees and independent contractors through the prism of vicarious liability.

Chapter seven re-appraises South Africa's black box of precarious self-employment through the lens of Canadian dependent contractor jurisprudence. In short, the chapter seeks to place the intermediate category as the centrepiece of addressing the opacities of form engendered by self-employment.

The concluding chapter sets forth proposal for bending and borrowing the dependent contractor category from Ontario's Labour Relations Act. The missing piece of the puzzle in three-stage *SITA* test for determining the existence of employment relationship as well as the lacuna in the statutory definition of an 'employee' in section 213 of the Labour Relations Act 1995 has so far escaped scholarly, judicial and legislative attention. The absence of a dependent contractor category renders the *SITA* test an imprecise tool for tackling the fine margins of self-employment. If statutory definition of an 'employee' is amended to include a 'dependent contractor', protection will be extended to persons who have some of the trappings of the independent contractor, but, in reality, are in a position of economic dependence, analogous to that of a subordinate employee. The dependent contractor category will also serve as filter to sidestep and mitigate the chilling effects of *Driveline* formalism where an employer contrives the opacities of form and uses technicalities to non-suit the employees' unfair dismissal claims. By all accounts, the intermediate category accords well with the goals of labour regulation in terms of promoting countervailing power.

7. Research Methodology

In the main, recourse will be had to relevant published and unpublished material. The historical record of decided cases and statutory texts, together with wider body of public discourse on legislative policy, will provide the primary raw material for pursuing this inquiry. This does not mean that the study will neglect the role of factors outside the law, ranging from globalisation to the influence of information communication technology on the form of production, and the unfolding transition to renewable energy and the problem of balancing and reconciling the impossible duality: minimising job dislocation and ensuring sustainable clean environment.

CHAPTER ONE

THE SHIFTING FRONTIERS OF WORK, GLOBALISATION AND PROBLEMS OF PRECARITY WITHIN AN EMPLOYMENT RELATIONSHIP

1.1 Introduction

The role of globalisation in ushering profound changes to the labour market across economies is irrefutable.[36] In entrenching labour market segmentation, globalisation has deepened and expanded precarious forms of work while diminishing job security. Apart from globalisation, the disruption to the normative patterns of labour law is also linked to the deployment of new technologies[37] leading to the emergence of "virtual work"[38] with its added complexities. The reasons for the shifting frontiers of work from standard to non-standard forms of employment are manifold, but globalisation and information and communication technologies (ICT) are among the most generally advanced. Standard employment is described as a subordinated waged employment in an establishment owned by the employer which is full-time, stable and open-ended. From regulatory point of view, this translates into a worker who is recognised by the law as an employee in a binary relationship with an employer under a contract of employment. Without attempting a comprehensive definition of what constitutes non-standard forms of employment - an expression embracing a range of unprotected forms of work-relationships known under variety of aliases: atypical employment, casual employment, part-time employment, self-employment, contracting

[36] For a sampling of prominent works see: "Special Issue: More Equitable Globalization" 2004 *ILR* 1; Ghose "Trade liberalisation, employment and global inequality" 2000 *ILR* 281; Kucera "Core labour standards and foreign direct investment" 2002 *ILR* 31; Busse & Braun "Trade and investment effects of forced labour: An empirical assessment" 2003 *ILR* 49. See also ILO: *A Fair Globalisation: Creating Opportunities for All*, Report of the World Commission on the Social Dimension of Globalisation, Geneva, 2004; Fenwick *et al Labour Law: A Southern African Perspective* (IILLS, Geneva, 2007). The literature is immense.

[37] Specifically useful in this respect is the collection of essays, Blanpain (ed) *The Evolving Employment Relationship and the New Economy: The Role of Labour Law and Industrial Relations – A Report from 5 Countries,* Bulletin of 41-2001 (2001); Arthurs "Reinventing labour law for the global economy" 1991 *Berkeley J Emp. & Lab* 271 and "Labour law without the State" 1996 *UTLJ* 1; Conaghan *et al Labour Law in an Era of Globalisation* (2002); Conaghan "Labour law and 'new economy' discourses" 2003 *AJLL* 9; McCallum "Conflicts of laws and labour law in the new economy" 2003 *AJLL* 50; Pittard "The dispersing and transformed workplace: Labour law and the effect of electronic work" 2003 *AJLL* 69.

[38] Cherry "A taxonomy of virtual work" 2011 *Ga. LR* 951 uses the term "virtual work" broadly not only to encompass virtual worlds but also to refer to work taking place online, including the type of micro-labour crowdwork performed on Amazon's Mechanical Turk).

and subcontracting, outwork and agency employment.[39] Non-standard forms of employment generally are located at the margins of labour law. Simply put, the allegedly precarious nature of non-standard forms of employment places many vulnerable workers beyond the protective ambit of labour and social security legislation.

Few would contest that the global economy has heightened labour insecurity.[40] Despite global growth and job creation, there has not been corresponding improvement in the working conditions for many. The recurrent labour market vulnerabilities have prevented many developing economies from benefiting optimally from the dynamism of globalisation. Globalisation has imposed new sources of external shocks.[41] For instance, South Africa is still experiencing the long-term consequences of the 2008 global financial crisis, and the sovereign debt crisis in the Eurozone,[42] which began in 2010. The adverse aftershocks of the recent credit downgrade[43] suggest that there will be no signs

[39] See generally, Brassey "Fixing the laws that govern the Labour Market" 2012 33 *ILJ* 1; Benjamin "Decent work and non-standard employees: Options for legislative reform in South Africa: A discussion document" 2010 31 *ILJ* 845; Fourie "Non-Standard Workers: The South African Context, International Law and Regulation by the European Union" 2008 *PER* 23; Van Eck "Employment Agencies: International Norms and Developments in South Africa" 2012 *IJCLLIR* 29; Botes "The history of labour hire in Namibia: A lesson for South Africa" 2013 *PER/PELJ* 506; Forere "From exclusion to labour security: To what extent does section 198 of the Labour Relations Act of 2014 strike a balance between employers and employees?" 2016 *SA Merc LJ* 375.

[40] It is telling that even during the commanding heights of the USA economy in the mid-1990s, with low inflation and unemployment falling, acute worker insecurity was still predominant. A snapshot of the testimony of former US Federal Reserve Bank Chairman, Allan Greenspan before the Committee on Banking, Housing, and Urban Affairs Senate, February 26, 1997 neatly captures the pervasive issue of employment vulnerability:

> "Atypical restraint on compensation increases has been evident for a few years now and appears to be mainly the consequence of greater worker insecurity."

For incisive exposition see Brazillier *et al* "Measuring employment vulnerability in Europe" 2016 *ILR* 265; Mughan & Lacy "Economic performance, job insecurity and electoral choice" 2002 *British Journal of Political Science* 513; Ezrow & Hellwig "Responding to voters or responding to markets? Political parties and public opinion in an era of globalisation" 2014 *International Studies Quarterly* 816.

[41] The mistrust of current forms of migration from the EU seems to have been a key part of the journey towards the Brexit vote. See Novitz "Collective bargaining, equality and migration: The journey to and from Brexit" 2017 46 *ILJ (UK)* 109; Motala "The Election of Donald Trump and activism in South Africa: The Contribution of Justice Sandile Ngcobo" 2017 *SAPL* 1.

[42] For well-argued and amply supported presentation on "vulture funds", sovereign debt and human rights, see: Lumina "'Preying on the poor': Vulture funds, sovereign debts and human rights in developing countries" *Inaugural Lecture*, University of Fort Hare 29 April 2016. See also Allen & DiGiuseppe "Tightening the belt: Sovereign debt and alliance formation" 2013 *International Studies Quarterly* 659; Armingeon & Baccaro "Political economy of the sovereign debt crisis: The limits of internal devaluation" 2012 41 *ILJ (UK)* 254; Koukiadaki & Krestsos "Opening Pandora's Box: The sovereign debts crisis and labour market regulation in Greece" 2012 41 *ILJ (UK)* 276.

[43] Donnelley "Global credit ratings agency has downgraded South Africa to junk status" *Mail & Guardian* http://www.mg.co.za>article2017-11-25g (accessed 19-07-2017).

of ending unemployment and job losses in the foreseeable future. Globalisation has assumed a special place as both a symptom and cause of labour market segmentation. In developing economies segmentation is synonymous with the polarities between a "formal" sector in which employment is stable and regulated, and an "informal" sector of casualised work relations which are, in varying degrees, undocumented, untaxed, and beyond the scope of collective agreements and legislative protections.[44]

The challenges of globalisation for labour regulation are enormous. At issue is the extent to which globalisation has amplified employment vulnerability. Also arising from the question of the impact of globalisation on work regulation are delicate questions of theoretical vintage. More importantly, however, the focal questions press the normative view of labour law as inherently ahistorical: Has labour law kept in step

[44] *Former President Mbeki's (the famous Two Nations address*) in crisp terms encapsulates the dualities of modern labour market:

> "So … we also pose the questions: What is nation-building? And is it happening?
> With regard to the first of these, our own response would be that nation-building is the construction of the reality and the sense of common nationhood which would result from the abolition of disparities in the quality of life among South Africans based on the racial, gender and geographic inequalities we all inherited from the past … We therefore make bold to say that South Africa is a country of two nations.
> One of these nations is white, relatively prosperous, regardless of gender or geographic dispersal. It has ready access to a developed economic, physical, educational, communication and other infrastructure. This enables it to argue that, except for the persistence of gender discrimination against women, all members of this nation have the possibility to exercise their right to equal opportunity, the development opportunities to which the Constitution … committed our country.
> The second and larger nation of South Africa is black and poor, with the worst affected being women in the rural areas, the black rural population in general and the disabled. This nation lives under conditions of a grossly underdeveloped economic, physical, educational, communication and other infrastructure. It has virtually no possibility to exercise what in reality amounts to a theoretical right to equal opportunity with that right being equal within this black nation only to the extent that is equally incapable of realisation.
> This reality of two nations … constitutes the material base which reinforces the notion that, indeed, we are not one nation, but two nations.
> And neither are we becoming one nation. Consequently, also, the objective of national reconciliation is not being realised.
> It follows as well that the longer this situation persists, in spite of the gift of hope delivered to the people by the birth of democracy, the more entrenched will be the conviction that the concept of nation-building is a mere mirage and that no basis exists, or will ever exist, to enable national reconciliation to take place".

Thabo Mbeki "Reconciliation and Nation Building", speech at the opening of the debate in the National Assembly, Cape Town, 29 May 1998, in Thabo Mbeki *Africa – The Time Has Come* (1998). See also Froneman "The Rule of law, fairness and labour law" 2015 36 *ILJ* 823; Wallis "The rule of law and labour relations" 2014 35 *ILJ* 849; Van Niekerk "The Labour Courts, fairness and the rule of law" 2015 36 *ILJ* 2451. For the characterisation of "two economies" in other contexts: Reich *The Work of Nations: Preparing Ourselves for 21st Century Capitalism* (1992); Hutton *The State Were In* (1995).

with shifting frontiers of work? In other words, is labour law fulfilling its overarching role of countervailing workers power?

This chapter tries to shed some light on the impact of globalisation on work regulation. It opens with a presentation on the globalisation and evolving nature of work. The second part of the chapter turns to the question of labour law's traditional and avowed vocation of protecting workers within an inherently asymmetric contractual relation with the employer in an attempt to elucidate the apparent paradox of an intensifying employment vulnerability at a time when there is accumulating assault on the pro-regulatory stance of labour law as protectionism, and even its continuing value as a specialist field of study.

1.2 The Ubiquitous Role of Work

Before the discussion turns to a consideration of the extent to which globalisation has intensified employment vulnerability, a few words on the concept of work and employment are appropriate. This compressed account is necessary because the question of work and employment is at the heart of the disquisition that this thesis pursues. Above all, labour law is profoundly concerned about protection of employment.[45] The vulnerability of employees is underscored by the level of importance which our society attaches to employment.

It is worth recalling that from its inception, and arguably in its modern operation labour law has functioned to lessen the asperities of the common law

[45] At the dawn of constitutional democracy, *In Re Certification of the Constitution of the RSA, 1996* 1996 4 SA 744 (CC) para 66 the Constitutional Court was mindful of the imbalance of power inherent in the employment relationship when it noted that employers "may exercise power against workers through a range of weapons, such as dismissal, the employment of alternative or replacement labour law, the unilateral implementation of new terms and conditions of employment and the exclusion of workers from the workplace (the last of these generally called a lock-out)". This line of reasoning is endorsed by Lord Reed JSC in *R (on the application of UNISON) v Lord Chancellor* 2017 UKSC 51 para 6:

> "Relationships between employers and employees are generally characterised by an imbalance of economic power. Recognising the vulnerability of employees to exploitation, discrimination, and other undesirable practices, and the social problems which can result, Parliament has long intervened in those relationships so as to confer statutory rights on employees, rather than leaving their rights to be determined by freedom of contract. In more recent times, further measures have also been adopted under legislation giving effect to EU law. In order for the rights conferred on employees to be effective, and to achieve the social benefits which Parliament intended, they must be enforceable in practice."

applicable to employment. The common law doctrine is as simple as it is far reaching – an employer can dismiss an employee for good reason, bad reason, or no reason at all.[46] Many labour law shcolars rightly adhere to Kahn-Freund first proposition, which is essentially that the common law is not there for the workers; it does not share labour's commitment to redressing the inequality of bargaining power inherent in the individual employment relationship.[47]

The sting of dismissal is underlined by the fact that it is aptly called "the labour relations equivalent of capital punishment."[48] The consequences of termination of employment are succinctly captured by the *Donovan Commission*:

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[46] In *Moropane v Gilbeys Distillers (Pty) Ltd* 1997 10 BLLR 1320 (LC) 1324 the court commented thus:

> "The common law permits an employer to terminate the service of an employee either summarily, without notice, or on notice. The decision of the employer to give notice is not subject to judicial scrutiny. The law is only concerned with the legality of the procedure followed to the extent that it enquiries whether proper notice has been given."

See too, *Ridge v Baldwin* 1964 AC 40, 65. See also Okpaluba "The opportunity to state case in the law of unfair dismissal in Swaziland in the light of the developments in South Africa and the United Kingdom" 1999 *AJICL* 392,392-393. Reflecting the common law position, the American employment regime is centred on the longstanding employment-at-will doctrine, which allows employers to discharge employees at any time and for any reason. Hence the US has some of the most relaxed employment protections in the world. See generally, Blades "Employment at will vs individual freedom" 1967 *CLR* 1404; Stone "Revisiting the at-will employment doctrine: Imposed terms, implied terms and the normative world of the workplace" 2007 36 *ILJ (UK)* 84; Epstein "In defence of the contract at will" 1984 *U Chicago LR* 947; Abrams & Nolan "Toward a theory of "just cause" in employee discipline cases" 1985 *Duke LJ* 594; Dominguez "Just cause protection: Will the demise of employment at will breathe new life into collective job security?" 1992 *Idaho LR* 947; Bird "Rethinking wrongful discharge: A continuum approach" 2004 *U Cin L Rev* 517; Scott "Where there's at-will, there are many ways: Redressing the increasing incoherence of employment at will" 2005 *U Pitt L Rev* 295.

[47] Freedland "The changing nature of the relationship at work – A symposium" 2016 45 *ILJ (UK)* 107, 108. According to Wedderburn *The Worker and the Law* (1986) 5 "… the individual worker brings no equality of bargaining power to the labour market and to this transaction central to his life whereby the employer buys his labour". Davies and Freedland, *Kahn-Freund's Labour and the Law* (3rd ed. 1983) 18 echo similar sentiments: "[T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination."
See also Freedland "Deductions, red herrings, and the wage-work bargain" 1999 28 *ILJ (UK)* 255.

[48] See e.g. *BAWU v Edward Hotel* 1989 10 *ILJ* (IC) 373G-H; *SA Polymer Holdings (Pty) Ltd t/a Mega-Pipe v Lallie* 1994 15 *ILJ* 277 (LAC) 281I; *CWIU v Algorax (Pty) Ltd* 2003 24 *ILJ* 1917 (LAC) para 70. See generally Landman "Unfair dismissal: The new rules for capital punishment in the workplace (part one)" 1995 *CLL* 41 and "Unfair dismissal: The new rules for capital punishment in the workplace (part two)" 1996 *CLL* 51. Collins *Justice in Dismissal: The Law on Termination of Employment* (1992) 15 writes that dismissal means that "the worker is excluded from the workplace which is likely to constitute a significant community in his or her life. It may be through this community, for instance, that the worker derives his or her social status and self-esteem. The workplace community may also provide the principal source of friendship and social engagements". In their work, *A Guide to South African Labour Law* (1992) 230 Rycroft and Jordaan state that for the retrenched worker "at a time of rising unemployment, the loss of a job frequently means disappearance into the large mass of the unemployed". For example it has been pointed out in "Termination by the employer: the debate on dismissal", Termination *of*

> "In reality people build much of their lives around their jobs. Their incomes and prospects for the future are inevitably founded in the expectation that their jobs will continue. For workers in many situations is a disaster. For some workers it may make inevitable the breaking up of a community and the uprooting of homes and families. Others, and particularly older workers, may be faced with the greatest difficulty in getting work at all". [49]

The vulnerability of employees is underscored by the level of importance which our society attaches to employment.[50]

It is unarguable that dismissal, whether fair or not is usually a devastating blow for an employee.[51] The harm caused to the dismissed employee may go far beyond a monetary loss.[52] Hurt to pride, dignity and self-esteem and economic dislocation are all readily foreseeable.[53] Securing another employment may not be easy because of damaged reputation.[54] Irretrievable collapse of employment relationship and the

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Employment Digest (ILO, 2000) 8 "that because of its economic social implications, and in spite of regulation at the highest level, the termination of employment by the employer is one of the most sensitive issues in labour today. Protection against dismissal is seen by most workers as crucial, since its absence can lead to dire economic consequences in most countries." Bogaric "New criminal sanctions inflicting pain through denial of employment and education" 2001 *Crim L Rev* 185, 193

[49] *Report of the Donovan Commission on Trade Unions and Employers' Associations* 1965-78, HMSO, UK, 142.

[50] *Reference Re Public Service Employee Relations Act (Alta.)* 1987 1 S.C.R. 313, 368.

[51] In *Netherburn Engineering Ceramic v Mudau* 2003 24 *ILJ* 1712 (LC) 1725E Landman J stated: "Dismissal relating to conduct hold serious social, financial and personal implications for employees and for employers. The concept of preserving job security is one of the paramount aims of the LRA. So protection against invalid and unfair termination of an employment relationship has a special significance. Employers too have a real and legitimate interest in maintaining a workforce that is not prone to misconduct (e.g. theft of goods and insubordination, inability to do the job, poor work performance)." See also *Ceballos v DCL International Inc.,* 2018 ONCA 49 (CanLII).

[52] DiMatteo "Justice, employment, and the psychological contract 2011 *Oregon LR* 445; 460-461.

[53] Brodie "A fair deal at work" 1999 *OJLS* 83, 85. See also *Wallace v United Grain Growers* 152 DLR (4th ed) 1, 33 where Iacobucci J observed: "The point at which employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection. In recognition of this need, the law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that result from dismissal." In a similar vein, Lord Hoffman in *Johnson (A) v Unisys Ltd* 2001 2 WLR 1076 para 35 made the following observations "… a person's employment is usually one of the most important things in his or her life. It gives a livelihood but an occupation, an identity and a sense of self-esteem. The law has changed to recognise this social reality." It is essential to remind ourselves just how central and significant the workplace is to the lives of employees. According to Brown *The Economics of Labour* (1962) 9 "Labour is the means which we define ourselves, our ethics, morals, success, and failures. An individual labour provides the means to live in the society as productive participant." Kanter *Men and Women of the Corporation* (1993) 3 point outs that "The most distinguished advocate and the most distinguished critic of modern capitalism were in agreement on one essential point, the job makes the person. Adam Smith and Karl Marx both recognised the extent to which people's attitudes and behaviour take shape out of the experience they have in their work".

[54] The role of negative employment references in obliterating prospects of future employment cannot be discounted. For example, the House of Lord in *Spring v Guardian Assurance Plc.* 1994 IRLR 460 found that the employer could be liable for providing an inaccurate refer as the employer has a duty of care not to make negligent misstatement. In the same vein, US Supreme Court in *Robinson v Shell Oil Co*. 519

primary remedy for unfair dismissal, namely, reinstatement,[55] confirm the importance of job security - though with a rather different emphasis.[56] The pivotal role of reinstatement in guaranteeing job security - a commodity in limited supply in the face

US 337 (1997) unanimously held that under federal law, employers must not engage in retaliatory workplace discrimination such as writing bad job references, or otherwise retaliating against former employees for filing job discrimination complaints. See also *Stuart v Armour Guard Services* 1996 1 NZLR 484, 498. See generally, Belknap "Defamation, negligent referral, and the world of employment references" 2001 *J. Small & Emerging Bus. L.* 113; Buckhalter "Speak no evil: Negligent employment and the employer's duty to warn (or, how employers can have their cake and eat it too)" 1998 *Seattle U LR* 265; Verkerke "Legal regulation of employment reference practices" 1998 *U Chicago LR* 115; Adler & Pierce "Encouraging employers to abandon their 'no comment' policies regarding job references: a reform proposal" 1996 *Wash. & Lee LR* 1381; Saxton "Flaw in the laws governing employment references: problems of 'overdeterence' and a proposal for reform" 1995 *Yale L & Pol'y Rev* 45; Gunning "*Spring v Guardian Assurance Plc*" 1994 *P L & P R* 150.

[55] For a root and branch examination of reinstatement see: Okpaluba "Reinstatement in contemporary South African Law of Unfair Dismissal: The statutory Guidelines" 1999 *SALJ* 815; Okpaluba & Budeli "Twenty Years of the Remedy of Reinstatement in the Law of Unfair Dismissal in South Africa: Some Preliminary, Jurisprudential and Sundry Issues (1)"2017 *SAPL* 1 and "Twenty Years of the Remedy of Reinstatement in the Law of Unfair Dismissal in South Africa: Some Preliminary, Jurisprudential and Sundry Issues (2)" 2017 *SAPL* 1; Geldenhuys "The reinstatement and compensation conundrum in South African Labour Law" 2016 *PER/PELJ* 7; Van Themaat "Reinstatement and security of employment – Part One" 1989 10 *ILJ* 205 and "Property rights, workers' rights and economic regulation" 1990 *CILSA* 53.

[56] *Equity Aviation (Pty) Ltd v CCMA* 2008 29 *ILJ* 2507 (CC) para 36 makes it clear that: "Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal."
See also *SACCAWU v Woolworths (Pty) Ltd* 2018 ZACC 44 paras 43-50 ("*Woorlworths II*").

of evident structural unemployment[57] and endemic poverty[58] in today's "tight economic and labour market times" can hardly be overstated.[59]

The proposition that work is a defining aspect of a personhood is so deeply entrenched that it no longer requires citation of authority. Indeed, Blackstone referred to work as one of the three relations in private life.[60] The immemorial assumption is ordained that every person must earn his or her daily bread.[61] Sacralisation of work as calling, the belief in fulfilling the divine will through work seemed to be engraved in stone. "No ethic", the aphorism goes, "is as ethical as the work ethic." Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support as well as a contributory role in society. A person's employment is an essential component of his or her identity, self-worth, and emotional well-being.[62] Work

[57] *Stats SA Report 2017: SA reports 48 000 job losses:* in first quarter between December 2016 and March 2017. *Quarterly Labour Force Survey – QLFS Q1-2017*: The growth in employment by 144 000, was offset by the growth in the numbers of job seekers 433 000.

[58] Leaving aside SA Statistics Reports, a portrait of inequality and poverty can also be gleaned from case law. *Assign Services (Pty) Ltd v NUMSA* 2018 39 *ILJ* 1911 (CC) para 2:

> "Statistics South Africa reports that the unemployment rate is 26.7% and that figure excludes more than two million discouraged work-seekers. Behind this number lies the legacy of systematic deprivation of opportunities for black South Africans and within it is the undeniable skew of racial inequality. This dire state of affairs is coupled with a history of very poor working conditions and pay for black employees."

See also *University of Stellenbosch Legal Aid Clinic v Minister of Justices &x Correctional Services* 2016 37 *ILJ* 2730 (CC) paras 41-48; *Black Sash Trust v Minister of Social Development* 2017 3 SA 335 (CC). For extended discussion see: Okpaluba "Bureaucratic delays in processing social grants: An evaluation of the contributions of the Eastern Cape judiciary to contemporary South African public law" 2011 *SJ* 48; Govindjee "Assisting the Unemployed in the Absence of a Legal Framework: The next frontier for the Eastern Cape Bench?" 2011 *SJ* 86; Plasket "Administrative justice and social assistance" 2003 *SALJ* 494; Liebenberg "From the crucible of the Eastern Cape: New legal tools for the poor" 2014 *SJ* 12; Mpedi "The evolving relationship between labour law and social security" in Le Roux & Rycroft (eds) *Reinventing Labour Law: Reflecting on the first 15 years of the Labour Relations Act and future challenges*" (2012) 270. For extensive engagement see: Tshoose *Social Assistance: Legal Reforms to Improve Coverage and Quality of Life for the Poor People In South Africa* (Unpublished LLD Thesis, UNISA 2016).

[59] Per Coglan CJ, *Edwards v Board of Trustees of Bay Islands College* 2015 NZEmpC 6 (3 February 2015) para 287 citing *Angus v Ports of Auckland Ltd (No 2)* 2011 9 NZELR 40 paras 61-68.

[60] Blackstone *Commentaries on the Laws of England* (1765-1769) 422 describes "the great relations in private life are, 1. That of *master and servant*; which is founded in convenience, whereby a man is directed to call in the assistance of others, where his own skill and labour will not be sufficient to answer the care incumbent upon him. 2. That of *husband and wife*… [and] 3. That of *parent and child* …." In England, the master-servant relationship was the pre-industrial age equivalent to the employer-employee relationship. See also Kennedy "The structure of Blackstone's Commentaries' 1979 *Buffalo LR* 205.

[61] For detailed treatment see: Kelly "Employment and concepts of work" 2000 *ILR* 1, esp. 6-9.

[62] See e.g. *Reference Re Public Service Employee Relations Act* 368.

is also sanctified as the touchstone of industrial citizenship[63] by advancing a sense of civic duty, reciprocity, social cohesion and community involvement.

In exploring the personal meaning of employment, Professor Beatty, in his seminal article "Labour is not a commodity",[64] has characterised it as follows:

> "As vehicle which admits a person to the status of a contributing, productive members of society, employment is seen as providing recognition of the individual's being engaged in something worthwhile. It gives the individual a sense of significance. By realizing our capabilities and contributing in ways society determines to be useful, employment comes to represent the means by which most members of our community can lay claim to an equal right of respect and concern from others. It is this institution through which most of us secure much of our self-respect and self-esteem."[65]

The essential value of work is encapsulated in an array of international instruments concerning the right to work and the objective of full employment. The Constitution of the International Labour Organisation (1919), as amplified by the Declaration of Philadelphia (1944) and the Employment Convention, 1964 (No. 122), proclaims the goal of securing "full, productive and freely chosen employment".[66] In equal measure, from Bretton Woods, to the Universal Declaration of Human Rights (UDHR, 1948),[67] the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966),[68] the Convention on the Elimination of Discrimination Against Women (CEDAW, 1979),[69] the European Social Charter (1996) and the Copenhagen World Summit (1995) the issue of work and the objective full employment is accorded prominent attention.

Closer to home, constitutional and statutory protection of employment play a role of undeniable importance. The elevation of the right to a fair labour practice to the status of a fundamental right in the South African Constitution[70] places job security on a

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[63] See Standing *The Precariat: The New Dangerous Class* (2011) 11-16 ("*The Precariat*"). See also Bruton & Fairris "Work and development" 1999 *ILR* 5; Klaaren "Human rights protection of foreign nationals" 2009 30 *ILJ* 82 and "Towards republican citizenship: a reflection on the jurisprudence of former Chief Justice Sandile Ngcobo" 2017 *SAPL* 1.

[64] Beatty "'Labour is not a commodity'" in Reiter & Swan (eds) *Studies in Contract Law* (1980) 313.

[65] Beatty "'Labour is not a commodity'" 324.

[66] Article 1.

[67] Article 23.

[68] Article 6.

[69] Article 11(1)(*a*).

[70] See s 27, Constitution of the Republic of South Africa Act 200 of 1993 (the interim Constitution); s 23, Constitution of the Republic of South Africa Act 108 of 1996 (the final Constitution). See generally, *NEHAWU v UCT* 2003 3 SA 1(CC) paras 33-38; *NUMSA v Bader Bop* 2003 3 SA 513 (CC) para 13.

firm constitutional footing. This is re-affirmed by the employee's right not to be unfairly dismissed[71] under the Labour Relations Act 66 of 1995. The commitment to employment protection is evident in the provisions of the Competition Act dealing with mergers.[72] In addition, issues of affecting the interests of workers as stakeholders in terms of the Companies Act 71 of 2008 are now part of the corporate law discourse.[73]

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[71] S 185 of the LRA. Cheadle AJ's comments in *Kylie v CCMA* 2008 29 *ILJ* 1918 (LC) para 68 are worth repeating:

> "The central purpose of dismissal legislation is to provide work security – that is to create conditions for continued employment and to prevent unnecessary dismissal because of the social harm that it can cause. That is why the Code of Good Practice: Dismissal62 makes it clear that employers must apply progressive discipline in misconduct cases and in poor performance cases, the employer must consult, counsel and give the employee the opportunity to improve. In retrenchments, the employer must consider measures to avoid dismissal and the possibility of future re-employment."

See also Van Niekerk "In search of justification: The origins of the statutory protection of security of employment in South Africa" 2004 25 *ILJ* 853. Maloka "Dismissal at the behest of third party: *Kroeger v Visual Marketing*" 2005 *Turf LR* 108, 109-110.

[72] In the context of s 12A (3) of the Competition Act 89 of 1998 competition authorities have tended to place great emphasis on the impact of a proposed transaction on employment. For example, in *Walmart/ Massmart* merger, the Competition Tribunal imposed a condition that no retrenchments for operational reasons can take place for two years (*Minster for Economic Development/Competition Tribunal* 2012 1 CPLR 6 (CAC) and *Minister of Economic Development v Competition Tribunal; In Re: SACCAWU v Massmart Holdings Ltd* 2013 1 CPLR 31(CAC)). In *Tiger Brands/Ashton Canning Company (Pty) Ltd* 2005 ZACT 82 the merger was going to result in the loss of 45 permanent jobs and 1000 seasonal jobs. The Competition Commission sought to impose a condition that provided for the creation of a training fund to the value of R2 million for the benefit of retrenched workers and members of the Ashton community. The merging parties considered the amount excessive and instead offered R250 000 for retraining. The Competition Tribunal approved the merger subject to conditions which included that the merging parties would not retrenched more than 45 employees from the aggregate number of employees employed by both firms immediately prior to the order; and that the merging parties make available an amount of R2 million for training all affected persons. See also *Daun et Cie AG/Kolosus Holdings Ltd* 2003 ZACT 49. See too Bierman "The road to double regulation paved with good intentions: An analysis of the interplay between the Labour Relations Act and the Competition Act regulation of retrenchments" 2015 36 *ILJ* 1693.

[73] See generally, Loubser & Joubert "The role of trade unions and employees in South Africa's business rescue proceedings" 2015 36 *ILJ* 21 and "The business rescue proceedings in the Companies Act of 2008: concerns and questions (part 1)" 2010 *TSAR* 501 and (part2) 2010 *TSAR* 698; Osode "Judicial implementation of South Africa's new business rescue model: preliminary assessment" 2015 *JLIA* 459; Maloka & Muthugulu-Ugoda "The deadlock principle as a ground for the just and equitable winding up of a solvent company: *Thundercats Investments 92 (Pty) Ltd v Nkonjane Prospecting Investment (Pty) Ltd* 2014 5 SA 1 (SCA)" 2016 *PER/PELJ* 35; Muthugulu-Ugoda "Identifying the missing link in section 81(1)(d)(iii) of the Companies Act 71 of 2008: A case for innovative approach to dealing with solvent companies overwhelmed by deadlock" 2018 *JCLA* 110; Nwafor "Exploring the goal of business rescue through the lens of the South African Companies Act 71 of 2008" 2017 *Stell LR* 597. Compared to the US model, the inclusion of the interests of other stakeholders in the corporation, in particular employees within the purview of the 2008 Companies Act represent a paradigm shift. See Njoya "Employee ownership and efficiency: An evolutionary perspective" 2004 30 *ILJ (UK)* 211; Carse & Njoya "Labour Law as the law of business enterprise" 311; Murray "Conceptualising the employer as fiduciary: Mission impossible?" 337 in Bogg *et al* (eds) *Autonomy of Labour Law* (2015) 377; Davis & Le Roux "Changing the role of corporation: A journey away from adversarialism" in Le Roux & Rycroft (eds)

The idea that an employee may be said to acquire something akin to a property in his employment[74] is derived from the fact that termination of employment is regarded as an act of last resort. There is has always been a marked trend towards shielding the employee where practicable, from undue hardship he/she may suffer at the hands of those who may have power over his livelihood - employers and trade unions. Expulsion from trade union membership[75] and trade union security cases[76] were instrumental in bringing the notion of the right to work to the fore.[77] In this respect *Hoffman*[78] firmly authenticated

Reinventing Labour Law: Reflecting on the first 15 years of the Labour Relations Act and future challenges" (2012) 306; Botha "Responsibilities of companies towards employees" 2015 *PER/PELJ* 12; Wiese "Worker participation: An overview and the Companies Act of 2008" 2013 34 *ILJ* 2467. Shareholder primacy is a distinctive feature of the US corporate law typology. The basic structural pillars of the public corporation are (1) it is a private and largely contractual undertaking and thus devoid of much "public law" significance. See e.g. Easterbook & Fischel "The corporate contract" 1989 *Colum LR* 1416; Coffee "Liquidity versus control: The institutional investor as corporate monitor" 1991 *Colum LR* 1277, and (2) the view that the separation of ownership and control is both inevitable and efficient. The separation of ownership and control was first identified by Berle and Means in their path-breaking book, *The Modern Corporation* (1932). See generally, Jacoby "Corporate governance and employees in the United States in comparison" in Gospel & Pendleton (eds) *Corporate Governance and Labour Management* (2004); Marshall "Book Review – Hedging around the question of the relationship between corporate governance and labour regulation" 2005 *AJLL* 97; Greenfield "The place of workers in corporate law" 1998 *Boston College LR* 283.

[74] See e.g. Hermann & Sor "Property rights in ones' job: The case for limiting employment-at-will" 1982 *Arizona LR* 763; Shapiro & Tune "Implied contract rights to job security" 1974 *Stanford LR* 335; Levine "Comment, towards a property right in employment" 1973 *Buffalo LR* 1081; Blumrosen "Legal protection for critical job interests" 1959 *Rutgers LR* 631.

[75] See *Hill v AC Parsons & Co Ltd* 1972 1 Ch 305, 1971 3 All ER 1345. See also *Langston v Amalgamated Union of Engineering Workers* 1974 1 IRLR 180; *Young, James and Webster v The United Kingdom* 1981 IRLR 408; *Turner v Australian Coal and Shale Employee Federation* 1984 6 FCR; 9 IR 87; 55 ALR 635.

[76] See generally *Mazibuko v Mooi River Textiles Ltd* 1980 10 *ILJ* 875 (IC); *Chamber of Mines v Mineworkers' Union* 1989 10 *ILJ* 133 (IC); *Municipal Professional Staff Association v Municipality of the City of Cape Town* 1994 15 *ILJ* 348 (IC); *MWU v O'Kiep Copper Co* 1993 4 *ILJ* 150 (IC); *MWASA v Die Morester en Noord-Transvaler* 1991 12 *ILJ* 802 (LAC); *Mbobo v Randfontein Estates GM Co* 1992 13 *ILJ* 1485 (IC). For a sampling of the leading works see: Weeks *Trade Union Security Law: A Study of Compulsory Unionism* (1995); McCarthy *The Closed Shop in Britain* (1964). For further reflection see: Note "Inter-union rivalry: *Johannes Mazibuko and Others v FAWU Ltd"* 1989 *LLB* 19; Albertyn "Freedom of association and the morality of the closed shop" 1990 11 *ILJ* 937; Grant "In defence of majoritarianism: Part 1 – Majoritarianism and freedom of association" 1993 14 *ILJ* 303 and "In defence of Majoritarianism: Part 2 - Majoritarianism and freedom of association" 1993 14 *ILJ* 1145; Landman "Closed shop born again: a surprise from the new Labour Relations Act" 1995 *CLL* 11; Madima "Freedom of association and the concept of compulsory union membership" 1994 *TSAR* 545 and "Freedom of association and a Bill of Rights" 1994 *LRSA* 116; Olivier & Potgieter "The right to associate freely and the closed shop" 1994 *TSAR* 289 and "The right to associate freely and the closed shop" 1994 *TSAR* 443.

[77] See e.g. Summers "The right to join a union" 1947 *Colum LR* 33 and "Union power and workers' rights" 1951 *Michigan LR* 49; Ewing "Trade union–expulsion" 1983 *CLJ* 207 and "Exclusion from trade union membership" 1983 *ILJ (UK)* 106; Tracey "The legal approach to the democratic control of trade unions" 1985 *MULR* 177. In this regard see, *Nagle v Fielden* 1966 2 QB 633; *Forbes v New South Wales Trotting Club Ltd* 1979 25 ALR 1; *Hughes v Western Australia Cricket Association (Inc.)* 1986 69 ALR 660; *Curro v Beyond Productions* Ltd 1993 30 NSWLR 337.

[78] *Hoffman v South African Airways* 2001 1 SA 1 (CC).

the right to work as the Constitutional Court signalled that in appropriate circumstances it will intervene to protect the right of a person to work and earn a livelihood. In this regard it is instructive to quote a passage from the judgement, which says:

> "An order of instatement, which requires an employer to employ an employee, is a basic element of the appropriate relief in the case of a prospective employee who is denied employment for reasons declared impermissible by the Constitution. It strikes effectively at the source of unfair discrimination. *It is an expression of the general rule that where a wrong has been committed, the aggrieved person should as a general matter, and as far as possible, be placed in the same position the person would have been but for the wrong suffered.* In proscribing unfair discrimination, the Constitution not only seeks to prevent unfair discrimination, but also to eliminate the effects thereof. In the context of employment, the attainment of that objective rests not only upon the elimination of the discriminatory employment practice, but also requires that the person who suffered a wrong as a result of unlawful discrimination be, as far as possible, restored to the position in which he or she would have been but for the unfair discrimination."[79]

In *Hoffman*, the employer had refused to employ the applicant, who had passed the employer's selection and screening processes as cabin attendant, when it discovered that he was HIV positive. Having held that the denial of employment on the ground that the applicant was living with HIV impaired his dignity under section 10 of the Constitution,[80] the next issue considered by the court was that of appropriate relief. Ngcobo J concluded that instatement, that is, an order that Hoffman be appointed to the position which he was denied, was the appropriate and most practicable relief in the circumstances.[81]

[79] Per Ngcobo J in *Hoffman v South African Airways* 2001 1 SA 1 (CC) paras 50-52 which was cited with approval by Pretorius A in *IMATU obo Xameko/Makana Municipality* 2003 1 BALR 4 (BC) at 9E-F where the employee was unfairly refused promotion and the disputed post no longer existed the remedy of "protective promotion" was ordered. See also *Walters v Transitional Local Government Council, Port Elizabeth* 2000 21 *ILJ* 2723 (LC). In *X v Y Corp* 1999 1 LRC 688 (Bombay HC) para 761, where the applicant was found to be medically fit for his normal job requirements and would not pose a threat to other workers due to his HIV positive status, the court ordered that the applicant's name be restored to the list of casual workers and be given work as and when available until such a time he would be considered for permanent employment. It was held that the medical test, which had shown him to be HIV positive, was unconstitutional and invalid. For further authorities and discussion see Okpaluba "Extraordinary remedies for breach of fundamental rights: Recent developments" 2002 *SAPL* 98, esp.111-117 and "Developing the jurisprudence of constitutional remedies for breach of fundamental rights in South Africa: analysis of *Hoffman* and related cases" 2017 *SAPL* 1.

[80] The trial judge had held in *Hoffman v South African Airways* 2002 2 SA 628 (WLD) that no breach of the plaintiff's right to equality had occurred through the corporation's policy which was the result of a careful and thorough research and was consistent with international trends and that even if the corporation's policy constituted unfair discrimination, it was justified within the meaning of section 36 of the Constitution.

[81] For eloquent discussion of remedies for breach of fundamental rights, see Okpaluba "Of 'forging new tool' and 'shaping innovative remedies': Unconstitutionality of legislation infringing fundamental

A constitutional right to work is a prerequisite for attainment of social justice. Of course, it should be mentioned that a constitutional right to work is a highly contested concept.[82] To an extent the discourse on the right to work is intertwined with a basic income grant.[83] Social justice, equality and dignity are bedrocks of the South African constitutional enterprise of the past twenty years.[84] An acknowledgement of the right to work as a human right it should be added recognises both the economic and social costs of unemployment, and how these impact on a person's self-worth. Particularly significant is that employment vulnerability intersects with gender. Women are frequently located in non-standard or precarious forms of employment, including work in the informal economy, and consequently beyond the protection of labour law. The constitutional right to work is necessary to address employment vulnerability, in particular the precarious position of women in the workforce, thereby alleviating their poverty - an essential prerequisite for social equality.[85]

Cooper deftly conceptualised the different strands of the right to work as follows:

rights arising from legislative omissions in the new South Africa" 2001 *Stell LR* 426 esp. fn 34 ("Of 'forging new tool'").

[82] See in this regard Elias "Trade union – expulsion – damages – right to work" 1971 *CLJ* 15; Hepple "A right to work" 1981 *ILJ (UK)* 65; Freedland "The obligations to work and to pay work" 1977 *CLP* 175; Kelling "Labour law: Failure to provide work" 1985 *TRW* 94; Howe "The job creation function of the state: A new subject for labour law" 2001 *AJLL* 242; Mantouvalou "The right to work: Legal and philosophical perspectives" 2016 45 *ILJ (UK*) 465; Branco "Economics for the right to work" 2017 *ILR* 1.

[83] *Transforming the Present – Protecting the Future* Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa. Taylor Report March 2002. For further discussion see: Black Sash *Breaking the Poverty Trap": Financing Basic Income Grant in South Africa* BIG Reference Group 2004; Standing "The South African solidarity grant" in Standing & Samson (eds) *A Basic Income Grant for South Africa* (2003) 7.

[84] See generally Chaskalson "Human dignity as foundational value of our Constitutional order" 2000 *SAJHR* 193; Gasper "Human Dignity: Lodestar for Equality in South Africa, Laurie Ackermann: book review"2015 *SAJHR* 425; Cowen "'Can dignity'' guide South Africa's equality jurisprudence"2001*SAJHR* 34; Kroeze "Doing things with values: The role of constitutional values in constitutional interpretation" 2001 *Stell LR* 265; Neethling "The protection of the right to privacy against fixation of private facts" 2004 *SALJ* 519; Liebenberg "The value of human dignity in interpreting socio-economic rights" 2005 *SAJHR* 1; Roederer "The constitutionally inspired approach to vicarious liability in cases of wrongful acts by police: One small step in restoring public's trust in the South African Police Services" 2005 *SAJHR* 575; Okpaluba "The right to the residual liberty of a person in incarceration: Constitutional and common law perspectives" 2012 *SAJHR* 458.

[85] Generally Albertyn *et al* "Introduction: substantive equality, social rights and women: comparative perspective" 2007 *SAJHR* 209; Fredman "Substantive equality, the Supreme Court of Canada, and the limits to redistribution" 2007 *SAJHR* 235 and and "Equality law: Labour law or an autonomous field?" in Bogg *et al* (eds) *Autonomy of Labour Law* (2015) 257; Fudge "Flexicurity and labour law: Labour market segmentation, precarious work, and just distribution" in *Normative Patterns and Legal Developments in the Social Dimensions of the EU* Numhauser-Henning & Ronmmar (eds) (2013) 211-235; Horne "Self-employed women's union: Tackling the class-gender intersection" 1995 *SALB* 34.

> "The right to work can also be conceptualised as guaranteeing protections which safeguard workers from discrimination, exploitation and job loss. In this instance the duty on the state is to avoid engaging in actions which are harmful to workers as well as to safeguard workers from harmful actions by private parties; the latter also have a duty not to infringe the right. The duty on the state to provide jobs or access to employment and its duty to protect can exist as coterminous dimensions of the right." [86]

Work is a wellspring of human dignity.[87] It underscores the proposition that work is a cornerstone of an individual's sense of worth as well as an affirmation of the worth of human beings in society.[88] Work encompasses the intrinsic worth of human beings shared by all people as well as individual reputation of each person built upon his or her own individual achievements. Similarly, human dignity as enshrined in the Constitution values both the personal sense of self-worth as well as the public estimation of the worth or value of individual.[89] Also, *Life Esidimeni Arbitration*[90] reminds us that "the right to human dignity is critical to meaningful departure from the oppression of the apartheid era."[91]

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[86] "Women and the right to work" 2009 *SAJHR* 573, 578-579.

[87] In *Affordable Medicines Trust v Minister of Health* 2009 3 SA 247 (CC) para 59, the Constitutional Court noted:

> "Freedom to choose a vocation is intrinsic to the nature of a society based on human dignity as contemplated by the Constitution. One's work is part of one's identity and is constitutive of one's dignity. Every individual has a right to take up any activity which he or she believes himself or herself prepared to undertake as a profession and to make that activity the very basis of his or her life. And there is a relationship between work and the human personality as a whole. 'It is a relationship that shapes and completes the individual over a lifetime of devoted activity; it is foundation of a person's existence'"

[88] For recent detailed treatment, see *Special Issue* 2017 *Comp. Lab. L. & Pol'y J* Fudge & Tham "Dishing up migrant workers for the Canadian food services sector: Labour law and the demand for migrant workers" 1; Brooks "Undefined rights: The challenge of using evolving labour standards in US and Canadian free trade agreements to improve working women's lives" 29; Chung & Hosoki "Disaggregating labour migration policies to understand aggregate migration realities: Insights from South Korea and Japan as negative cases of immigration" 83; Griffith & Gleeson "The precarity of temporality: How law inhibits immigrant worker claims" 111; Janda "We asked for workers…" Legal rules on temporary labour migration in the European Union and in Germany" 143; Wright & Clibborn "Back door, side door, or front door? An emerging de-facto low-skilled immigration policy in Australia" 165 and Martin "Guest or temporary foreign worker programs" 189. See generally, Ruhs "The rights of migrant workers: Economics, politics and ethics" 2016 *ILR* 283; Fudge "Precarious migrant status and precarious employment: The paradox of international rights for migrant workers" 2012 *Comp. Lab, L. & Pol'y J* 95.

[89] See e.g. *S v Makwanyane* 1995 3 SA 391 (CC) para 224; *National for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 41; *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 35; *Khumalo v Holomisa* 2002 5 SA 401 (CC) para 27; *Prinsloo v RCP Media Ltd t/a Rapport* 2003 4 SA 456 (T) 468F-I; *Mashavha v President of the RSA* 2005 2 SA 476 (CC) para 51; *The Citizen 1978 (Pty) Ltd v McBride* 2011 8 BCLR 816 (CC) para 143-7; *Everfresh Market Virginia (Pty) Ltd Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) para 71.

[90] *Families of Mental Health Care Users Affected by the Gauteng Mental Marathon Project and National Minister of Health of the RSA* 2018 ("*Life Esidimeni Arbitration*"). See also Van der Merwe "Life Healthcare Esidimeni: A (Human Rights) dream deferred" 2018 *Obiter* 289.

[91] *Life Esidimeni Arbitration* para 183. In *NM v Smith* 2007 5 SA 250 (CC) para 50, Madala J stated that:

No sharp lines can be drawn between work, dignity and equality. The right to work serves to foster human dignity, equality and social justice.[92] To sum up, work and employment matter beyond measure.

1.3. The Concept of Precarious Employment

The concept of precarious employment illuminates many aspects of the shifting frontiers of work that have weakened the employer-employee relationship, and degraded job security. The concept of precarious employment *prima facie* speaks to more flexible forms of employment and increased employment vulnerability driven by globalization and digitalization of work. It neatly captures the economic underpinnings and drivers of precarious work, the legal framework that allowed two work-related penalties: insecurity and poverty.[93] Precariousness is a multidimensional and complex issue. The ILO succinctly explains:

> "Although a precarious job can have many faces, it is usually defined by uncertainty as to the duration of employment, multiple possible employers or a disguised or ambiguous employment relationship, a lack of access to social protection and benefits usually associated with employment, low pay and substantial legal and practical obstacles to joining a trade union and bargaining collectively."[94]

> "While it is not suggested that there is a hierarchy of rights it cannot be gainsaid that dignity occupies a central position. After all, that was the whole aim of the struggle against apartheid – the restoration of human dignity, equality and freedom."

[92] *Government of the RSA v Grootboom* 2001 1 SA 46 (CC) para 23 posited the role of human dignity in the context of socio-economic rights:

> "Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter."

See also in Liebenberg "Towards a transformative adjudication of socio-economic rights" in *Law & Transformative Justice in Post-Apartheid South Africa* Osode & Glover (eds) 36; Liebenberg & Goldblatt "The interrelationship between equality and socio-economic rights under South Africa's transformative constitution" 2007 *SAJHR* 335; McCrudden "Labour law as human rights law: A critique of the use of 'dignity' by Freedland and Kountoris" in Bogg *et al* (eds) *Autonomy of Labour Law* (2015) 275.

[93] Standing *The Precariat* 9. See also Standing "Economic insecurity and global casualization: Threat or promise?" 2008 *Social Indicators Research* 15.

[94] ILO 2011 *From precarious work to decent work: Policies and regulations to combat precarious employment*. Report prepared for the Symposium "Regulations and Policies to Combat Precarious Work" organised by the ILO's Bureau for Workers' Activities, 5 ("ILO 2011 *From precarious work to decent work*").

Although precarious employment is generally benchmarked against standard employment,[95] what defines precariousness is employment vulnerability[96] typified by "inadequate earnings, low productivity and difficult conditions of work that undermine workers' fundamental rights".[97]

In examining the impact of globalization on the shifting the frontiers of work, the thesis anchors analysis to the concept of precarious employment. The notion of precarious employment as a discourse (or cluster of discourses) spans both academic and policy arenas,[98] and is not necessarily internally coherent, but contested.[99] The concept remains ambiguous and the boundaries of the discourse are not fixed.[100] Precarious employment encapsulates four inter-related dimensions that coalesced to generate uncertainty, vulnerability and lack of control on the part of workers over their occupational and social trajectory.[101] There are broader definitions of precariousness. On Vosko's definition:

[95] The term "standard" or "typical" employment is understood to refer to:

> "Wage work which is performed within a formalised employer-employee relationship (i.e. under a statute or a contract of indeterminate duration concluded within the framework of a collective agreement), is stable (possibly offering career prospects), is fulltime (thus a basis for participation in collective life and social identity), provides the essential part of the family income, depends on a single employer, is performed at a specific workplace and is specifically assigned to the individual concerned."

Caire "Atypical wage employment in France" in *Precarious Work in Europe: The State of the Debate* in Rodgers & Rodgers (eds) (1989) 75. See also Theron & Godfrey *Protecting Workers on the Periphery* (2000) 6.

[96] TUC Commission on Vulnerable Employment – *Hard Work Hidden Lives: The Short Report of the Commission on Vulnerable Employment* (2008) defines vulnerable employment as "precarious work that places people at risk of continuing poverty and injustice resulting from an imbalance of power in the employer-worker relationship".

[97] See "Vulnerable employment and poverty on the rise: Interview with ILO chief of Employment Trends Unit" 26 January 2010, available at http://www.ilo.org/global/about-the-ilo/press-and-media-centre/insight/WMCS_120470/lang-en/index.htm (accessed 18-04-2017).

[98] McCann & Fudge "Unacceptable forms of work: A multidimensional model" 2017 *ILR* 147.

[99] See generally, Standing *The Precariat* (2011) 7-13; Gutierrez-Barbarrusa "The growth of precarious employment in Europe: Concepts, indicators and the effects of global economic crisis" 2016 *ILR* 477; Caballer & Peiro "The consequences of job insecurity for employees: The moderator role of job dependence" 2010 *ILR* 59; Brazillier *et al* 2016 *ILR* 265; TUC Commission on Vulnerable Employment – Hard work hidden lives: The short report of the Commission on Vulnerable Employment (2008).

[100] Gutierrez-Barbarrusa 2016 *ILR* 484 makes the point that "the identification of precarious work is certainly not a straight forward matter. The simple dichotomy between secure, standard jobs and precarious, atypical jobs can indeed be misleading. In practice, the security and protection of standard employment when it comes under threat can be an equally important issue; and although atypical jobs tend to be more precarious than standard jobs, this is not always the case."

[101] ILO 2011 *From precarious work to decent work: Policies and regulations to combat precarious employment*. Report prepared for the Symposium "Regulations and Policies to Combat Precarious Work" organised by the ILO's Bureau for Workers' Activities.

> "[P]precarious employment encompasses forms of work involving limited social benefits and statutory entitlements, job insecurity, low wages and high risks of ill-health. It is shaped by employment status (i.e. self-employment or wage work), form of employment (i.e. temporary or permanent, part-time or full-time), and dimensions of labour market insecurity as well as social context (such as occupation industry and geography) and social location (the interaction between social relations, such as 'gender' and 'race' and political conditions)."[102]

There are four main approaches to defining precarious work. The first is to explain precarious work with reference to insecurity regarding continuity of the employment relationship. Precarious work makes it difficult for workers to exercise control over their occupational and social future and their vulnerability vis-à-vis the employing enterprise.[103] The second dimension of precarious work focuses on insufficient wages because remuneration largely determines a worker's standard of living his or her destiny and social position. This type of precariousness is closely associated with part-time and casual employment which generally do not enable those doing them to gain financial independence. The third dimensions precariousness draws attention to the deterioration of employment relationship and workers vulnerability. The most important determinants of vulnerability is the general poor climate of employment relations in the workplace and the likelihood of adverse treatment by the employer.[104] The fourth dimension of precarious work is the weakening of the workers' social protection.

A few examples will suffice to underscore the point. It has been clear since earliest days that workers engaged by intermediaries such as labour brokers work under condition of informality in the formal economy.[105] Another marker of precariousness is wage disparity. Pay rates for similarly situated unskilled workers provided by the

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[102] Vosko *Precarious Employment: Understanding Labour Market Insecurity in Canada* (2006) 3-4.
[103] Gutierrez-Barbarrusa 2016 *ILR* 482.
[104] Brazillier *et al* 2016 *ILR* 267-8.
[105] See e.g. *Pienaar v Tony Cooper & Associates* 1994 9 BLLR 86 (LC); *Labuschagne v WP Construction* 1997 9 BLLR 1251 (CCMA); *Matava v Afrox Home Healthcare* 1998 19 *ILJ* 931 (CCMA); *Mandla v LAD Brokers (Pty) Ltd* 2000 5 *LLD* 457 (LC); *LAD Brokers (Pty) Ltd v Mandla* 2001 22 *ILJ* 1813 (LAC). See also Landman "The law relating to labour brokers, their clients and workers" 1993 *EL* 80 and "Temporary labour services" 1996 *CLL* 50; Hutchison & Le Roux "Temporary employment services and the LRA: Labour brokers, their clients and the dismissal of employees" 2000 *CLL* 51.

temporary employment agency are about fifty percent or less than those earned by workers in standard employment doing equivalent work.[106]

> "The existence of differentials of this magnitude in the formal workplace exposes the fallacy of supposing that because labour legislation acknowledges no distinction between workers in standard and non-standard employment, and the particular form it has taken in South Africa, are exacerbating inequality. The term 'passive deregulation' appropriately describes the failure of labour law to address this problem."[107]

Likewise, entrenched precariousness[108] fuelled the grievous struggle for better wages and conditions on the platinum belt culminating in the tragic events of 16 August 2012.[109] In broader terms, employment vulnerability is embedded in the baneful consequences stemming from worker indebtedness epitomized by "the searing stories of human stress and distress"[110] that lie behind the *University of Stellenbosch Legal Aid Clinic* litigation. It takes a little to appreciate that precariousness has significantly contributed to the rebirth of adversarialism[111] and upsurge in strike violence.[112] It is only

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[106] Theron *et al Globalisation, The Impact of Trade Liberalisation, and Labour Law: The Case of South Africa Discussion Paper International Institute for Labour Studies (*DP/178/2007) 9 "*The Impact of Trade Liberalisation, and Labour Law*". Analogous situation arises with respect to "wage theft", or the failure to pay a worker properly for all hours worked, which is rampant in the low-wage workforce. While the phenomenon is perhaps most pervasive in vulnerable immigrant communities, studies reveal significant levels of wage theft among all low wage workers. Coleman "Rendered invisible: African American low-wage workers and the workplace exploitation paradigm" 2016 *Howard LJ* 61.

[107] Theron *et al Globalization, The Impact of Trade Liberalisation, and Labour Law* 8.

[108] On the disease burden mineworkers have carried over the past century, see, generally, *Mankayi v AngloGold Ashanti Ltd* 2011 (3) SA 237 (CC); *Nkala v Harmony Gold Mining Co Ltd* 2016 (5) SA 240 (GJ).

[109] See generally, Ngcukaitobi "Strike law, structural violence and inequality in the platinum hills of Marikana" 2013 34 *ILJ* 836; Theron *et al* "Organisational and collective bargaining rights through the lens of Marikana" 2015 36 *ILJ* 849. For insight into the different side of the same Marikana coin, see Okpaluba "Constraints on judicial review of executive conduct: The juridical link between the Marikana mineworkers' imbroglio and the Gauteng e-tolling saga" 2015 *TSAR* 286.

[110] Per Cameron J, *University of Stellenbosch Legal Aid Clinic* para 128.

[111] Cohen "Limiting organisational rights of minority unions: *POPCRU v Ledwaba* 2013 11 BLLR 1137 (LC)" 2014 *PER/PELJ* 2209, 2222 elaborates:

> "Abject poverty, a loss of confidence in existing bargaining structures, and disappointed expectations have led to the alienation of unskilled and semi-skilled vulnerable employees from majority unions. Minority unions have taken up the cudgels of frustrated and disempowered employees – that have tired of the 'co-dependent comfort zone' that majoritarianism has engendered. The Marikana experience has largely been attributed to the unsuitability of the current collective bargaining model within the South African socioeconomic and political landscape."

See also *AMCU v Chamber of Mines of SA* 2017 38 *ILJ* 831 (CC)*; AMCU v Chamber of Mines of SA* 2016 37 *ILJ* 1333 (LAC).

[112] See generally, Calitz "Violent, frequent and lengthy strikes in South Africa: Is the use of replacement labour part of the problem?" 2016 *SA Merc LJ* 436; Webster "The shifting boundaries of industrial relations: Insights from South Africa" 2015 *ILR* 27; Rycroft "What can be done about strike-related

recently that academic labour law has begun to acknowledge the depth and seriousness of crisis in collective bargaining.[113]

Conceptualizing labour law's perennial problem of unmasking the true employee and the real employer in contemporary work environment as a challenge of combatting precarious employment has a number of implications. It means thinking about the way in which precariousness is both oppressive and reproductive. If one looks at the modern labour market, the forms of precarity are escalating, as employers assiduously refine strategies to circumvent legislation[114] or find loopholes in regulation to augment profitability at the expense of their workers.[115] Precarity underlies ambiguous or disguised employment relationship. Put another way, the thorny issue of workers who are labelled as self-employed when they are in fact dependent or integrated into the firm. Another core aspect of precarious work speaks to the lack of clarity as to the identity of the employer.[116] The dominant fit has been the vertical disintegration of formerly integrated enterprises into more horizontal arrangements involving entities such as franchising, subcontracting and temporary employment

violence?" 2014 *ICLLIR* 199 and "The legal regulation of strike misconduct: The *Kapesi* decisions" 2013 34 *ILJ* 859; Manamela & Budeli "Employees' right to strike and violence in South Africa" 2013 *CILSA* 308; Gericke "Revisiting the liability of trade unions and/or their members during strikes: Lessons to be learnt from case law" 2012 *THRHR* 566; Grogan "Riotous strikes. Unions liable to victims" 2012 *EL* 11. Viewed differently Marikana while it is emblematic of the crisis of collective bargaining, it also an anti-thesis of institutional deradicalisation of industrial conflict. In this regard, see Klare "Labour law as ideology: Toward a new historiography of collective bargaining law" 1981 *Industrial Relations Law Journal* 540 and "Traditional labour law scholarship and the crisis of collective bargaining law: A reply to Professor Finkin" 1985 *Maryland LR* 731.

[113] See generally, Brassey "Labour law after Marikana: Is institutionalised collective bargaining in SA wilting? If so, should be glad or sad?" 2013 34 *ILJ* 823.

[114] An emerging trend is the registration of sham cooperatives solely in order to circumvent the application of the LRA. See *NCCMI (KZN) v Glamour Fashions Workers Primary Co-operative Ltd* 2018 39 *ILJ* 1737 (LAC) ("*Glamour Fashions Workers Primary Co-operativeII*"); *NCCMI (KZN) v Glamour Fashions Workers Primary Co-operative Ltd* 2017 38 *ILJ* 17849 (LC) ("*Glamour Fashions Workers Primary Co-operativeI*"). In *Magoso/ st Key; 2nd Excellent Services* 2018 9 BALR 927 (MIBC) a temporary employment service styled itself as a "worker co-operative. See also Du Toit & Ronnie "Regulating the informal economy: Unpacking the oxymoron – from worker protection to worker empowerment" 2014 35 *ILJ* 1802.

[115] For example resort to automatic termination of employment clauses by temporary employment agencies ostensibly to erode statutorily guaranteed protection of employees against unfair dismissal. See e.g. *Enforce Security Group v Fikile* 2017 38 *ILJ* 1041 (LAC); *Dube v Fidelity Supercare Cleaning Services Group (Pty) Ltd* 2015 8 BLLR 837 (LC); *Dyokhwe v De Kock NO* 2012 33 *ILJ* 2401 (LC) ("*Dyokhwe*"); *Mahlamu v CCMA* 2011 32 *ILJ* 1122 (LC) ("*Mahlamu*").

[116] See e.g. *NUMSA v Intervalve* trilogy: *NUMSA v Intervalve (Pty) Ltd* 2015 36 *ILJ* 363 (CC); *Intervalve (Pty) Ltd v NUMSA* 2014 35 *ILJ* 3048 (LAC) and *NUMSA v Steinmuller Africa (Pty) Ltd* 2012 BLLR 733 (LC).

agencies. The problem is that legislation has not kept pace with these organisational changes, failing to differentiate between these complex multilateral relationships and the traditional simple bilateral relationships between a worker and an employer.[117]

1.4 Globalisation

Globalisation as a term arouses suspicion[118] and is accompanied by diverse ranges of perspectives.[119] Space considerations bar extended discussion of the rich debate on globalisation as well as variety of definitions that are put forward to render the concept operational. Crisply stated, globalisation can be defined at the level of increased cross-border economic interdependency resulting from a greater mobility of factors of production and of goods and services has established linkages over a broader geography of location.[120] It is usually accompanied by,

> "trade liberalisation and a rising volume of international trade; currency market liberalisation and an enormous increase in international currency transactions; liberalisation of the rules governing foreign investments and cross-border capital flows; the emergence and dominance of multi-national enterprises; increased

[117] Collins "Independent contractors and the challenge of vertical disintegration to employment protection laws" 1990 *OJLS* 353 ("The challenge of vertical disintegration"); Fudge "The legal boundaries of the employer: Precarious workers, and labour protection" in Davidov & Langille (eds) *Boundaries and Frontiers of Labour Law* (2006); Forrest "Political values in individual employment law" 1980 *MLR* 361.

[118] According to Dicken *Global Shift: Mapping the Changing Contours of the World Economy* 6ed (2011) 4: "despite, or perhaps because of, its 'woolliness', globalization generates heated and polarized arguments across the entire political and ideological spectrum." See also Watts *et al* "Trump, Xi Push Opposing Views on Trade" *The Wall Street Journal* Nov. 10 2017 https://www.wsj.com>articless (accessed 20-11-17); News Reporter "Why Donald Trump can't bully China on trade" Guardian https://www.guardian.com (accessed 24-11-2017).

[119] The most visible manifestation of contestation over Globalisation concerned the "hyper-globalist" and "neo-liberals". The hyper-globalists contend that globalisation has created a "borderless world", a world in which 'nation-states are no longer significant actors or meaningful economic units. On the other hand, "neoliberals" maintain that globalisation has resulted in a 'more efficient allocation of resources and exploitation of comparative advantages between countries' consequently raising productivity, boosting economic growth and providing increased prosperity for all. At the extreme end of the spectrum, 'sceptical internationalists' argue that the "newness" of the current situation has been grossly exaggerated. See generally, Dicken *Global Shift* (2011) 4-6; Rodrick *Has Globalisation Gone Too Far?* (1997); Held *et al*, *Global Transformation: Politics, Economics and Culture*, (1999); Hirst & Thompson *Globalisation in Question*, 2d ed (1999); Stiglitz *The Myth of Globalisation and its Discontent*, (2002); Brenner *Work in the New Economy: Flexible Labour Market in the Silicon Valley* (2002) Budlender *Industrial Relations and Collective Bargaining: Trends and Developments in South* Africa (2009) 2.

[120] Habridge *et al* "Globalisation and labour market deregulation in Australia and New Zealand: Different approaches, similar outcomes' 2002 *ERJ* 424.

manufacturing in developing nations; heightened international wage competition; and steady increases in cross-border labour migration."[121]

It cannot be denied that globalisation has greatly altered the manner in which the production of goods is being done. Before the advent of globalisation, the production process was organised in such a way that the industrialised countries produced manufactured goods while developing or non-industrialised countries supplied raw materials and acted as markets for the products of the industrialised countries.[122] The production process has undergone remarkable transformation from large-scale production techniques which were based on the assembly line model,[123] to the more flexible methods of production: the result being the emergence of a global division of labour in production which is characterised by the fragmentation of the production process and its subsequent geographical relocation on a global scale in a way that cut across national boundaries.[124]

There can be no question that changes in the production process as a result of globalisation have had significant impact on labour relations. As always, it bears repeating that the major forces driving change in the workplace lie outside the province of law and indeed often beyond the labour market itself.[125] To be sure, the regulatory effect of the law, while not inconsequential, remains ancillary. To understand the compulsion brought by external factors, one needs to reflect on the recurrent issue of business restructuring. Although not inevitable, job losses are certainly foreshadowed

[121] Dicken *Global Shift* (2011) 1.
[122] Dicken *Global Shift* (2011) 36-37.
[123] Fordism denotes a manufacturing philosophy that aims to achieve higher productivity by standardizing the output, using conveyor assembly lines, and breaking the work into small deskilled tasks. Whereas Taylorism on which Fordism is based seeks machine and worker efficiency. For full exposition: Stone "The new psychological contract: Implications of the changing workplace for labour and employment law" 2001 *UCLA LR* 519, 526-535.
[124] Dicken *Global Shift* (2011) 13-35. See also Buizendhout & Cock "Commodity chains and corporate power: Impacts on employment, society and the environment" paper presented at *Workshop on: A Decent Work Research Agenda for South* Africa UCT, 4-5 April 2007; Suzuki "The fallacy of globalism and the protection of national economies" 2001 *Yale Int'l L* 319; Busse & Braun "Trade and investment effects of forced labour: An empirical assessments" 2003 *ILR* 49; Hepple "'Race to the top' International investment guidelines and corporate codes of conduct' 2000 *Comp. Lab. L & Pol'y J*. 347 and "New approaches to international labour regulation" 1997 26 *ILJ (UK)* 347; Deakin & Wilkinson "Rights vs. efficiency? The economic case for transnational labour standards" 1994 23 *ILJ* (UK) 289; McCrudden "Human rights codes for transnational corporations: What can the Sullivan and MacBride principles tells us?" 1999 *OJLS* 167.
[125] Thompson "Labour-management relations" in Cheadle *et al Current Labour Law* (2000), 35.

in employers' business decisions whether they relate to the introduction of new technology, process improvements or alterations in work practices,[126] outsourcing[127] and transfers of employees as part of a going concern.[128] For instance, when jobs are redesigned to provide greater flexibility, their skill requirements often increase.[129] The

[126] Also arising is the difficult question when it is 'fair' for an employer, in the course of restructuring its business, to dismiss an employee for declining to accept changes in her or his terms and conditions of employment? Expressed differently, whether only conditional dismissals intended to compel employees to accede to an employer's demands on a matter of mutual interest can constitute an automatically unfair dismissal in terms section 187(1)(*c*) of the LRA. This aspect of restructuring has generated seminal case law and commentary. See e.g. *NUMSA v Fry's Metal (Pty) Ltd* 2005 26 *ILJ* 689 (SCA). *Fry's Metal (Pty) Ltd v NUMSA* 2003 24 *ILJ* 133 (LAC); *General Food Industries v FAWU* 2004 25 *ILJ* 1260 (LAC). See generally, Du Toit "Business restructuring and operational requirements dismissals: *Algorax* and beyond" 2005 26 *ILJ* 595; Thompson "Bargaining, business restructuring and the operational requirements dismissal" 1999 20 *ILJ* 755; Irvine "Dismissal based operational reasons and the jurisdiction of courts - *National Union of Metalworkers and others v Fry's Metal (Pty) Ltd*" 2005 *CLL* 81.

[127] Outsourcing is defined as "[t]he policy of hiring outside consultants, trainers, technicians and other professionals to take over the complete function of a particular department (e.g. human resources) rather than employing full-time personnel. These non-core activities include catering, gardening, communications and data processing." Barker & Holtzhausen *SA Labour Glossary* (1997). See generally, *SAMWU v Rand Airport Management Co (Pty) Ltd* 2002 23 *ILJ* 2304 (LC); *NUMSA v Staman Automatic CC* 2003 24 *ILJ* 2162 (LC); *NUMSA obo Matlala and Active Distributors* 2006 27 *ILJ* 633 (BC). For discussion: Van Niekerk "Breached skeletons resurrected and vibrant horses corralled – *SA Municipal Workers Union v Rand Airport Management Company (Pty) Ltd and Others* and the outsourcing of services" 2005 26 *ILJ* 661. On second-generation outsourcing: *COSAWU s v Zikhethele Trade (Pty) Ltd* 2005 26 *ILJ* 1056 (LC); *Zikhethele Trade (Pty) Ltd* 2007 28 *ILJ* 2742 (LAC). For further discussion see: Todd *et al Business Transfers and Employment Rights in South Africa* (2004) 27; Grogan "Second-generation outsourcing: The reach of section 197" 2005 *EL* 10; Le Roux "Outsourcing and the transfer of employees to another employer: What happens in the "second generation" transfer?" 2005 *CLL*111. Insourcing is not the norm: *Imvula Quality Protection v UNISA* 2017 11 BLLR 1139 (LC).

[128] See e.g. *Vermaak v Sea Spirit Trading 162 CC t/a Paledi Super Spar* 2017 38 *ILJ* 1411(LC). See also Blackie & Horwitz "Transfers of contracts of employment as a result of mergers and acquisitions: A study of section 197 of the Labour Relations Act 66 of 1995' 1999 20 *ILJ* 1387; Smit "Should transfer of undertaking be statutorily regulated in South Africa?" 2003 *Stell LR* 205 and "A chronicle of issues raised in the course of dismissals by the transferor and/or transferee in circumstances involving the transfer of an undertaking" 2005 26 *ILJ* 1853; Workman-Davies "The right of employers to dismiss employees in the context of unfair dismissal provisions of the Labour relations Act" 2007 28 *ILJ* 2133.

[129] See e.g. *SA Mutual Assistance Society v Insurance & Banking Staff Association* 2001 BLLR 1045 (LAC); *Greig v Afrox Ltd* 2001 22 *ILJ* 2102 (ARB), *Wolfaardt v Industrial Development Corp of SA Ltd* 2002 23 *ILJ* 1610 (LC); *Ntshanga v SA Breweries Ltd* 2003 8 BLLR 789 (LC); *FAWU v SA Breweries Ltd* 2004 25 *ILJ* 1979 (LC). In his critique of the *SA Mutual Assistance Society* Rycroft commences with concise yet probing observation of parallel and quite different form of corporate restructuring:

> "An industrial relations trend has taken root in terms of which an employer, operational reasons, seeks to introduce a restructured organisational template, and in so doing redefines the requirements and competencies for jobs in the new structure. Existing staff are then told that all existing positions have become redundant and that if they want to continue in employment with the employer, they must apply for the 'new' positions. Those who fail to apply or who are not appointed, are considered to have resigned or are retrenched."

"Corporate restructuring and "Applying for your own job" 2002 23 *ILJ* 678. See also Le Roux "Unfair retrenchments: *FAWU v SA Breweries"* 2004 *CLL* 16.

new employment practices thus impose not only risk of job loss on employees, but also risk of depreciation of one's own skill base.[130]

The controversy is significant because employees face a constant risk of job losses due to continual workforce churning that characterise modern workplace. Law reports suggest no let-up in sight. *Woolworths I*[131] is a familiar example of dismantling of the internal labour market structures. The outcomes embodying these processes include the forging of new types of employment relationships giving employers the flexibility to cross-utilise employees, reduce costs and to make rapid adjustments as they confront increasingly competitive environment. In the case at hand, the employer engaged in cost saving measure by converting full-time employees to flexi-time workers resulting in substantial reduction in wages, benefits and related conditions of employment previously enjoyed by the employees working on full-time basis. Pay rates within workplace were markedly diverse despite the fact that full-time workers and flexi-timers performed similar work. The remuneration package of some full-timers surpassed the wages and benefits applicable to flexi-timers by 50%. The Labour Appeal Court found the dismissal of full time employees who declined conversion was substantively fair. Rather than being able to count on a rising wage level and a comfortable retirement, many workers can anticipate being dismissed to give effect to the employer's operational requirements.

In the latest pronouncement in *Woolworths II* the Constitutional reversed the decision of the LAC, and restored the earlier finding of the LC. The LC upheld SACCAWU's challenges that the dismissals were both substantively and procedurally unfair. Woolworths was ordered to reinstate the 44 dismissed workers retrospectively from the date of their dismissal. On the facts Nkabinde J found that Woolworths failed to prove that the retrenchments were operationally justifiable on rational grounds or that it properly considered alternatives to retrenchments[132]. It follows that the dismissal

[130] Stone "Legal regulation of the changing [employment] contract" 2004 *Cornell JL & Pub Pol'y* 563; 570. See also Fisk "Reflections on the new psychological contract and the ownership of human capital" 2002 *Connecticut LR* 765.

[131] *Woolworths (Pty) Ltd v SACCAWU* 2018 39 *ILJ* 222 (LAC).

[132] *Woolworths II* para 38.

of the individual applicants was substantively unfair because Woolworths has failed to prove that it complied with section 189A(19)(b) or (c).

1.5 Problems of Precarity

A large number of contributors to the literature on the social implications of globalisation have noted that over the past 20 years,[133] many developing economies have suffered from similar problems of rising unemployment, poverty and inequality.[134] This troika of attributes found in many economies have amplified labour market vulnerabilities. The finest contributors to this discourse as it pertains to South Africa – reminds us that when we undertake a disquisition into the shifting frontiers of work we must have (a) a firm handle on trade liberalisation in the context of South Africa's evolving economic policies;[135] (b) the changing structure of employment and its ramifications for labour law and the protection of worker rights;[136] and (c) a nuanced appreciation of regulated flexibility.[137]

[133] In the words of the ILO's Director-General, "the global job crisis is putting security, development, open economies and open societies all at risk. This is not a sustainable course." Cited in 'World of work: Migrants in a globalising labour market' – Migration in an interconnected world: New directions for action' *Report of the Global Commission on International Migration*, October 2005, chap. 4 at 11. See generally, Jenkins *et al The quest for a fair globalisation: Three years on: Assessing the impact of the World Commission on the Social Dimension of Globalisation* (2007) 17.

[134] *National Development Plan 2030 – Programme of Action* – National Planning Commission.

[135] See generally, McCrudden "Human rights codes for transnational corporations: What can the Sullivan and MacBride principles tells us?" 1999 *OJLS* 167; Keet "Globalisation, the World Trade Organisation and the implications for developing countries" 1999 *LDD* 3; Warikandwa & Osode "Human rights, core labour standards and the search for a legal basis for a trade-labour linkage in the multilateral trade regime of the World Trade Organisation" 2014 *LDD* 11; "Legal theoretical perspectives and their potential ramifications for proposals to incorporate a trade labour linkage" 2014 *Speculum Juris* 41 and "Exploring the World Trade Organisation's trade and environment/public health jurisprudence as a model for incorporating a trade-labour linkage into the organisation's multilateral trade regime: Should African countries accept a policy shift?" 2017 *AJICL* 47.

[136] See generally, Brassey "Fixing the laws that govern the labour market" 2012 33 *ILJ* and "The nature of employment" 1990 11 *ILJ* 889; Thompson "The Changing nature of employment" 2003 24 *ILJ* 1793; Theron "Employment is not what it used to be" 2003 24 *ILJ* 1247 and "The shift to services and triangular employment: Implications for labour market reform" 2008 29 *ILJ* 1; Dupper *et al* "Eroding the core: Flexibility and the re-segmentation of the South African labour market" 1999 C*ritical Sociology* 216; Baskin "South Africa's quest for job, growth and equity in a global context" 1998 19 *ILJ* 986; Blanpain "Work in the 21 century" 1997 18 *ILJ* 185.

[137] See generally, Van Eck "Regulated Flexibility and the Labour Relations Amendment Bill of 2012" 2013 *De Jure* 600; Cheadle "Regulated flexibility, revisiting the LRA and the BCEA" 2006 27 *ILJ* 663, Mills "The situation of the elusive independent contractor and other forms of atypical employment in South Africa: Balancing equity and flexibility?" 2004 25 *ILJ* 1203; Kalula "Beyond Borrowing and Bending: Labour Market Regulation and the Future of Labour Law in Southern Africa" in Barnard *et al*

That South Africa has not escaped the adverse effects of integration into the world economy is not exactly news.[138] The transition to a constitutional democracy occurred in parallel with South Africa's re-entry into the global market economy. From the outset, South Africa was presented with tension between political/social and economic reform.[139] After a brief experimentation with the RDP policy, the Growth, Employment and Redistribution (GEAR) became the government's market oriented strategy which emphasizes trade liberalisation and flexibility, aimed at attaining macro-economic stability.

The question that naturally arises is: how successful was South Africa post 1994 in confronting the exploiting complementarities between trade and labour market reforms? A candid response to this question is that trade reforms increased labour market vulnerabilities. The exposure of the previously sheltered primary and secondary sectors to intense competition has long been seen as primary cause of decline.[140] The collapse encountered in these sectors had adverse impact on employment as these two sectors were most labour intensive.[141] Formal employment in these sectors waned, however tertiary sector saw an increase in employment. To put fine point on the impact of trade liberalization, it has not reversed, or contributed to reversing to the loss of unskilled jobs in the formal economy.

The displacement of jobs as a result of globalisation had gone hand in hand with change in the nature of employment. As firms are forced into a more competitive environment as a result of increases in trade and global competition, employer's affinity for flexibisation of employment took root. The upshot was the proliferation of what has

(eds), *The Future of Labour Law: Liber Amicorum Bob Hepple QC* (2004) 275 ("Beyond Borrowing and Bending").

[138] See generally, Fakier "The internationalisation of the South African labour markets: The need for a comparative research agenda" *Workshop on: A Decent Work Agenda for South Africa* UCT, 4-5 April 2007; Famish *Globalisation and Work Regulation in South Africa* (unpublished LL.M thesis, UWC 2009); Gweshe *Collective Bargaining in a Globalised Era – A change in Approach* (unpublished LL.M thesis, UCT 2012).

[139] Rodrick "Understanding South Africa's economic puzzles" 2008 *Economics of Transition* 783; Streak "The gear legacy: did gear fail or move South Africa forward in development?" www.tandfonline.com>dol>full (accessed 30-10-2017).

[140] Mills "The situation of the elusive independent contractor and other forms of atypical employment in South Africa: Balancing equity and flexibility?" 2004 25 *ILJ* 1210.

[141] Theron *et al* Discussion Paper Series No 178 4.

been termed "atypical" or non-standard employment.[142] The reorganisation of work is forcing an increasingly large proportion of people to seek the means for their economic and social survival through various types of disorganised, insecure, risky, casualised and poor work.[143] Moreover, flexibisation created a new class of vulnerable and relatively powerless workers in need of more rather than less protection from labour law.[144] In sum, vulnerabilities inherent in atypical employment have prevented many workers from fully benefitting from the dynamics of globalisation.

The hallmarks of different forms of employment patterns that have emerged as a result of globalisation are (a) casualization (b) externalization and (c) informalisation.

1.5.1 Casualisation

While casualisation and externalisation are siblings, they not necessarily twins. Casualisation is considered a diluted version of standard employment and externalisation involves workers providing goods and services to the end-user via a commercial arrangement, usually involving an intermediary[145] Casualisation denotes direct employments that is part-time or temporary, and therefore not standard.[146] A common thread of casualisation is the displacement of employees in a standard employment relationship with temporary or seasonal labour and/or part time employees.

Workers falling within the embrace of casuals encompass workers working less than 24 hours, part-time workers (working only a percentage of the time worked by the

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[142] See Christianson "Atypical employment - the law and changes in the organisation of work" 1999 *CLL* 65; Kelly "Outsourcing statistics" 1999 *SALB* 37.

[143] MacDonald "Informal work, survival strategies and the idea of an 'underclass'" in Brown (ed) *The Changing Shape of Work* (1997) 123.

[144] Visser *Farm Workers' Living and Working Conditions in South Africa: Key Trends, Emergent Issues, and Underlying and Structural Problems* ILO (2015).

[145] See Le Roux *The World of Work: Forms: Forms of Engagement in South Africa* Institute of Development and Labour Law Monograph, UCT 02/2009 (Le Roux *The World of Work*) 13-17; Theron *et la Keywords for a 21st Century Workplace* Institute of Development & Labour Law Monograph UCT 11/ 2011 (*Keywords for a 21st Century Workplace*) 27-29. The boundaries of "casualisation" and "externalisation" are malleable. For example, subcontracting, which is now seen as a manifestation of externalisation, was in earlier literature often described as a form of casualisation. See Klerck "Industrial restructuring and the casualisation of labour: A case study of subcontracted labour in the process industries" 1994 *SA Sociological Review* 216. Further, the term "atypical" was preferred by some to denote both casualisation and externalisation and that no obvious distinction was made between the different policy considerations that casualisation and externalisation demand. See Mhone "Atypical forms of work and employment and their policy implications" 1999 20 *ILJ* 197.

[146] Theron *et al Keywords for a 21st Century Workplace* 9.

permanent employees) and seasonal workers. This changes the standard employment relationship by altering the employment relationship between employer and employee from continuous to temporary and/or full time to part time. Although the use of temporary, seasonal and/or part time labour is not a new phenomenon, it is now a prevalent feature of contemporary labour market.[147] It is also important to note that in the past these workers would have been considered as part of the core function of the business, and thus important to the survival of the business. However, in the era of globalisation these workers are now considered to be dispensable and are now found at the periphery of the business.[148]

Employers clearly benefit from the casualisation process. They are able to reduce their labour costs by avoiding the "non-wage costs of employment such as paid leave, sick leave, healthcare compensation etc."[149] They are also able to link the demand for business to the size of the labour force. They can thus increase their workforce, extend working hours during peak periods to increase productivity, to reduce labour costs,[150] at the same time decrease it when their business face a downturn.[151] Unfortunately the consequences of casualisation are not mutually beneficial. Casualised workers face a number of disadvantages which their permanent employed peers do not. For instance businesses that employed casualised workers do not have to provide employment benefits such as pension schemes, medical aid, paid sick leave and maternity leave.[152] In general, they have wage insecurity and they also tend to have lower wages than their counterparts.[153] In any event, casual employment is often so transient that dismissal claims are simply uncommon.

[147] Theron & Godfrey *Protecting Workers on the Periphery* (2000) 6.
[148] Barchesi "Informality and casualisation as challenges to South Africa's industrial unionism: Manufacturing workers in the East Rand/Ekurhuleni Region in th1 1990" 2010 *African Studies Quarterly* 67; Klerck 1994 *SA Sociological Review* 216; Bezuidenhout "Casualisation: Can we meet it and beat?" 2005 *SALB* 39; Vlok "Being casual" 1999 *SALB* 47.
[149] Standing *Work After Globalisation: Building Occupational Citizenship* (2009) 72.
[150] Bodibe *The Extent of and Effect of Casualisation in Southern Africa: Analysis of Lesotho, Mozambique, South Africa, Swaziland, Zambia and Zimbabwe* (2006) NALEDI 10.
[151] Theron & Godfrey *Protecting Workers on The Periphery* (2000) 7. See also Albin & Prassl "Fragmenting work, fragmented regulation: The contract of employment as a driver of social exclusion" in Freedland *et al* (eds) *The Contract of Employment* (2016) 209.
[152] See e.g. *Woolworths I*.
[153] Bezuidenhout *et al Non-standard Employment and Its Policy Implications* (Report submitted to the Department of Labour 2003) 5. See also Makino "The changing nature of employment and the reform of labour and social security legislation in post-Apartheid South Africa" (2008) IDE Discussion Paper.

The potential role contract of employment in aggravating employment vulnerable of casualised workers cannot be ignored. The crisp question that arises is not whether the contract of employment obfuscates the status of casual workers as employees, but whether the unitary nature of the contract of employment and the sameness of regulation that applied to casualised (and the complete lack of regulation in the case of those who work for less than 24 hours per month for specific employer) amplify precariousness. To the extent that Basic Conditions of Employment Act 75 of 1997 (BCEA) endorses the contract of employment as a unitary concept, this unification is also responsible for the erosion of workers. Theron *et al* postulate:[154]

> "…[this] exposes the fallacy of supposing that because labour legislation acknowledges no distinction between workers in standard and non-standard employment, workers in non-standard employment enjoy the same rights. In truth, both the growth of non-standard work, and the particular form it has taken in South Africa are exacerbating inequality."

1.5.2 Externalisation

Externalisation entails a process whereby employment is regulated by a commercial contract instead of a contract of employment. This allows the user firm to let go of some "headache" associated with dealing with employees, whether it is hiring, firing and so forth.[155] Externalisation encapsulates two inter-related dimensions. The first is the "outsourcing" of employer responsibilities to an intermediary. Although the intermediary becomes the nominal employer of the workers, the terms and conditions of their employment are wholly determined by the terms and conditions of the commercial contract between the intermediary and the core business.[156] The second dimension entails superficial impression that an employee is an independent contractor. This brings to the table the familiar problem of elaborate sham service arrangements between workers and employing entities.[157] Closely allied to the conversion of

[154] Theron *et al Globalization, The Impact of Trade Liberalisation, and Labour Law* 9.
[155] Vosko *Temporary Work: The Gendered Rise of a Precarious Employment Relationship* (2000) chap. 4; Rica "The behaviour of the state and precarious work" in Rodgers & Rodgers (eds) *Precarious Jobs in Market Regulation* (1989).
[156] Le Roux *The World of Work* 17.
[157] See *Dyokhwe*; *Building Bargaining Council (Southern & Eastern Cape) v Melmos Cabinets CC* 2001 22 *ILJ* 120 (LC) ("*Melmons Cabinet CC"*); *Madlanya v Forster* 1999 20 *ILJ* 585 (LAC) ("*Madlanya*"); *Shezi v Gees Shoes* CC 2001 22 *ILJ* 1707 (CC) ("*Shezi*").

employees into independent contractors is the acute problem of disguised employment. Attempts to convert legal status of employees into independent contractors have the sole purpose of diluting the application of labour law.

The predominant modern posture of externalisation entails the process in terms of which an enterprise "unbundles" itself by contracting with other entities to perform some of the tasks previously performed in-house.[158] In practical terms, this translates into 'the traditional outsource/retrench/offer of employment with a service provider[159] or a labour broker route'.[160] That the key features of outsourcing of services reinforce employment vulnerability cannot be gainsaid.

> "Pulling in an independent service provider is attractive to employers because it transfers the headaches as well as the employees to an outside entity. That option presents two problems, however. The first is that the sub-contractor may not want to take on any or some of the workers who have been providing the service concerned. This leaves the employer with the problem of retrenching them. And gives rise to the

[158] Wallis "Is outsourcing in? An ongoing concern" 2006 27 *ILJ* 1.

[159] In *SATAWU v Old Mutual Life Assurance Co Ltd* 2005 26 *ILJ* 293 (LC) para 13, the company's restructuring strategy was described as follows:
"1 A business as usual case. This scenario envisages continuation of our current thrusts which are essentially to continue to refine the nature of our services and to focus heavily on cost management.
2 A gradual outsource case: This scenario envisages outsourcing of elements of our services in a methodical way as the external service provider community develops and is able to demonstrate cost and know-how advantages over the in-house service.
3 An empowerment or privatisation case: This scenario envisages creation of a new services company and the outsourcing, with some form of contractual underpin or guarantee, of facilities services from Old Mutual to a new company. Existing staff would be transferred from Old Mutual to the new company and staff would own a meaningful share of the new company."
NEHAWU v UCT the University opted for a "phased approach" to outsourcing campus protection services. This apparently allowed affected employees a choice between "remaining with CPS [and likely ultimately being retrenched]; voluntary retrenchment; early retirement with incentives; redeployment with UCT where vacancies exist and employment by the service provider should the service provider find the employee suitable".
For excellent exposition see: Bosch "Operational requirements dismissal and section 197 of the Labour relations Act: Problems and possibilities" 2002 23 *ILJ* 641; "Section 197 transfer of business as going concern: Reigning in the Labour Appeal Court – *NEHAWU v UCT* 2003 24 *ILJ* 95 (CC)" 2003 *Obiter* 232; "Of business parts and human stock: Some reflections on section 197(1)(a) of the Labour Relations Act" 2004 25 *ILJ* 1865 and "Balancing the Act: Fairness and Transfers of Businesses" 2004 25 *ILJ* 923.

[160] In *Springbok Trading (Pty) Ltd v Zondani* 2005 26 *ILJ* 1681 (LAC) the employer decided to retrench part of its labour force and to re-engage their services through a labour broker. Their new terms of employment would be less advantageous. The employer claimed that the transfer was effected by agreement between itself and the employees' union. However, the LAC found, on the evidence, that no valid agreement had been established. It found it most unlikely that an experienced trade union official would not have challenged the proposed new conditions on behalf of its members. The retrenchments were accordingly unfair.

second question: may the employer do so, or is the sub-contractor bound to employ the workers for purposes of the contract?" [161]

The fact that outsourced workers are in an invidious position is palpable.[162] If an employer elects to engage contractors, the contract of employment between the employer and the employees is replaced with a commercial contract between the employer and an independent contractor, or between the employer and a self-employed individual.[163] Further, it is clear that the retrenched employees find themselves in precarious employment positions as either workers in the informal sector or workers for "small service suppliers"[164] such as subcontractors or a temporary employment service.

Externalisation has had a pronounced and destructive impact on the fortunes of employees.[165] The high point of precariousness is that employees are coerced into trading relatively permanent and secure employment with their employers for either "short term highly insecure contracts" or unemployment.[166] Externalisation strategies are fashioned toward the use of a TES a triangular employment relationship. That is, establishing a tripartite relationship between the TES, client and worker. In broader outline, the TES becomes a nominal employer supplying labour and assuming the risk of employment. The client, however, is the real employer as it ultimately determines the

[161] Wallis "Outsourcing services: The effect of the new section 197" 2005 *EL* 3, 3. See also Wallis "Section 197 is the medium: What is the message?" 2000 21 *ILJ* 1.

[162] Bosch "Transfers of contract of employment in the outsourcing context" 2002 23 *ILJ* 840, 841 sums up this dilemma nicely,

> "They are redundant to the needs of their old employer as a result of its decision to outsource the activity in which they were engaged, while the work that they were doing is still available and being undertaken by the contractor. There is the possibility that an employee will be offered the opportunity to work for the contractor, and that employment may be on the same or better terms and conditions than those enjoyed with their old employer. On the other hand, and this is apparently more often than the case, workers are in no position to refuse an opportunity to work for the contractor and are therefore compelled to work for that entity on terms and conditions of employment that are far less beneficial than those they previously enjoyed."

[163] Theron "Prisoners of a paradigm: labour broking, the 'new services' and non-standard employment" in Le Roux & Rycroft (eds) *Reinventing Labour Law: Reflecting on the first 15 years of the Labour Relations Act and future challenges*" (2012) 50.

[164] Olowu "Globalisation, labour rights, and the challenges for trade unionism in Africa' 2006 *Sri Lanka Journal of International Law* 132, 141.

[165] See generally, Fudge & Strauss (eds) *Temporary Work, Agencies and Unfree Labour – Insecurity in the New World of Work* (2015).

[166] See generally, *COSAWU v Zikhethele Trade (Pty) Ltd* (LC) para 29; Le Roux "Outsourcing and the transfer of employees to another employer: What happens in the "second generation" transfer?" 2005 *CLL* 111, 112.

terms and conditions of employment.[167] The triangle is completed by the commercial contract that ties the nominal employer (service provider) to the real employer (client). This form of employment is not highly precarious but changes the standard employment relationship by obscuring who the employer is and by moving the worker's place of work from the employer's premises, to those of the client's.

1.5.3 The Amendments to Non-Standard Employment: The good, The Bad and The ugly

As a counter to increased informalisation of labour and pervasive employment vulnerability, the Labour Relations Amendment Act 6 of 2014 ("LRAA") was enacted to accord greater protection to employees placed by TES, fixed term employees and part-time employees. This immediately raises fundamental questions concerning changes wrought by the amendments to tackle abusive practices in triangular employment relationship. This is an issue of some importance. It relates to a long standing angst in labour law across jurisdictions – regulation of temporary employment agencies.[168] A question that springs to mind is: to what extent are consequences of employment vulnerability insidiously reproducing themselves through triangular employment relationship? The ensuing discussion focuses on aspects of the LRAA regarding unequal pay, termination of employment and dismissals at the behest of a client of the broker.

1.5.4 Equal Pay Provision for Employees in Atypically Employment

[167] Theron "Employment is not what it used to be".

[168] See generally, Finkin & Jacoby "An introduction to the regulation of leasing and employment agencies" 2001 *Comp Lab L & Pol J* 1; O'Donnell & Mitchell "The regulation of public and private employment agencies in Australia: An historical perspective" 2001 *Comp Lab L & Pol J* 7; Vigneau "Temporary agency work in France" 2001 *Comp Lab L & Pol J* 45; Schruren "Employee leasing in Germany: The hiring out of an employee as a temporary worker" 2001 *Comp Lab L & Pol J* 67; Sol "Targeting transitions: Employment services in the Netherlands" 2001 *Comp Lab L & Pol J* 81; Royo "Temporary work and employment agencies in Spain" 2001 *Comp Lab L & Pol J* 129; Nystrom "The legal regulation of employment agencies and employment leasing companies in Sweden" 2001 *Comp Lab L & Pol J* 173; Van Eck "temporary employment services (labour brokers) in South Africa and Namibia" 2010 *PER/PELJ* 107 and "Revisiting agency work in Namibia and South Africa: Any lessons from Decent Work Agenda and flexicurity approach?" 2014 *IJCLLIR* 49.

The new legislative scheme embodied in the LRRA now provides a statutory basis for addressing pay dispersion in tripartite relationship.[169] The equal pay provisions are enshrined in sections 198A-198D of the LRA. The content of section 198A(5) reads as follows:

> "An *employee* deemed to be an *employee* of the client in terms of subsection (3)(*b*) must be treated on the whole not less favourably than an *employee* of the client performing the same or similar work, unless there is a justifiable reason for different treatment."

Section 198B of the LRA applies to fixed-term contract employees earning below the threshold. An employer may only employ an employee on a fixed-term contract or successive fixed-term contracts for longer than three months if the nature of the work is of a limited or definite duration or the employer can advance a justifiable reason for fixing the term of the contract.[170] Where an employer employs an employee in contravention of this section then the fixed-term contract or the renewal of the contract is deemed to be for an indefinite duration. Section 198B(8)(*a*) on the other hand, elaborately lays down the equal pay provision as follows:

> "An *employee* employed in terms of a fixed term contract for longer than three months must not be treated less favourably than an *employee* employed on a permanent basis performing the same or similar work, unless there is a justifiable reason for different treatment."

[169] Anonymous "A critical analysis of the new equal pay provisions relating to atypical employees in sections 198A-198D of the LRA: Important lessons from the United Kingdom" *PER/PELJ* (forthcoming). See also Ebrahim "Equal pay for work of equal value in terms of the Employment Equity Act 55 of 1998: Lessons from the International Labour Organisation and the United Kingdom" 2016 *PER/PELJ* 32; Leighton & Wynn "Classifying employment relationships – More sliding doors or a better regulatory framework?" 2011 40 *ILJ (UK)* 5 ("Classifying employment relationship"); Selwyn *Selwyn's Law of Employment* 16th ed (2011) 83-84.

[170] S 198B(3)(*a*)-(*b*) of the LRA. S 198B(4) of the LRA sets out the following list of reasons which would amount to a justifiable reason as contemplated in section 198B(3)(*b*) of the LRA: "(*a*) is replacing another *employee* who is temporarily absent from work; (b) is employed on account of a temporary increase in the volume of work which is not expected to endure beyond 12 months; (c) is a student or recent graduate who is employed for the purpose of being trained or gaining work experience in order to enter a job or profession; (d) is employed to work exclusively on a specific project that has a limited or defined duration; (*e*) is a noncitizen who has been granted a work permit for a defined period; (*f*) is employed to perform seasonal work; (*g*) is employed for the purpose of an official public works scheme or similar public job creation scheme; (*h*) is employed in a position which is funded by an external source for a limited period; or (*i*) has reached the normal or agreed retirement age applicable in the employer's business."

This section requires that the employee must not be treated less favourably than a permanent employee performing the same or similar work unless there is a justifiable reason for doing so.

Section 198C of the LRA deals with part-time employees who earn below the threshold. The equal pay provision is set out in section 198C(3)(*a*) of the LRA which reads as follows:

> "(3) Taking into account the working hours of a part-time *employee,* irrespective of when the part-time *employee* was employed, an employer must—
> (*a*) treat a part-time *employee* on the whole not less favourably than a comparable fulltime *employee* doing the same or similar work, unless there is a justifiable reason for different treatment."

The main requirement of section 198C(6) of the LRA is that a part-time employee must choose a comparable full-time employee employed by the employer on the same type of employment relationship who performs the same or similar work in the same workplace. Otherwise, if there is no comparable full-time employee in the same workplace, then a comparable full-time employee employed by the employer in any other workplace.[171]

Sections 198A, 198B and 198C of the LRA state that an employee must be treated "on the whole not less favourably" unless there is a justifiable reason for the different treatment. To this end, section 198D(2) of the LRA provides that a justifiable reason would include that the different treatment is as a result of the application of a system that takes into account the following: (a) seniority, experience, length of service; (b) merit; (c) the quality or quantity of work performed; or (d) any other criteria of a similar nature; and such reason is not prohibited by section 6(1) of the Employment Equity Act 55 of 1998.[172]

It is worth mentioning that the Israeli response triangular employment is combination of the European and North American approaches.[173] According to legislation, the wages and conditions of agency workers must be equal to the wages and

[171] S 198C(6)(*a*)-(*b*) of the LRA.
[172] S 198D(2)(*a*)-(*d*) of the LRA.
[173] Davidov "Joint employers' status in triangular employment relationships" Available at SSRN: https://ssrn.com/abstract=551702 (accessed 10-03-2017).

conditions of the user firm's employees. There is also a provision that after nine months of work for the same user firm, the worker becomes the legal employee.[174]

1.5.5 Automatic Termination of Employment

Generally, automatic termination of employment is a familiar problem linked to the expiry of a fixed-term contract.[175] Another way in which an automatic termination arises is through the operation of law where the employer invokes a deeming provision.[176] Issues regarding automatic termination clause contained in employees' contract and deemed dismissals[177] as well as primary questions pertaining to the denial of access to remedies for unfair dismissal are prominent in law reports.[178] To the contrary, constitutional and public interest litigation now occupy a central place in the

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[174] Employment of Employees by Labour-Only Contractors Law, 1996, as amended.

[175] In *SATAWU obo Dube v Fidelity Supercare Cleaning Services Group (Pty)* 2015 36 *ILJ* 1923 (LC) para 29, Labour Court held:

> "A view has already been posited, approved and upheld in the labour courts holding effectively that a current contract of employment can terminate by operation of its terms (*de jure*), as a natural consequence of the termination of another contract, to which the current contract intensively relies for its own subsistence. This is possible in all instances where there is a contractual arrangement in terms of which a person, the employee, agrees that his or her services have been procured for and will be provided to a client, a third party, by a temporary employment service ("the employer"). When in such circumstances, there is a clause in the current contract to the effect that when a certain "event" occurs, such as the client terminating the SLA contract with the employer, the current contract will also terminate. There can be no question, save where there is an attack on the lawfulness or validity of the contract itself, that when such an event comes to pass, the current contract will also validly and/or lawfully terminate."

See also *Twoline Trading 413 (Pty) Ltd t/a Skosana Contract Labour v Mongatane* 2014 JOL 31668 (LC); *SARPA v SA Rugby (Pty) Ltd* 2008 9 BLLR 845 (LAC); *Buthelezi v Municipal Demarcation Board* 2004 25 *ILJ* 2317 (LAC). For further discussion see: Geldenhuys "The effect of changing public policy on the automatic termination of fixed-term employment contracts in South Africa" 2017 *PER/PELJ* 1; Gericke "A new look at the old problem of a reasonable expectation: The reasonableness of repeated renewals of fixed-term contracts as opposed to indefinite employment" 2011 *PER/PELJ* 105.

[176] Note "Deemed dismissal: Discharge for desertion in the public service" 2004 *EL* 18.

[177] See e.g. *Minister of Defence & Military Veterans v Mamasedi* 2018 2 SA 305 (SCA); *Gangaram v MEC for the Department of Health, KZN* 2017 38 *ILJ* 2261 (LAC); *Solidarity v PHWSBC* 2013 34 *ILJ* 1503 (LAC); *Makade v PHSDSBC* 2014 ZALAC 43; *Grootboom v NPA* 2013 5 BLLR 452 (LAC); *Phenithi v Minister of Education* 2006 27 *ILJ* 447 (SCA); *MEC for Education & Culture v Mabika* 2005 26 *ILJ* 2368 (LC).

[178] See generally, Aletter & Van Eck "Employment agencies: Are South Africa's recent legislative Amendments Compliant with the Controversies over temporary employment agencies in South Africa and Namibia" 2016 *SA Merc LJ* 285 ("Employment agencies"); Benjamin "To regulate or to ban? International Labour Organisation's Standards?" in Malherbe & Sloth-Nielsen (eds), *Labour Law into the Future: Essays in Honour of D'Arcy du Toit* (2012) 189; Cohen "Debunking the legal fiction – *Dyokhwe v De Kock NO & others*" 2012 33 *ILJ* 2318 ("Debunking the legal fiction") and "Legality of the automatic termination of contract of employment" 2011 *Obiter* 665; Le Roux "Automatic termination of employment: The Labour Court express scepticism" 2010 *CLL* 101.

South African legal imagination insofar as termination of appointments by operation of law[179] are concerned.

The typical automatic termination clause provides that when the client no longer requires the services of the employee, the contract shall automatically terminate. Such termination shall not be construed as a retrenchment but a completion of contract. If this occurred, there would be no dismissal and therefore no claim for unfair dismissal. In effect, this leaves the employee with no recourse against joint employers, namely; the client and the labour broker. Unscrupulous employers' embrace of automatic termination clause is an exemplar of tactically shrewd approach to evade the fair dismissal obligations imposed by the LRA and the Constitution. The ultimate objective is to render ineffective measures intended to curb abusive practices.[180] The ouster of

[179] A striking example is the recent Constitutional Court pronouncement in *Corruption Watch NPC v President of the RSA* 2018 10 BCLR 1179 (CC)3 upholding the Pretoria High Court judgement in *Corruption Watch (RF) NPC v President of the RSA* 2017 ZAGPPHC 741 setting aside appointment of Acting NDPP, Mr Abrahams. The genesis of this robust and expansive proclamation of judicial supremacy is the seminal judgement in *DA v President of the RSA* 2012 1 SA 417 (SCA) setting aside the appointment of former NDPP, Mr Simelane as inconsistent with the Constitution and invalid. For a helpful exposition, see Govender "Taking risky decisions: *Democratic Alliance v President of the Republic of South*"2015 *CCR* 1. In the same vein, the High Court in *General Council of the Bar of SA v Jiba* 2017 2 SA 122 (GP) struck off the roll of advocates Jiba and Adv Mrwebi, thereby effectively terminating their appointment as Deputy NDPP and NPA executive respectively. Cf. *Jiba v General Council of the Bar of SA* 2018 3 All 622 (SCA). Also the North Gauteng High Court judgements in *HSF v Minister of Police* 2017 1 SACR 683 (GP) and *HSF v Minister of Police* 2017 3 All SA 253 (GP) brought an end to a controversy concerning the appointment of Lt-General Ntlemeza as head of the Directorate of Priority Crime Investigation (Hawks).

[180] See Convention concerning Private Employment Agencies, C181 of 1997 (Adopted 1997, came into force 10 May 2000). The effect of the deeming provision in s 198A(3)(*b*) LRA of 1995 as amended by the Labour Relations Amendment Act 6 of 2014 is that once an employer-employee relationship existed between the client and the employee and the client concurrently assumes responsibility to ensure that the duties and obligations in terms of the LRA were met. In *Assign Services v CCMA* 2015 36 *ILJ* 2853 (LC) Brassey AJ rejected the dual employment approach as it could lead to uncertainty and confusion and was not aligned with the purpose of the amendments to s198, which was to address abusive associated with TESs and provide a greater protection to vulnerable employees. In *Mphiriwe and Value Logistics Ltd* 2015 36 2433 (BC) the BC arbitrator found that the TES and the client remained jointly and severally liable for breaches referred to s 189(4), i.e. breaches of BCEA 75 of 1997, sectoral determination, collective agreements and awards regulating terms and conditions of employment.
S 198(4)(C) prohibits the employment by a temporary employment service of any one on terms and conditions not permitted by the Act. This section proscribes any term or condition that is against the provisions of the Act. See further, Grogan "The New Dispensation - The amendments to the Labour Relations Act, Part 1 - Non-standard employment" 2014 *EL* 3 and "Let the 'Deemed' be damned: Section 198A(3)(*b*) deconstructed" 2015 *EL* 4; Cohen "The effect of the Labour Relations Amendment Bill 2012 on non-standard employment relationships" 2014 35 *ILJ* 2607.

unfair dismissal jurisdiction is a manifest violation of sections 5(2)(*b*),[181] 5(4)[182] and 185 of the LRA. From decided cases[183] and especially factors to be considered to determine whether the contracting parties have contracted out the protection against unfair dismissal is provided by Tlaletsi DJP in *Enforce Security Group*;[184] to the effect that judicial hostility to impermissible use of automatic termination clauses is obvious.

The question of the lawfulness of automatic termination clause in employment contract is laden with rich complexity. Underlying the contentious issue of automatic termination clause is the cherished principle of contractual autonomy[185] – *pacta sunt servanda*.[186] The principle that contractual obligations must be honoured when the parties have entered into the contractual agreement freely and voluntarily is deeply embedded in our jurisprudence.[187] Accordingly, it has been said that "self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity."[188] And in the same vein, public policy

[181] S 5(2)(*b*) of the LRA provides that "…no person may do, or threaten to do, any of the following…prevent an employee…from exercising any right conferred by this Act".

[182] S 5(4) reads as follows:

> "A provision in any contract, whether entered into before or after the commencement of this Act, that directly or indirectly contradicts or limits any provision of section 4, or this section, is invalid, unless the contractual provision is permitted by this Act".

The UK Court of Appeal in *Igbo v Johnson Mathery Chemicals Ltd* 1986 IRLR 215 (CA) it held that statutory rights cannot be waived, even by consensual agreement.

[183] See *SATAWU obo Dube*; *Dyokhwe*; *Mahlamu* para 10; *SA Post Office v Mampeule* 2009 30 *ILJ* 664 (LC); *SA Post Office v Mampeule* 2010 31 *ILJ* 2051 (LAC).

[184] *Enforce Security Group* para 41-42.

[185] See *Wells v South African Alumenite Company* 1927 AD 69; 73 *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2017 ZASCA 176 paras 23-24; *Brisley v Drotsky* 2002 4 SA 1 (SCA) para 3. See also Bhana "The implications of the right to equality in terms of the Constitution for the common law of contract" 2017 *SALJ* 141; Barnard-Naude "'Oh, what a tangled we weave…' Hegemony, freedom of contract, good faith and transformation – Towards a politics of friendship in the politics of contract" 2008 *CCR* 5; Bhana & Pieterse "Towards a reconciliation of contract law and constitutional values" *Brisley* and *Afrox* revisited" 2005 *SALJ* 865.

[186] *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 15. For historical account see: Kahn (ed) *Contract and Mercantile Law* Vol 1 (1988) 1-4; Visser "The principle *pacta sunt servanda* in Roman and Roman-Dutch law…" 1984 *SALJ* 641; Hutchison "Contract formation" in Zimmerman & Visser (eds) *Civil Law and Common Law in South Africa* (1996) 165.

[187] *Napier v Barkhuizen* 2006 4 SA 1 (SCA) para 7 the SCA linked public policy to the *Constitution* by finding that public policy "… now derives from the founding constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism". Clauses that are ruled "unreasonable, oppressive or unconscionable" by the court would generally be considered contrary to the constitutional values..." See also Du Bois "Contractual obligation and the journey from natural law to constitutional law" 2015 *Acta Juridica* 281.

[188] Per Ngcobo J in *Barkhuizen v Napier* para 57. See also *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) para s 38-40; *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff* 2009 3 SA 78 (C) 85A.

incorporates notions of fairness, justice and reasonableness.[189] In certain limited circumstances, courts have always been fully prepared to reassess and declare contractual terms that conflict with the constitutional values or the public policy unenforceable despite the fact that the parties had agreed upon them. Recently the SCA in *Mohamed's Leisure Holdings*[190] consequently restated the obvious, that the enquiry calls for a balancing and weighing-up of two considerations, namely the principle of *pacta sunt servanda* and the considerations of public policy, including of course constitutional imperative.

If a contract terminates automatically and without intervention of the employer, no dismissal, in the strict sense of the word, takes place. Take a fixed–term employment contract entered into for a specific period or upon the happening of a particular event. An event that comes into the picture would include a conclusion of a project or the cancellation or expiry of a contract between an employer and a third party. Once the event agreed to between an employer and its employee materializes, there would ordinarily be no dismissal.[191] At common law, the expiry of the fixed term contract of employment does not constitute termination of the contract by any of the parties.[192] The effect is an automatic termination of the contract by operation of law and not a dismissal.[193] Therein lies the rub.

[189] *Barkhuizen v Napier* paras 11, 13, 15, 51, 140. Public policy also needs to consider "the necessity to do simple justice between individuals. The court has held that the public policy is informed by the principle of Ubuntu" - *Barkhuizen v Napier* para 51; see further *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 9F-G; *Jajbhay v Cassim* 1939 AD 537 544. See further Schulze "The banks' right to cancel the contract between it and its customer unilaterally: *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA)" 2011 *Obiter* 211.

[190] *Mohamed's Leisure Holdings* para 21.

[191] See e.g. *Sindane v Prestige Cleaning Services* 2010 31 *ILJ* 733 (LC) para 16; *Mahlamu v CCMA* 2011 32 *ILJ* 1122 (LC) para 23.

[192] *Air Traffic and Navigation Services Company v Esterhuizen* 2014 JOL (SCA) para 17.

[193] Dismissal of an employee for the purposes of the LRA is defined in s 186 which provides that: "(1) —Dismissal means:

> (*a*) an employer has terminated a contract of employment with or without notice;
>
> (*b*) an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it;
>
> (*c*) an employer refused to allow an employee to resume work after she –
>
> (i) took maternity leave in terms of any law, collective agreement or her contract of employment, or

A fundamental problem concerning automatic termination clause stems from its role in forestalling access to purpose-built 'one-stop shop dispute resolution structure in the employment sphere'[194] created by the LRA.[195] The first crucial step in accessing the proactive ambit of the LRA starts with an employee establishing the existence of dismissal.[196] The question whether dismissal has occurred is not necessarily a straightforward matter.[197] Determining the existence of dismissal is a task of considerable complexity that is pregnant with the potential for error. So, for example, it has been held that where an employee's contract contains a resolutive condition, freely agreed to, triggered by the client of a temporary employment service, there is no termination of the contract by the employer temporary employment service, and therefore no dismissal.[198] Conversely, where the termination of limited duration contract is for reasons not related to the project on which employees were employed such termination would constitute an unfair dismissal.[199]

(ii) was absent from work for up to four weeks before the expected date, and up to eight weeks after the actual date, of the birth of her child;

(*d*) an employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another; and

(*e*) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee;

(*f*) an employee terminated a contract of employment with or without notice because the new employer, after a transfer in terms of Sec 197 or 197A, provided employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided by the old employer."

[194] *Chirwa v Transnet* 2008 29 *ILJ* 73 (CC) para 54.

[195] See e.g. *Steenkamp v Edcon Ltd* 2016 37 *ILJ* 564 (CC) para 33; *CUSA v Tao Ying Metals Industries* 2008 29 *ILJ* 2451 (CC) para 65 ("*CUSA*"). See also Van Niekerk "Speedy Social Justice: Structuring the statutory dispute resolution process" 2015 36 *ILJ* 837; Steenkamp & Bosch "Labour dispute resolution under the 1995 LRA: Problems, pitfalls and potential" 2012 *Acta Juridica* 120.

[196] S 192 of the LRA.

[197] At issue in *NUMSA v Abancedisi Labour Services CC* 2012 33 *ILJ* 2824 (LAC) was whether the removal of employees in terms of section 198(2) from work by client against the will of labour broker who insisted that they are still employed constituted dismissal in terms of section 186(1), read with sections 187, 188 or 189 of the LRA.

[198] See e.g. *Dick v Cozens Recruitment Services* 2001 22 *ILJ* 276 (CCMA); *April v Workforce Group Holdings (Pty) Ltd t/a The Workforce Group* 2005 26 *ILJ* 2224 (CCMA). Bosch "Contract as a barrier to 'dismissal': The plight of the labour broker's employee" 2008 *ILJ* 813 has correctly pointed out that such resolutive clauses contained contract are invalid because they are contrary to public policy, or because they do not reflect the realities of the triangular relationship that is established when an employee is placed on assignment with the client of a temporary employment service.

[199] See *Nakeng and Capacity Outsourcing (Pty) Ltd* 2017 *ILJ* 1722 (CCMA).

Two cases illustrating both sides of this coin are *Madulo*[200] and *Nkunzo*.[201] Both cases concerned the employment of employees was terminated on expiry of their fixed-term contracts. The employees referred unfair dismissal disputes to the CCMA, relying on s198B of the LRA 1995 and arguing that their fixed term contracts were not valid, and they were deemed to be indefinitely employed and therefore they had a reasonable expectation of permanent employment. In *Madulo* the commissioner found that the requirements of section 198B(6)(*a*) and (*b*) had been met. There was internal correspondence setting out the reason the services were required, the duration of the service and the rate of pay, all terms normally contained in a fixed term contracts, and the employer had justifiable reasons for conclusion of fixed-term contracts. In the circumstances, the employees' employment was not indefinite. However, in *Nkunzo* the commissioner found that, although the implementation of the project was justifiable reason for concluding fixed-term contracts when employing employees, in this instance the contracts made no reference to the new project nor that the contracts would terminate when the project was implemented. The commissioner accordingly found that the employees were unfairly dismissed and awarded them compensation.

In grappling with this often difficult problem of jurisdiction it must be borne in mind that the inquiry into the existence of dismissal is generally clouded by factual disputes.[202] The resignation, early retirement and reinstatement controversy involving disgraced former Eskom Group CEO, Mr Brian Molefe[203] provides an illuminating example. It is, however, also necessary to stress that the stage at which the employment relationship fractures it is when the employee is most vulnerable and hence, most in

[200] *NEHAWU obo Madulo and Performing Arts Council FS* 2017 398 *ILJ* 2157 (CCMA).
[201] *SAMWU obo Nkunzo and Pikitup Johannesburg* 2017 38 *ILJ* 2167 (CCMA).
[202] Examples are replete in constructive dismissal disputes *Morna v Commission on Gender Equality* 2001 22 *ILJ* 351 (W); *Sihlali v SABC* 2010 3 *ILJ* 1477 (LC); *Asuelime / University of Zululand* 2017 12 BALR 1312 (CCMA); *Harnden and Christian Centre (Abbotsford) East London* 2017 38 *ILJ* 2140 (CCMA).
[203] *DA v Minister of Public Enterprises* 2018 ZAGPPHC 1 para 17. After being served with a notice to attend a disciplinary hearing, the applicant in *Nogoduka v Minister of Higher Education & Training* 2017 6 BLLR 634 (LC) resigned "with immediate effect". The hearing proceeded in his absence and he was dismissed. The applicant claimed that the tribunal had no authority to him because he was no longer in the employer's employment when the decision to dismiss him was taken. The LC noted that the Public Service Act 103 of 1994 expressly prohibits executive authorities from accepting notice shorter than is required from employees charged with misconduct. It followed that when the decision to dismiss was taken, the applicant was still in employment. The application was dismissed.

need of protection. It is apparent where employment contract ends automatically, an unfair dismissal claim is generally foreclosed.[204]

With those general observation in mind, it is now necessary to deal with the more concrete issues raised by *Pecton Outsourcing Solutions*[205] and *Enforce Security Group*. The issue of "automatic termination" clause linked the continuance of the fixed-term appointments of the workers to the service contract between the TES and its client. Here the resolutive condition provided that, if the service contract between the TES and the client is cancelled, the employment contract would terminate automatically, and that "[s]uch termination shall not be construed as a retrenchment, but shall be a completion of the contract".[206] The arbitrating commissioner concluded that the employees had been dismissed, and although the dismissals had been for a fair reason they had been procedurally unfair.[207] On review, Whitcher J held that the commissioner had erred in finding that the "automatic termination" clause was included as an attempt to contract out of the process for fair retrenchment. However, the judge agreed with the commissioner's finding that the "automatic termination clause" was an attempt to contract out of the applicant's retrenchment obligations in terms of the LRA. Consequently, it was unenforceable, making the terminations a dismissal.[208]

The factual background in *Enforce Security Group* also involved a situation where an employment agency or "service provider" employer placed workers with a client. Like *Pecton Outsourcing Solutions*, the contract between the employer and the client was to terminate as soon as the service rendered by the workers were no longer required. The employer giving notice to employees of termination of their employment contracts because the eventuality to terminate the fixed-term contract having taken place. The commissioner in the CCMA ruled the termination as not constituting a dismissal. The LC disagreed, holding that a dismissal had occurred that was both substantively and procedurally unfair. On appeal, the LAC reversed the LC decision. It concluded that the commissioner was correct that this was an automatic termination,

[204] See e.g. *Nogcantsi v Mnquma Local Municipality* 2017 38 *ILJ* 595 (LAC) para 42. See also *Matjila/Eco Group Civils (Pty) Ltd* 2017 9 BALR 982 (CCMA).
[205] *Pecton Outsourcing Solutions CC and Pillemer B* 2016 37 *ILJ* 693 (LC).
[206] *Pecton Outsourcing Solutions* para 3.
[207] *Pecton Outsourcing Solutions* para 12.
[208] *Pecton Outsourcing Solutions* para 22.

and not a dismissal as the termination of the underlying contract between the client and the employer was the trigger of the termination.

As for *Central Technical Services*,[209] the employees of a TES entered into contracts of employment linked to project performed by a client. After the termination of their services, bargaining council arbitrator found that the employees had been unfairly dismissed. On review, the LC found that the project was not identified in the contract and this meant that there had been no meeting of minds on the termination event that would serve to limit the duration of the contract. The employees were therefore employed on permanent and not fixed term contracts, and the termination of the contracts amounted to an unfair dismissal.

1.5.6 Gendered Precariousness: Discriminatory Dismissals at the Behest of a Client of the Labour Broker

A third party demand that another employee be dismissed is one of the vexed and complex problems that may confront modern management.[210] Faced with mounting pressure to dismiss, an employer is caught between the proverbial "rock" and a "hard place". On the one hand, the employer (typically a TES) is expected to make strenuous efforts to dissuade the third party to drop the demand. While on the other hand, the employer is expected to exhaust all alternatives without recourse to dismissal, taking into account the injustice likely to be suffered by the targeted employee.

Chuma[211] presents the opportunity to consider some of the interesting problems raised by the dismissal of 28 female security guards ostensibly for operational reasons as a result of pressure exerted by the client of the TES. The reason was that the Chuma's client, Metrorail, requested it to employ fewer women and more women as security. Chuma was presented with a Hobson choice: either it retains reliable female security officers, then risk losing the Metrorail contract or terminate the services of the

[209] *Central Technical Services (Pty) Ltd v MEIBC* 2017 38 *ILJ* 1651 (LC).
[210] See generally, *NUPSAWU obo Mani v National Lotteries Board* 2014 3 SA 544 (CC); *NUMSA v Hendor Mining Supplies (A Division Masrchalk Beleggings) (Pty) Ltd* 2003 24 *ILJ* 2171 (LC).
[211] *NUMSA v High Goal Investments t/a Chuma Security Services* 2016 ZALCCT 34. For further exposition, see Maloka "A critical appraisal of dismissal at the behest of a third party: The impact of the constitutional labour rights" in Dyani-Mhango *et al* (eds) *The Courts, Judicial Review and The Democratic State: A Tribute to Nelson Rolihlahla Mandela* (forthcoming).

targeted employees thereby contravening section 187(1)(f) of the LRA[212] for unfairly discriminating the female employees on the basis of gender. In order to assuage the client, and at same time avoid losing lucrative contract, Chuma chose to retrench the female security guards.

The vulnerability of employees to adverse treatment in triangular employment can hardly be overemphasised. Employment vulnerability is most amplified at the point of termination induced by coercive power of a third party. In particular where there was no fault on the part of the employee[213] or a breakdown of the requisite relationship of trust and confidence,[214] or in a case where the employee had been disciplined, but not dismissed[215] and the employer did not want to terminate the employee's employment but had been coerced by the third party.[216]

Applying the *Lebowa Platinum Mines* principles,[217] the following questions may be posed in relation to *Chuma*: did the client's demand for reduction of female guards

[212] S 187 provides as follows:

"187. Automatically unfair dismissals

(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is –

…

(*f*) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to..., gender, ... "

[213] A petition to management by workers targeted on the ethnic basis is apposite:

> "... the concerned employees addressed a letter to the general manager of ERPM. It asked of management an answer to the following question: *"Are the employees have the right to dismiss other employees just because they don't want them?"* [sic] *No amount of verbal elaboration or supposed legal sophistication can express more powerfully the question a dismissal at behest of a third party raises."*

Per Cameron J (as he then was) in *ERPM Ltd v UPUSA* 1996 27 *ILJ* 1135 (LAC) at 1150D.

[214] See e.g. *Mazibuko v Mooi River Textiles Ltd* 1980 10 *ILJ* 875 (IC); *Mnguni v Imperial Truck Systems (Pty) Ltd* 2002 23 *ILJ* 492 (LC).

[215] See e.g. *NUMSA v Hendor Mining Supplies (Pty) Ltd* 2003 24 *ILJ* 2171 (LC); *Rainbow Farms (Pty) Ltd v FAWU* 1995 16 *ILJ* 418 (IC).

[216] See e.g. *SA Quilt Manufacturers (Pty) Ltd v Radebe* 1994 15 *ILJ* 115 (LAC); *Jonker v ABI (Pty) Ltd* 1993 14 *ILJ* 1232 (LAC).

[217] The principles for determining the substantive fairness of a dismissal in response to a demand by a third party were enunciated by Kroon JA in *Lebowa Platinum Mines Ltd v Hill* 1998 19 *ILJ* 112 (LAC) 671-673 as follows:

- the mere fact that a third party demands the dismissal of an employee does not render such dismissal fair;
- the demand for the employee's dismissal must have good and sufficient foundation;

have legitimate foundation? How serious and imminent was the threat of loss of business? Did the employer make reasonable endeavours to dissuade its client from making the demand for the removal and/or dismissal of the targeted employees? In addition, were alternatives to dismissal explored?

1.5.6.1 Did the Demand for Removal of Female Guards have Legitimate Foundation?

It is trite that the mere fact that a third party demands the dismissal of an employee does not render such dismissal fair. The crisp question is whether a demand for the dismissal of the targeted employee is predicated on legitimate foundation. If the third party's demand amounts to discrimination (on the basis of race, nationality or some personal features impinging upon the employee's inherent dignity),[218] special considerations need to be taken into account in determining whether it enjoys such a foundation. The issue of a demand infringing upon the fundamental rights of the targeted employees was dealt with in *Boardman Bros.*[219] At issue was the dismissal of black workers following an illegal industrial action which was triggered by the recruitment of coloured employees. They had demanded that coloured workers be dismissed. In an appeal against their dismissal the workers contended that, although their strike was illegal, it was justified because of the fear that their job security was in jeopardy as a result of the change in recruitment policy.

- the threat of action by the third party if its demand was not met had to be real or serious;
- the harm that would be caused if the third party were to carry out its threat must be substantial; mere inconvenience is not enough to justify dismissal;
- the employer must make reasonable efforts to dissuade the party making the demand to abandon the demand; the third party cannot be persuaded to drop the demand, the employer must investigate and consider the alternatives to dismissal; and
- in the process of considering alternatives, the employee must be consult the employee and make it clear to him or her that the rejection of the any possible will result in dismissal.

[218] A contemporary situation of discriminatory demand for dismissal of other employees occurred in *De Doorns* where locals demanded dismissals of mainly Zimbabwean nationals. See Report *Violence, Labour and the Displacement of Zimbabweans in De Doorns, Western Cape* 2009 *Forced Migration Studies Programme* University of Witwatersrand available http://migration.org.za (accessed 19-10-2017); Visser *Farm Workers' Living and Working Conditions in South Africa: Key trends, Emergent Issues, and Underlying and Structural Problems* ILO (2015).

[219] *CWIU v Boardman Bros (Pty) Ltd* 1991 12 *ILJ* 864 (IC).

The court found that the change in recruitment policy was not racist and the fears of black workers that the introduction of coloured employees would lead to their dismissal were unfounded. Maritz AM felt their discontent was understandable, but not morally defensible or supportable by the court. In upholding the fairness of the dismissal, the court noted that the striking workers' stance was unjustified and their demand enjoyed no legitimate foundation.

ERMP stands out as an illustration of circumstances where the dismissal in response to a third party demand had its origins in direct or indirect discrimination. It has been said that where mass dismissal of employees of one ethnic group was effected to placate the demand of another, a test of necessity, and not reasonableness, should be applied in scrutinising management's action in dismissing targeted workers in such circumstances.[220]

Nape[221] closely resembles *Chuma* in that the essential dispute concerned the dismissal of an employee at the behest of a third party by a labour broker. The employee had sent an e-mail containing offensive material at the client's premises and the client demanded the removal of the employee. It was a term of the contract between the client and the labour broker that the client could demand the removal of an employee for any reason whatsoever. In defending an unfair dismissal claim brought by the employee, the employer relied on *Lebowa Platinum Mines* and argued that there was nothing it could do after the client demanded the removal of the employee. It also argued that in those circumstances it could legitimately invoke the provisions of section 189 of the LRA as it had very little bargaining power with the client. The court found that the employer and the client could not structure their contractual relationship in a way that would effectively treat employees as commodities to be passed and traded at the whims and fancies of the client and that the contractual relationship should not be structured in a way that undermines the employee's constitutionally guaranteed rights. In holding the client's demand illegitimate, the Labour Court invoked the following rationale:

[220] *ERMP* 1151B & F-G.
[221] *Nape v INTCS Corporate Solutions (Pty) Ltd* 2010 31 *ILJ* 2120 (LC). For extended discussion see: Nkhumise "Dismissal of an employee at the instance of a client: Revisiting *Nape v INTCS Corporate Solutions (Pty) Ltd* in the context of the Labour Relations Amendment Act 6 of 2014" 2016 *LLD* 106.

> "An illegal demand can never found the basis to justify a dismissal based on operational requirements just as it cannot form the basis of a lawful strike. (*TSI Holdings (Pty) Ltd & Others v NUMSA & Others* (2006) 27 *ILJ* 1483 (LAC))…By the same token s189 cannot be used to disguise the true reason for dismissal…"[222]

On the facts of *Chuma* two things are immediately notable about the unlawfulness of the demand for removal of a female security personnel. The first is its focus on female employees as constitutes serious encroachment on the right to equality, dignity, fair labour as amplified in the EEA and the LRA. Indeed, "Chuma conceded that, but for the fact that the applicants were women, their employment would not have been terminated. They were dismissed to make way for male security officers."[223] The second is the relative lack of substantive reasons for the dismissal[224] of the affected employees. To put it bluntly, the female security officers were good workers because "they did not miss work and they did not attend work with a hangover".[225] Unlike the targeted supervisor in *Lebowa Platinum Mines*,[226] there was no fault or a degree of moral turpitude that can be attributed to the retrenched female security officers aside from the fact that the call for their replacement was predicated on gender. To this may be added, that Chuma was alive to the fact that the demand by Metrorail which resulted in the dismissal of the applicant was unlawful and in fact contravened the equality laws.[227] This means that the dismissals were automatically unfair as envisaged by section 187(1)(*f*).

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[222] *Nape* para 72.

[223] *Chuma* para 50.

[224] LRA 1995 contemplates three substantive grounds for discipline and dismissal: misconduct, incapacity or operational reasons. For incisive exposition see: Okpaluba "Current Issues of Fair Procedure in Employer's Disciplinary Enquiry I" Unpublished paper presented at the *Workshop on Unfair Dismissals at the 12th Annual Labour Law Conference* (30 June - 2 July 1999 Durban) (on file with the author).

[225] *Chuma* para 7.

[226] *Lebowa Platinum Mines* dealt with a situation in which a supervisor had called a black subordinate a "bobbejaan" (which means a 'baboon'). The supervisor received a final warning for this offence and was told not to do it again. The employees and their union were dissatisfied with the leniency of that sanction and demanded that the supervisor be fired. The employees threatened to embark upon industrial action if the offending employee was not dismissed. After exhaustive negotiations, the company decided to terminate the services of Mr Hill for operational reasons. In light of uncompromising stance adopted by the workers, the union's unshakeable intention to implement the threat of industrial action in the form of a strike, the fact that the employee' safety could not be guaranteed, the court held that the employee, in unreasonably refusing the transfer, left the door open for his discharge. See also *Govender v Mondi Kraft-Richards Bay* 1999 20 *ILJ* 2881 (LC) ("*Govender*"); *TSI Holdings (Pty) Ltd v NUMSA* 2004 25 *ILJ* (LAC).

[227] *Chuma* para 53.

1.5.6.2 The Tension between the Third Party Demand and the Norm of Accountability

The reading of *Chuma* leads one to an inevitable tension between the third party demand for displacement of female security officers and the norm of accountability. Foremost, PRASA/Metrorail an organ of State is bound to uphold and respect fundamental rights while acting both ethically and accountably.[228] The constitutional tri-norms of accountability, responsiveness and openness are embodied in section 1(*d*) of the Constitution. Apart from playing a focal role in adjudication,[229] the norm accountability[230] closely intersects with the protection and advancement of fundamental rights of women[231] and children.[232] *Carmichele*[233] and *K*[234] have given authoritative view of the norm of accountability when fundamental rights are at stake. Cleary, the demand for removal of female security guards is at variance with the norm of accountability. It involved encroachment on the fundamental rights of vulnerable employees in the wake of incidents of sexual assault on duty. In addition, it cannot be said that the posture adopted by the Metrorail and Chuma accord with the spirit, objects and purport of the Bill of Rights.

[228] S 195(1)(*f*). See also *President of RSA v SARFU* 2001 (1) SA (CC) para 133. For decisional trends on accountability, openness and transparency of recent vintage see: *Public Protector v SARB* 2019 ZACC 29; *Life Esidimeni Arbitration; President of the RSA v Office of the Public Protector* 2017 ZAGPPHC 748; *President of the RSA v Office of the Public Protector* 2017 ZAGPPHC 747; *Corruption Watch (RF) NPC v President of the RSA* 2017 ZAGPPHC 741; *PRASA v Swifamabo Rail Agency (Pty) Ltd* 2017 6 SA 223 (GJ); *Ntlemeza v HSF* 2017 3 All SA (SCA); *EFF v Speaker of the National Assembly* 2016 3 SA 580 (CC); *HSF v President of the RSA* 2015 2 SA 1 (CC); *My Vote Counts NPC v Speaker of the National Assembly* 2015 ZACC 31; *Allpay Consolidated Investment Holdings (Pty) Ltd v CEO: SASSA* 2014 (1) SA 604 (CC); *DA v President of RSA* 2013 1 SA 248 (CC); *Viking Pony Africa Pumps (Pty) Ltd v Hidro-Tech Systems (Pty) Ltd* 2011 (1) SA 327 (CC).

[229] For extended discussion see: Okpaluba & Osode 223-226; Okpaluba "The constitutional principle of accountability: A study of contemporary South African case law" 2018 *SAPL*1 and "Delictual liability of public authorities: Pitching the constitutional norm of accountability against the 'floodgate' arguments" 2006 *SJ* 248. Osode *Remedial interventions in public procurement process: An appraisal of recent appellate jurisprudence in search of principles* (Inaugural Lecture delivered at University of Fort Hare, 2013) available at: http://tinyurl.com/jherbhq (accessed 20-12-2017).

[230] See Okpaluba "Delictual liability of public authorities: Pitching the constitutional norm of accountability against the 'floodgates" argument" 2006 *SJ* 248.

[231] See e.g. *Omar v Government of the RSA* 2006 2 SA 289 (CC); *Bhe v The Magistrate, Khayelitsha* 2005 1 SA 563 (CC).

[232] See e.g. *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 2 SA 168 (CC); *HOD, Department of Education, Free State Province v Welkom High School* 2014 2 SA 228 (CC); *Bannatyne v Bannatyne (Commission for Gender Equality as Amicus Curiae)* 2003 2 SA 363 (CC).

[233] *Carmichele v Minister of Safety and Security* 2001 4 S A 938 (CC).

[234] *K v Minister of Safety and Security* 2005 6 SA 419 (CC).

In the same breadth, it is also unethical as it reinforces intersecting patterns of race and gender discrimination in society.[235] It is widely accepted that black women in South Africa have suffered multidimensional oppressions and have been marginalized by virtue of being both black and female.[236] Examined through the prism of critical race theory,[237] the retrenchment of female security guards as result of a mounting third party pressure more than typifies precariousness of triangular relationship, but underscores the porous boundary between gendering vulnerability and the double jeopardy of subordination: female and black. Indeed, precariousness is inherently gendered and racialised.

1.5.6.3 Interplay of Public Authority Liability and Demand for Replacement of Female Security Officers

As already noted, cogent reasons exist for denigrating the demand for removal of female security personnel. One might ask how, if the demand is both unlawful and discriminatory, is there a scope for finding that management's call makes sense and is indeed rational? The answer lies in South African law of public authority liability, a site of burgeoning jurisprudence.[238]

[235] *Brink v Kitshoff NO* 1996 6 BCLR 752 (CC) para 44. This also brings to the fore the grotesque facts of *Ntsabo v Real Security* 2003 24 *ILJ* 2341 (LC). See generally, Zalesne "The effectiveness of the Employment Equity Act and the Code of Good Practice in reducing sexual harassment" 2001 *SAJHR* 507, 509; Rycroft & Perumal "Compensating the sexually harassed employee" 2004 25 *ILJ* 1153; Le Roux "Sexual harassment in the workplace: Reflection on *Grobler v Naspers*" 2004 25 *ILJ* 1897; Whitcher "Two roads to an employer liability for sexual harassment: *S Grobler v Naspers Bpk en ander and Ntsabo v Real Security CC*" 2004 25 *ILJ* 1907; Mukheibir & Ristow "An overview of sexual harassment: Liability of the employer" 2006 *Obiter* 248.

[236] See generally, O'Regan "Equality at work and the limits of the law: Symmetry and individualism in antidiscrimination legislation" 1994 *AJ* 64, 65; Romany "Black women and gender equality in a new South Africa: Human rights law and the intersection of race and gender" 1996 *Brook J Int. L* 857, 861. For historical account of intersectionality between race, class and inequality: Seekings & Nattras *Class, Race and Inequality in South Africa* (2006).

[237] For a sampling of critical race theory research see: Crenshaw "Demarginalizing the intersection of race and sex: A black feminist critique of anti-discrimination doctrine, feminist theory and anti-racist politics" 1989 *U Chicago LR* 139; "Mapping margins: Intersectionality, identity politics, and violence against women of colour" 1991 *Stan LR* 1241 and "Twenty years of critical race theory: Looking back to move forward" 2011 *Connecticut LR* 1253; King "Multiple jeopardy, multiple consciousness of a black feminist ideology" 1988 *Signs* 42.

[238] For insight into important and durable contribution see: Okpaluba & Osode *Government Liability: South Africa and the Commonwealth* (2010). See also Okpaluba "The law of bureaucratic negligence in South Africa: A comparative Commonwealth perspective" 2006 *AJ* 117; Price "State liability and accountability" 2015 *AJ* 313.

Behind Metrorail's insistence on the removal of female security officers, lies business imperatives aligning with the pressing concern for rail commuter safety. Its hardened attitude can be ascribed to the freighted issue of public authority liability. To the extent that this is true, that is, to the extent that the demand for replacement of female security officers was to enhance safety and minimise the risk of vicarious liability, it taps into important reality. It is apparent from *Rail Commuters Action Group*[239] recognised that the rail commuter services carry a positive obligation to implement reasonable measures to ensure the safety of rail commuters who travel on the trains, and that such obligation should give rise to delictual liability where there is a risk of harm to commuters resulting from falling out of the crowded trains running with open doors, which is foreseeable.

It is trite that rail commuter services carry a positive obligation to implement reasonable measures to ensure the safety of all commuters who travel on the trains.[240] The primary responsibility for ensuring that measures are in place, irrespective of whether a service provider assigned to implement them, rests with Metrorail and the Commuter Corporation.[241] Seen through the prism of public authority liability, it is submitted that Metrorail's hostile approach is not necessarily underpinned by antipathy towards the deployment of female officers *per se* - the problem was their alleged ineffectiveness. If regard is had to risk of delictual liability, the stance adopted by Metrorail makes perfect sense. Therefore the insistence on change of security personnel in circumstances where services were inadequately performed was simply to ensure that constitutional and statutory obligations are fulfilled.

1.5.6.4 How Serious and Imminent Must the Threat Be?

The other important element required to be established by an employer is that the threat by the third party if its demand is not met was real or serious. In this regard

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[239] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 2 SA 359 (CC) para 84.

[240] News Reporter "Prasa worker in stable condition after attack on CT northern line" available at: https://ewn.co.za/2018/02/08/prasa-worker-in-stable-condition-after-attack-on-ct-northern-line (accessed 10-03-2018)

[241] *Rail Commuters Action Group* paras 73-78 and 84; *Mashongwa v PRASA* 2016 3 SA 528 (SCA) para 52; *PRASA v Mobil* 2017 4 All 648 (SCA) paras 32-34. See Okpaluba & Osode 225-226. See generally, Okpaluba "Standing to challenge governmental acts: current case law arising from South Africa's constitutional experiment" 2002 *SJ* 208 and "Justiciability and standing to challenge legislation in the Commonwealth: A tale of the traditionalist and judicial activists approaches" 2003 *CILSA* 25.

the employer must lead convincing evidence as to the outside pressure he was under as well as demonstrate that non-compliance would have brought the company to a standstill resulting in irreparable harm.[242] A mere inconvenience would not be enough. In many instances the economic consequences to the employer should a third party threat materialize would not be challenged. The decisive question is whether the employer properly assessed the threat as sufficiently serious and imminent for it not to be overlooked, and to take drastic step in respect of the offending employee's position?

Although Chuma appreciated that the client's request lacked substance and patently unlawful, it contended that the threat of losing Metrorail contract loomed large. It should be remembered that the underlying rationale of outsourcing is that the outsourcer is in a position to bring in a specialist service provider and to ensure quality of service via the terms of the outsourcing contract (so-called "management by contract") and the threat of non-renewal of that contract if such services are not adequately performed.[243] Defying the client meant non-renewal of the contract. As the Metrorail wanted fewer female security officers and as service provider it has to do as demanded by the client.[244] The threat of non-renewal of monthly contract could not be taken lightly, because "the e-mail from Blom had been copied to senior people within PRASA, who had the powers to terminate the contract."[245] With threat of Metrorail contract in mind, Chuma acted with deliberate speed in informing PRASA that 50 female employees would be retrenched.

Granted that the threat non-renewal of contract was imminent, the question that may be asked is: what measures are at the disposal of a labour broker when a client

[242] For example in *Jonker v ABI (Pty) Ltd* 1993 14 *ILJ* 199 (IC); *ABI (Pty) Ltd v Jonker* 1993 14 *ILJ* 1232 (LAC) the court was not convinced that a threat of national strike by 1, 2 million workers and its likely effect on the company's operations was sufficient to justifying the dismissal of the targeted manager. In that case FAWU had demanded that Jonker be dismissed because of past affiliations with security police and his involvement in the assault of union members. The fact that termination would ensure the normal operation was found not to be compelling justification; the employer was required to satisfy the court that the problem created by the third party could only be solved by terminating the employee. See also *Mnguni*; *Govender*. Generally *Quin v Leathem* 1901 AC 435; *Rookes v Barnard* 1964 AC 1129; *Thomson v Deakin* 1952 Ch 646; *J & T Stratford & Son v Lindley* 1965 AC 269 (HL); *Grootcon UK Ltd v Keld* 1984 IRLR 302; *Ford Motor Co. Ltd v Hudson* 1978 ICR 482. Further reading see Hoffman "*Rookes v Barnard*" 1965 *LQR* 116; Wedderburn "Intimidation and the right to strike" 1964 *MLR* 267 and "Right to threaten strikes" 1961 *MLR* 57.

[243] Grogan "Outsourcing workers: A fresh look at section 197" 2000 *EL* 15, 24.

[244] *Chuma* para 8

[245] *Chuma* para 23.

demands unlawful removal of the employee? According to the *Nape* court the answer is in the affirmative:[246]

> "… the labour broker is in fact not powerless to resist its client's attempt to wield its bargaining power in a way which undermines the fundamental rights of employees. The labour broker is entitled to approach a court of law to compel the client not to insist upon the removal of an employee where no fair grounds exist for that employee to be removed…"

This is what Chuma ought to have done as it rightly conceded that the client's demand infringed upon employees' fundamental rights. The point is aptly driven home by the *Nape* court as follows:

> "The respondent labour broker could have accordingly resisted the client's attempts to invoke clauses in its contract with the client which undermined the applicant's rights. It was unfair of it not to do so before invoking its right to terminate the contract of employment for operational requirements and also because the demand of the client was unlawful and unfair."[247]

If Metrorail terminates the contract because of Chuma's failure to comply with its unlawful demand, the labour broker could approach the Labour Court for urgent relief. This brings to the fore a perennial headache for the Labour Court.[248] The shoals of the Labour Court's urgent roll are littered with wrecks from unsuccessful declaratory and interlocutory applications in which the court is asked to intervene in disciplinary proceedings that were hardly out of the starting block and certainly not finalized.[249] The

[246] *Nape* para 77.
[247] *Nape* para 86.
[248] See Okpaluba "Current Issues of Fair Procedure in Employer's Disciplinary Enquiry I" 2-3; Gaibie "Disciplinary Proceedings – Rights, Limits and Dangers" Workshop 4.1 Disciplinary Proceedings-Paper - LexisNexis – (Date of use 30 November 2015) accessed 30-11-2015); Lityi & Breier "Court's Intervention In Disciplinary Hearings: Justifiable Or Just Delay Tactics?" http://www.mondaq.com/southafrica/x/138302/Employment+Litigation/Courts+Intervention+In+Disciplinary+Hearings+Justifiable+Or+Just+Delay+Tactics (accessed 30-11-2015); Cohen "Precautionary suspensions in the public sector: *MEC for Education, North West Provincial Government v Gradwell* 2012 33 *ILJ* 2012 (LAC)" 2013 34 *ILJ* 1706; Maloka & Peach "Is an agreement to refer a matter to an inquiry by an arbitrator in terms of section 188A of the LRA a straightjacket" 2016 *De Jure* 368; Maloka "Interdicting Disciplinary Enquiry: *Golding v HCI Managerial Services (Pty) Ltd* 2015 36 *ILJ* 1098 (LC)" *PER/PELJ* (under review).
[249] This aspect of labour dispute resolution continues to generate countless cases. See generally, *Poya v Railway Safety Regulator* 2018 ZALCJHB 354; *Gama v Transnet SOC Ltd* 2018 ZALCJHB 348; *Mohlomi v Ventersdorp/Tlokwe Municipality* 2018 4 BLLR 355 (LC); *Lesiba v Regional Head: Department of Justice and Constitutional Development (Mpumalanga Province* 2017 ZALCJHB 365; *Mtati v KPMG Services (Pty) Ltd* 2017 3 BLLR 315 (LC); *Benyon v Rhodes University* 2017 4 BLLR 423 (ECG); *BEMAWU v SABC* 2016 ZALCJHB 74; *Sesoko v Independent Police Investigative Directorate* 2016 ZALCJHB 223; *McBride v Minister of Police* 2015 ZALCJHB 216; *Zondo v Uthukela District Municipality* 2015 36 *ILJ* 502 (LC); *Ngobeni v Minister of Communications* 2014 ZALCJHB 141; *Feni v PAN South African Language Board* 2014 ZALCJHB 133; *Mahoko v Mangaung Metropolitan Municipality* 2013 ZALCJHB 63.

Labour Court's orthodox position is clear, namely, that courts will only intervene in urgent basis if truly exceptional circumstances are shown to exist, for instance, where the constitutional rights of an employee are being "trampled".[250] The factual context in *Chuma* is a textbook example of exceptional circumstances that may warrant the Labour Court to grant interim restraining party from exercising contractual power in a manner that impairs the fundamental rights of female employees.

It is clear from the eminent authorities[251] that the general thrust of section 8(2) of the Constitution is not to obstruct private autonomy or to impose on a private party the duties of the state in protecting the Bill of Rights. Put simply, it is rather to require private parties not to interfere with or diminish the enjoyment of a right.[252] If Metrorail terminates the contract with Chuma as a result of the latter's failure to remove female security personnel, such a measure would negatively infringe upon the rights of affected employees. Given that Metrorail is an organ of State, the intensity of the obligation not negatively diminished constitutionally protected rights is greater.

1.5.6.5 Did the Employer Make Reasonable Endeavours to Dissuade the Third Party to Drop its Demand?

Having regard to the pertinent facts in *Chuma*, could it be said that management pressed the fruit while still green and expected it, unreasonably to ripen? Put differently, was the dismissal of female security officers precipitate? The question whether, in the circumstances, management made efforts to persuade the third party to abandon its demand for the employee's dismissal, would depend on the facts of each case. In most cases, the employer would be constrained by the nature of the misconduct giving rise to demand or the unreasonable conditions put by the third party as precondition for withdrawing its demand.[253]

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[250] *Bargarette v PACOFS* 2007 ZALC 182.

[251] See also *Jaftha v Schoeman* 2005 2 SA 140 (CC) paras 33-4; *Rail Commuters Action Group* paras 68-71; *Minister of Health v TAC* 2002 5 SA 721 (CC) para 46; *Grootboom* para 34; *Van Eeden v Minister of Safety & Security (Women's Legal Centre Trust, as Amicus Curiae)* 2003 1 SA 389 (SCA) paras 13. Other rights may also carry the same kind of obligation: *S v Baloyi (Minister of Justice and Another Intervening)* 2000 2 SA 425 (CC) para 11.

[252] *Governing Body of the Juma Musjid Primary School v Essay NO* 2011 8 BCLR 761 (CC) para 58.

[253] In *Govender* the workforce's condition for abandoning their demand for dismissal proved unacceptable to the employer. Black employees would only accept the employee's continued

It needs to be stressed that the paramount consideration in dissuading the third party to abandon the demand for dismissal is to avoid an injustice to the targeted employee. The facts in *Chuma* reveal that the employer was focused on not jeopardising its commercial relationship with the client. What is more, Chuma's representative in his testimony felt that 'he was to be applauded because he has succeeded in getting Metrorail to back down on the big number of female security officers that they wanted replaced by male security officers.'[254] Furthermore, the point must be made that Chuma had ammunition in resisting the unlawful, unjustified and discriminatory demand made by Metrorail. The terms of the contract with PRASA did not require the deployment of male security guards. This all points distinctly to the fact that no steps were taken by Chuma to persuade Metrorail to drop its demand. Neither did it investigate the specific incidents that Metrorail relied upon in support of its demand for the removal of female security officers nor attempts to secure alternative positions for the dismissed employees.[255] The rationale for the dismissal was to placate the client and safeguard commercial interests. Steenkamp J explains:

> "There can be no debate that termination of the employment of the applicant caused injustice to these employees, who were not at fault. They had done nothing wrong. Chuma ought to have considered this factor. There is no evidence that the factor was considered and if it was, what weight, if any, it had on the decisions ultimately made by the respondent. Against those facts, the test of necessity or fairness has not been passed by the respondent. Chuma did not have a fair reason for dismissing the applicants."[256]

In sum, the dismissal of female security officers for operational reasons was simply a ruse.

1.5.6.6 Were Alternatives to Dismissal Genuinely Explored?

At what point does dismissal become appropriate and what alternatives should an employer have explored? These considerations are central to an assessment of the

employment with the company if it reinstated a black employee who had been dismissed for assaulting an Indian employee three years earlier. This would have opened floodgate of claims for reinstatement by ex-employees who were dismissed for misconduct. Further, a transfer was proposed by management but rejected by the workers on the basis that the problem itself would be transferred.

[254] *Chuma* para 8.
[255] *Chuma* paras 60 and 67.
[256] *Chuma* para 71.

fairness of dismissal at the behest of a third party. It has been suggested that fairness in this context does not require that the employer should exhaust every possibility to avoid termination but to act reasonably and *bona fide* and take into account the alternatives of his intended course of conduct. Indeed, there is no hard and fast rule.

It is settled law that dismissal at the behest of a third party can be effected for operational reasons or incapacity.[257] The reason for dismissing the employee is the basis of the enquiry in any dismissal case. It is by reference to that reason that the fairness of the dismissal must be judged. Since the reason is peculiarly within the knowledge of the employer, the onus is on the employer to proffer such valid reason in the dismissal proceedings.[258] If the employer does not, the court will conclude that the dismissal was a stratagem and find against it.[259]

The termination of an employee's services actuated by pressure imposed upon management sits uneasily within the realm of dismissal for operational reasons. Where the demand for dismissal is attributable to the targeted employee's own reprehensible conduct,[260] then fault based dismissal for operational reasons[261] as opposed to statutory

[257] Grogan *Dismissal* (2002) 279-280 points out that "...dismissals at the behest of third parties are more closely akin to classic dismissal for operational reasons than dismissal for incompatibility, because the tension arising from the employee's continued presence cannot be alleviated even if the employees concerned adapt their conduct. However, the two classes of dismissal may shade into each other because the employees' demand that offending employees be dismissed may be caused by the latter's unacceptable conduct. However, the distinguishing aspect of dismissal at the instance of third parties is that, had it not been for the pressure exerted by the third party, the employer would not have dismissed the employee. Such dismissals are effected because employers regard the cost of keeping offending employees on their payroll as outweighed by the actual or potential costs of the third parties' reaction if the employees are not dismissed."

[258] S 192 of the Labour Relations Act 66 of 1995.

[259] See for instance *Van Dyk v Zeda Car Leasing (Pty) Ltd t/a Avis Fleet* 2018 ZALCJHB 19; *Ntshanga v SAB Ltd* 2003 8 BLLR 834 (LC); *Harmse v Dainty Delite* 2003 9 BALR 1030 (CCMA); *NUMSA obo Buthelezi v Falcon* 2003 10 BALR 1152 (CCMA); *French and Compuware Corporation Southern Africa* 2003 24 *ILJ* 2991 (CCMA).

[260] In *Kroeger v Visual Marketing* 2003 24 *ILJ* 1979 (LC) the demand for the employee's dismissal was based on his conduct, namely; the brutal killing and shooting of a black motorist during a road rage incident, coupled with the use of racial slurs at work. See generally

[261] In *ERPM Ltd v UPUSA*1996 27 *ILJ* 1135 (LAC) 1150A-B a distinction was drawn between normal dismissals for operational reasons and 'fault' based dismissal for operational requirements. Cameron (as he then was) explained:

> "These dismissals *at the behest of third parties* were not, however, as in *Atlantis Diesel Engines,* the product of operational reasons arising from serious financial difficulties in consequence of a declining market-share. Nor were they retrenchments arising from 'outsourcing' of a portion of the enterprise's business. Nor, again, were they the product of reorganization or technological developments or electronic supersession of previous employee functions. There was in fact work for these workers to do. It was urgent that they should return it. The company could, at

dismissal for operational reasons[262] arises. Unlike the conventional grounds for operational reasons within the purview of section 189, hinged largely in response to a third party pressure triggers a searching judicial examination of management's motives and the actuating causes which formed the background to its action. To be sure, the inquiry into the rationale for dismissal for operational reasons will prompt a closer scrutiny. This is more so, where retrenchment exercise is fuelled by the pressure imposed by a third party, and there is no culpable conduct on the part of the affected employee(s).

In *Chuma*, the decision to retrench was presented as a *fait accompli*. Chuma ignored the statutory guidelines in section 189. Pointers include that it avoided NUMSA despite the fact that the verification process had established that it had 49.5% membership. In effect, NUMSA was not afforded an opportunity to put proposals on the table on possible measures to avoid dismissals. Therefore it cannot be said that the dismissal could not be avoided. The Labour Court cannot be faulted for holding that the retrenchment exercise embarked upon was both substantive and procedurally unfair.

1.5.6.7 Gendered and Gendering Dimension of Precariousness

Leaving the obvious problem of employment vulnerability for a moment, from critical feminist standpoint *Chuma* implicates in context the specific way the re-production of gendered violence. Also arising is the spatial and temporal distancing

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> least in the foreseeable short term, pay them to do it. They were not dismissed because their job had disappeared. They were dismissed because the company was unable to guarantee their safety at the premises because of ethnic hostility in the workplace."

The jurisprudential foundations for *sui generis* fault-based dismissal for operational reasons is the touchstone case on derivative misconduct - *Chauke v Lee Service Centre CC t/a Leeson Motors* 1998 19 *ILJ* 1441 (LAC) para 12. In treating the misconduct as collective issue, Cameron J explained is justified where one of only two employees is known to have been involved in "major irreversible destructive action" but management is unable to pinpoint which of them is responsible for the act. In this instance, the employer may be entitled to dismiss both of them, including the innocent one, where all avenues of investigation have been exhausted. The rationalisation here is that of operational requirement, namely that action is necessary to save the life of the enterprise. For serious engagement see: Okpaluba "Current Issues of Fair Procedure in Employer's Disciplinary Enquiry I" 18-22; Maloka "Derivative misconduct and forms thereof: *Western Platinum Refinery Ltd v Hlebela* 2015 *ILJ* 2280 (LAC)" 2016 *PER/PELJ* 1; Maqutu "Collective misconduct in the workplace: is 'team misconduct' 'collective guilt' in disguise?" 2014 *Stell LR* 566; Le Roux "Group misconduct: When will dismissal be a fair remedy for employers" 2011 *CLL* 101.

[262] S 189 of the LRA.

through which violence is constructed. The posture assumed by the TES and the client is reflective of masculinist approach of human security. Equally, it is important to note that the demand for removal and subsequent retrenchment of female security officers casts a spot light on how vulnerability to violence is problematized, and what kind of gendered meanings are thereby produced, mobilized and reinforced.

If we return to *Chuma*, Metrorail raised the issue of increased crime on sites serviced by Chuma and surmised that this was due to the deployment of mostly female security officers, who according to Metrorail could not arrest crime.'[263] This was particularly true with respect to two incidents involving female guards. In one incident a female security officer was sexually assaulted while doing cable patrol, in the company of a male security officer, and vandalism on the line. The other incident involved a female security guard who was attacked whilst in a guardroom on Metrorail's premises.

It can be recalled that there was no serious case of misconduct or incapacity linked to the female security officers that could perhaps justify Metrorail's demand for a drastic action. On the contrary, female security guards were at a great risk of sexual assault while on patrol. The vulnerability of female security officers to violence are illustrative of "a disturbingly dark side to the often-stated miracle of our constitutional democracy."[264] Against the backdrop of intolerable levels of gender-based and sexual violence,[265] incidents of sexual assault involving female security officers on duty in a high risk environment were fairly routine. With the police failing to contain a gendered security crisis in the Western Cape,[266] with Cape Town dubbed South Africa's real crime capital,[267] it can be argued that Metrorail was taking cheap shots by blaming female

[263] *Chuma* para 6.
[264] Per Van der Westhuizen J in *Loureiro v Imvula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC) para 2.
[265] See generally, *Gender-Based Violence (GBV) in South Africa: A Brief Review* April 2016; Stevens "Recent developments in sexual offences against children – A constitutional perspective" 2016 *PER* 1; Goldblatt "Violence against women in South Africa – constitutional responses and opportunities" in Dixon and Roux (eds) *Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution's Influence* (2017) Available at SSRN: https://ssrn.com/abstract=2872478) (accessed 15-04-2017); Maloka "Rape shield in the wake of *S v M*" 2004 *SJs* 264, "Childhood sexual-abuse narratives: Taking their place in a long line of 'gendered harms' and 'mirrored silence'" 2006 *SJ* 78.
[266] See *Commission Report: Toward a Safer Khayelitsha* August 2014.
[267] See Nicolson "National crime statistics offer only cursory indicator to understand crime" Aug 22, 2017 *Daily Maverick* https://ww.dailymaverick.co.za/.../2017-08-22-urban-crime-in-the-cities-report (accessed 12-11-2017); Staff Writer "Cape Town is South Africa's real crime capital" 23 August 2017

security guards for failing to arrest crime[268] South Africa's notoriety for gender based violence[269] hardly needs explanation.

Metrorail's keenest objections about the ineffectual female security officers and the demand for the deployment of male security guards demonstrates how gender impinges significantly on human security. In addressing the client security concerns, Chuma distanced itself from the plight of its reliable female workforce. This underscores the way in which 'security' is still dominantly conceived as relating primarily to the ruptures of normal life rather than violence embedded *within it*.[270]

Chuma illustrates how violence against women arises out of and contribute to reproducing wider, "multiple intersecting axes of inequality and discrimination." Analysed from the vantage point of "preservation-through—transformation"[271] thesis, attempts to dismantle precariousness at work and inequality regime may well improve the material and dignitary circumstances of subordinated workers groups. Ironically, far from repudiating some of the abusive practices, changes to the status quo may also enhance the capacity of bearers of power to alter practices that perpetuate inequalities and limit the participation of vulnerable workers in the labour market. In sum, it illustrates continuities between gendered precariousness and the norms of hegemonic masculinities.

1.5.7 Franchising

https://ww.news24.com/SouthAfrica/.../crimestats-western-cape-is-the-murder-centre... (accessed 11-11-2017).

[268] *Chuma* paras 61-62.

[269] Notorious headlines have continued unabated: A particularly disturbing feature of violent sexual crimes that permeates society is intimate partner violence .The latest face of gender violence is Karabo Mokoena whose femicide in April 2017 caused outrage and provoked much soul searching. Recent high profile cases include: *S v Rohde* 2018 ZAWCHC 146; *S v Panayiotou* 2018 1 All SA 224 (ECP); *DPP, Gauteng v Pistorius* 2018 1 SACR 115 (SCA).

[270] Marhia *Everyday (In) Security/ (Re)securing the everyday: Gender, policing and violence against women in Delhi* (Unpublished PhD Thesis, UCL, 2012) 14. Generally Shepherd "Gender, Violence and Global Politics: Contemporary Debates in Feminist Security Studies" 2009 *PSR* 208; Fox "Girl Soldiers: Human Security and Gendered Insecurity" 2004 *Security Dialogue* 465; Gasper "Securing Humanity: Situating 'Human Security' as Concept and Discourse" 2005 *JHDC* 221; Hudson "'Doing Security As Though Humans Matter: A Feminist Perspective on Gender and the Politics of Human Security" 2005 *Security Dialogue* 155.

[271] See Siegel "Why equal protection no longer protects: The evolving forms of status-enforcing state action" 1997 *Stan LR* 1111; "'The rule of love': Wife beating as prerogative and privacy" 1996 *Yale LJ* 2117.

The typical franchise is a contractual relationship whereby one party (the franchisor) agrees with another (the franchisee) that the franchisee will operate a separately constituted branch or "clone" of the franchisor's business concept.[272] At the heart of franchise relationship is an agreement which allows the franchisee to provide a service which has been pre-packaged by the franchisor with the proviso that the franchisee operates within the parameters as established by the franchisor.[273] The franchisor, however, has the power over the business with regard to employment and labour related matters. The recruitment of workers, however, is left in the hands of the franchisee.[274]

Modern business format franchising has emerged as one of the most popular and lucrative forms of doing business.[275] From employment and labour perspective, there are drawbacks to franchising. Comparative experience reveals that unchecked franchising is arguably the most serious manifestation of externalisation, marginalising the social protection of individuals styled as franchisees and marginalising trade union recruitment.[276] Franchising is used internationally to shield large corporations from responsibilities towards. Franchised hotel, fast food, and janitorial sectors are prime examples. To be sure, franchising is characterised as "an often unrecognised from of fissured employment."[277] While the franchisors claim that they have no influence over wages paid to workers, they control wages by controlling every variable in the business bar wages. Turning to McDonald's, the NELP report assert that McDonald's software keep track of data on sales, inventory, and labour costs, calculate the labour needs of the

[272] See Theron *et al Keywords for a 21st Century Workplace* 30-31.
[273] *Rodgers and Assist-U-Drive* 2006 27 *ILJ* 847 (CCMA) 853F.
[274] O'Connell Davidson "What do franchisors do? Control and commercialism in milk distribution" 1994 *W E & S* 23.
[275] Oberymeyer "Resolving the catch 22: franchisor vicarious liability for employee sexual harassment claims against franchisees" 2007 *Indiana LR* 611, 615-616.
[276] For a view of franchising in the US, Kaufmann *et al* "A franchisor is not the employer of its franchisees or their employers" 2015 *Franchise LJ* 439. For the Australian experience see Riley "Regulating unequal work relationships for fairness and efficiency: A study of business format franchising" in Arup *et al* (eds) *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relations* (2006) 561.
[276] For the Australian experience see Riley "A blurred boundary between entrepreneurship and servitude: Regulating business format franchising in Australia" in Fudge *et al* (eds) *Challenging the Legal Boundaries of Work Regulation* (2012) 101. For the position in the Netherlands see Veens "Franchising: 'window-dressing" *van die Dienstbetrekking*" 2000 *SMA* 93.
[277] Weil *The Fissured Workplace* (2014) 158.

franchisees. [278] In addition it monitors the franchisee's employees work schedules, track franchisee wage reviews. The control and supervision by the franchisor and the economic dependence resemble those of standard employment relationship, but importantly all the risks are with the franchisee.[279]

1.5.8 Sub-contracting, Home-Work or Outwork and Domestic Work

For an understanding of sub-contracting, home-work or outwork, it is necessary to avoid foreshortening of the historical horizon.[280] The familiar tale of economic history is how production was initially based in the home or in the home-based artisanal workshop.[281] The making of good for family or for consumption by others, including work on raw material provided by others became known as the "putting out" system.[282] The fundamental point here is that there is nothing anachronistic in outsourcing to home workers. Where the work can be fragmented, "so that individuals or small teams can work independently, often in different locations"[283] the doing of it can readily be outsourced, including to the home. The employer's costs of real estate and equipment can be eliminated or reduced. Conversely, where work

[278] National Employment Law Project (NELP) report entitled *Who's The Boss: Restoring Accountability for Labour Standards in Outsourced Work* (2014) 11.

[279] Steinberg & Lescatre "Beguiling heresy: Regulating the franchise relationship" 2004 *Penn State LR* 105; Donnelly "Franchisees last out at Pick n Pay" *Mail & Guardian* Nov 2012 11:05. Available at https://mg.co.za/article/2012-11-09-franchisees-lash-out-at-pick-pay (accessed 25-11-2017).

[280] Deakin & Wilkinson *The Law of the Labour Market: Industrialisation, Employment, and Legal Evolution* (2005) 4:

> "[T]he problems which the employment model is currently encouraging are the result, not simply of a changing labour market environment, but of the contingent and specific historical circumstances which accompanied its emergence. It also remains the case that forms of work which fall on the edges of, or completely outside, the scope of the employment contract – forms such as self-employment, outwork or homework, agency work, temporary and (to some degree) part-time – derive their seemingly marginal or excluded status by reference to the particular features of that model."

See further Linder "Who is an employee? Why it is, but should, not matter" 1989 *Law and Inequality* 155, 163-173.

[281] See generally, Landes *The Wealth and Poverty of Nations* (1993); Boris *Home to Work: Motherhood and the Politics of Industrial Homework in the United States* (1994); Meyer *The Roots of American Industrialisation* (2003).

[282] Cohen "Introduction: Max Weber on Modern Western Capitalism" in Max Weber, *General Economic History* xv, (1981) Ivii ("The domestic [putting-out] system was an intermediate step toward the ultimate emergence of the modern capitalist industrial organisation.").

[283] Rubery & Wilkinson "Outwork and Segmented Labour Markets" in Wilkinson (ed) *The Dynamics of Labour Market Segmentation* (1981) 115, 120 ("Outwork and Segmented Labour Markets").

must done on capital-intensive equipment beyond the reach of the individual, it cannot be outsourced.

The economic logic of the putting out systems[284] is a replicated in the contemporary cloud sourcing of cognitive work.[285] Referring to this Finkin explains:

> "Instead of avoiding guild regulation, by the location of work, the modern cloud putter-outer can avoid, or try to avoid, domestic legal regulation with that very end in mind, as one of arms-length dealing with self-employed independent contractors. If the worker is not an employee, the purchaser of her services need not withhold income taxes, pay into other publicly mandated benefits such as social security or unemployment compensation, nor be subjected to any of these other employment-based restriction. Where the work is put out to workers abroad, the out-sourcing company, like the mechanic capitalist of centuries before who relocated to gain regulatory freedom, can get the benefit of the weak or non-existent labour regulation of the jurisdiction where the work is performed." [286]

The transition from "widgets to digits"[287] means that cloud sourcing cognitive work via apps preserves the advantages the putting out systems holds for employers, but without its historical disadvantages. In digitally mediated work employers need not invest in a workplace for the work to be done, no need to provide equipment. Electronic oversight enables employers to closely monitor workers' activities, and if they so wish to act, to do so more swiftly and efficiently.

Subcontracting involves a contractor engaged to provide certain services. It is the preferred mode for provision of cleaning and security services in South Africa.[288] Generally, it is often achieved by outsourcing, involving retrenched employees, but it is

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[284] "Rubery & Wilkinson Outwork and Segmented Labour Markets 120 lay out the economic considerations that conduce for or against the contemporary use of home-based outsourcing: (1) the role of investment and capital intensive technology; (2) the lack of need to supervise the work; (3) the avoidance of collective action; (4) the flexibility of the product market, and (5) the control of labour cost and the avoidance of legal regulation.

[285] See generally, Freedland & Prassl *Employees, Workers and the 'Sharing Economy' – Changing Practices and Changing Concepts in the United Kingdom* Legal Research Paper Series Paper No 19/2017 – available at https://ssrn.com/abstract=2932757 (accessed 10-08-2017); Prassl & Risak "Uber, TaskRabbit, and Co.: Platforms as employers? Rethinking the legal analysis of crowdwork" 2016 *Comp. Lab. L. & Pol'y J.* 619; Todolo-Signes "The end of the subordinate worker? Collaborative economy, on-demand economy, gig economy, and the crowdworkers' need for protection 2017 *IJCLLIR* 241; Infranca "Intermediary institutions and the sharing economy" 2016 *Tulane LR* 29.

[286] Finkin, "Beclouded Work in Historical Perspective" 2016 *Comp. Lab. L. & Pol'y J.* 1, 16-17. Available at SSRN: https://ssrn.com/abstract=2712722 (accessed 20-07-2016).

[287] Stone *From Widgets to Digits: Employment Regulation for the Changing Workplace* (2004).

[288] Toli "Subcontracting at OT Tambo International: Precarious work and attack on workers' rights" *Daily Maverick* 23 Nov 2017 available at https://www.dailymaverick.co.za/opinionista/2017-11-23-subcontracting-at-or-tambo-international-precarious-work-and-attacks-on-workers-rights/ (accessed 23-11-2017).

not unusual for enterprises to be established on this basis from the outset.[289] A salient feature of subcontracting is that the workers generally do not work the premises of the nominal employer.

What defines subcontracting across jurisdictions is the prevalence of homeworking in the textile, clothing, footwear and associated industries ('TCF industry"). TCF industry is unique in that it is structured around both traditional manufacturing workplaces and home-based outworkers.[290] There is also a third sector, typically described as "sweatshops", which is not a "traditional manufacturing" workplace, nor is the work performed at home. Sweatshops are premises, which can be small factories, sheds or private residences, where workers are subject to illegal, unfair and unsafe conditions. These sectors, particularly in the clothing and apparel sub-industries, often occur within the one supply chain and provide work for the one principal fashion house/retailer at the top of the supply chain.

The TCF industry has been subjected to sustained restructuring over many decades, driven and accelerated by a complex combination of drivers.[291] These factors include progressive domestic tariff reduction and trade liberalisation, the globalisation of TCF supply chains, the significant import penetration of TCF goods from low wage countries. The same competitive forces that place downward pressure on wages also encourage companies to avoid employment-related responsibilities by hiring intermediaries and resorting to home-work.[292] Businesses utilise home-work in order to

[289] Le Roux *The World of Work* 18.

[290] Submission by Textile Clothing and Footwear Union of Australia (TCFUA), *Productivity Commission Review into the Workplace Relations Framework* - January 2011, available https://www.pc.gov.au/_data/assets/pdf_file.../sub214-workplace-relations.pdf (accessed 19-09-2017)

[291] See generally, Van der Westhuizen "Women and work restructuring in the Cape Town clothing industry" in Webster & Von Holdt (eds) *The Apartheid Workplace: Studies in Transition* (2005) 335; Klerck 1994 *SASR* 32; Kenny & Webster "Eroding the core: Flexibility and the re-segmentation of the South African labour market" 1999 *Critical Sociology* 216; Kenny & Bezuidenhout "Fighting sub-contracting: Legal protection and negotiating strategies" 1999 *SALB* 39; Theron *et al Globalisation, The Impact of Trade Liberalisation, and Labour Law*.

[292] Estlund "Corporate self-regulation and the future if workplace governance" 2009 *Chi-Kent LR* 617, 631 remarking on current trends in labour markets that encourage firms to use intermediaries. See also Estlund "Rebuilding the law of the workplace in an era of self-regulation" 2005 *Columbia LR* 319, 324 – explaining how some employers resist workplace enforcement efforts.

disclaim their status as employers.[293] Home-work or outwork is also an activity which is usually brokered through an intermediary.

Workers operating in the garment industry often toil, atomized and isolated, in homes adjacent to condominium buildings that once housed a manufacturing industry notorious for its working conditions.[294] Sweatshop labour is not just a developing problem.[295] It is global and ubiquitous and it is local,[296] as was highlighted by the recent Labour Court judgment in *Glamour Fashions Workers Primary I* and its Canadian antecedent *Lian*.[297]

Because workers who actually make the clothes have contractual relationship with only one of the intermediaries at the bottom of the pyramid, they are highly vulnerable to the risk of non-payment of the wages or basic statutory entitlements.[298] In South Africa homeworking typically has three dimensions. A CMT (cut, make and trip) operation with a workforce of as a many as 20 or more workers and with a clear distinction between the owner of the operation and the workers; a M&T (make and trim) operation, normally with a smaller workforce than that of CMT operations, with the owner of the enterprise often working alongside the other workers; and the "survivalist" operations, which are very small operations, normally without cutting facilities and

[293] Glyn "Taking the employer out of employment law? Accountability for wage and hour in an age of enterprise disaggregation" 2011 *Emp. Rts & Emp. Pol'y J* 201, 212-13 – describing the ways in which some firms outsource all tasks except "core functions … associated with highly skilled labour".

[294] Kates "The supply chain gang: Enforcing the employment rights of subcontracted labour in Ontario" 2006 *CLELJ* 449, 45("The supply chain gang"); Cregan *Home Sweat Home: Preliminary Findings of the First Stage of Two Part Study of Outworkers in the Textile Industry in Melbourne*, Victoria Department of Management, University of Melbourne (November 2001).

[295] On the US situation see: Goldstein *et al* "Enforcing fair labour standards in the modern American sweatshop: Rediscovering the statutory definition of employment" 1999 *UCLA LR* 983, Lung "Exploring the joint employer doctrine: Providing a break from for sweatshop garment workers" 2003 *Loy. U. Chi. LJ* 291. On the Australian position see Nossar *et al* "Regulating supply chains to address the occupational health and safety problems associated with precarious employment: The case of home-based clothing workers in Australia" 2004 *AJLL* 137; Rawling "Generic model of regulating supply chain outsourcing" in Arup *et al* (eds) *Labour Law and Labour Market Regulation* (2006) 520. On the UK experience see: Oxfam Briefing Paper *Made at Home: British Homeworkers in Global Supply Chains* (May, 2004); Ewing "Homeworking: A framework for reform" 1982 11 *ILJ (UK)* 94.

[296] For an overview of this phenomenon in South Africa, see: Godfrey *et al On the outskirts But Still in Fashion: Homeworking in the South African Clothing Industry: The Challenge to Organisation and Regulation* Institute of Development and Labour Law Monographs, UCT 2/2005.
Budlender & Theron "Working from home: The plight of home-based workers" 1995 *SALB* 14.

[297] *Lian v J. Crew* 2001 54 OR (3d) 239.

[298] Nossar *et al*" 2004 *AJLL* 137, 145.

with the homeowner working alongside a very small number of workers, who tend to take collective responsibility for expenses.[299]

A word needs to be said about domestic/household work, a sector characterised by disturbing levels of exploitation and abuse.[300] Domestic work was delineated as a separate area of work when productive and reproductive work got separated. This has been expressed as interaction between "household economy" and the "larger "market economy":

> "The household economy describes the collective economic activities of households. The rest of the economy can then be called the market economy. The major types of inter-economy trade are the sale of labour time by the household and the sale of household goods and services by the market." [301]

The intimacy that often characterises the relationship between the employer and the domestic worker makes her seem like a family member – not a worker. The sense of intimacy can be false, though, because the relationship between the domestic worker and the employer, who is a woman most of the times is characterised by a difference of status that the latter is often keen to maintain.[302] Moreover, domestic work is hard to regulate, being invisible because it is performed in the privacy of the employer's household.[303] The location of domestic labour makes the workers more vulnerable to abuse by the employers. Domestic labour also has a stigma attached to it because it is the poorest and neediest who perform this work, and due to the tasks required from the workers, which are gendered and undervalued.[304]

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[299] Le Roux *The World of Work* 19; Godfrey *et al On the outskirts But Still in Fashion* 15-16; Van der Westhuizen "Women and work restructuring in the Cape Town clothing industry" 342-343.

[300] For critical analysis of domestic work in South Africa, see Du Toit (ed) *Exploited, Undervalued – And Essential: Domestic Workers and the Realisation of their Rights* (2013).

[301] Soupourmas & Ironmonger "Calculating Australia's gross household product: Measuring the economic value of household economy 1970-2000" R*esearch Paper*, Department of Economic, University of Melbourne, 2002, 21. See also Ally *From Servant to Workers: South African Domestic Workers and the Democratic State* (2010) 5.

[302] See Anderson "A very private business: Exploring the demand for migrant domestic workers" 2007 *Eur J. WS* 247 and "Just another job? The commodification of domestic labour" in Ehrenreich & Hochschild (eds) *Global Woman* (2003).

[303] Calitz & Garbers "A comparative perspective on the application of domestic labour legislation in international employment disputes" 2013 *Stell LR* 538.

[304] Delaney *et al* "Comparing Australian garment and childcare homeworkers' experience of regulation and representation Comparing Australian garment and childcare homeworkers' experience of regulation and representation" 2018 *Economic and Labour Relations Review* 1. See also Nussbaum *Sex and Social Justice* (1999).

Performed in the domestic sphere, characterised by caring labour, and profoundly gendered, domestic work has long been emblematic of informality, its capacity for legal regulation dismissed or disregarded.[305] The fact that domestic workers are dispersed and isolated has had significant consequences. For many workers in the sector collective bargaining is unknown and enforcement of workers' right is extremely limited. Some commentators[306] have proposed cooperatives as a possible model of organisation with a view to empowering domestic workers. It is suggested that cooperatives offer a platform for domestic worker organisation not only for socio-economic empowerment by providing services for members but also enabling workers to act collectively in the promotion of their rights.

Tackling the plight of domestic workers is thus crucial and, indeed, interwoven with the struggle for gender equality.[307] The above discussion is no more than an overview of a vast and complex subject, raising fascinating question warranting sustained appraisal by subject specialists. What is undeniable is that domestic work inseparable from the wider economy which all workers contribute. "This implies, first of all," as Du Toit points out "that domestic workers are not to be seen as mere appendages of private families and objects of state or private benevolence. Their rights are built on the same foundation as those of other workers."[308]

1.5.9 Informalisation

[305] McCann "New frontiers of regulation: Domestic work, working conditions, and the holistic assessment of nonstandard work norms" 2012 *Comp. Lab, L. & Pol'y J* 167. Albin "Human rights and the multiple dimensions of precarious work" 2012 *Comp. Lab, L. & Pol'y J* 193; Anderson *Doing the Dirty Work? The Global Politics of Domestic Labour* (2000). For further reading, see Roux "Advancing domestic workers' rights in a context of transformative constitutionalism" 31; Du Toit & Huysamen "Implementing domestic workers' labour rights in a framework of transformative constitutionalism" 65; Du Toit "constructing an integrated model for the regulation and enforcement of domestic workers' rights" 351 in Du Toit (ed) *Exploited, Undervalued – And Essential: Domestic Workers and the Realisation of their Rights* (2013).

[306] Du Toit & Tiemeni "Do cooperative offer a basis for worker organisation in the domestic sector? An exploratory study" 2015 36 *ILJ* 1677 and Du Toit & Ronnie "Regulating the informal economy: Unpacking the oxymoron – From worker protection to worker empowerment" 2014 35 *ILJ* 1802.

[307] See e.g. Weeks "Life within and against work: Affective labour, feminist critique, and post-Fordist politics" 2007 *Ephemera* 233.

[308] Du Toit "Situating domestic work in a changing global labour market" in Du Toit (ed) *Exploited, Undervalued – And Essential: Domestic Workers and the Realisation of their Rights* (2013)1, 9.

Casualization and externalisation have combined and coalesced to generate informalisation. Informalisation occurs when employment becomes increasingly unregulated either in part or altogether.[309] Informal work in South Africa has been described as work which occurs at businesses that are not registered in any way. Thus, it is work which 'take place outside the formal wage-labour market … including various forms of self-employment'.[310] A compounding factor in South African context is that the Apartheid repressive policies not only stunted but drove African enterprise and entrepreneurship into the informal market.[311] It is usually conducted from homes, street pavements, and in some cases business premises.

As already noted, the effects of globalisation have played a decisive role in increasing the number of employees in the informal sector, some growth can also be attributed to the repeal of old legislation. In general, the informal sector tends to attract entrepreneurs because it enables them to conduct business outside of the rules that apply to most. For example, the informal sector can generally escape state regulation in terms of taxation, labour regulation and other general rules that are applicable in the conduct of business. Informalisation of workers in the informal sector results in the "atomisation of the workforce".[312] This makes the *de facto* protection of workers in the informal sector extremely difficult.

1.6 The Decentring of Labour Law

The proliferation of non-standard working arrangements and the digitalisation of work, including the complexities of "uberised employment" has drawn labour law academy into discomfiting directions. At the same time (and partly as a result), becoming the primary lens through which ongoing debate and discussion of the future development of labour law are framed, considered, assessed, rejected, or embraced. Redefining labour law protagonists anxious to halt 'productive disintegration'[313] have

[309] Bezuidenhout *et al Non-Standard Employment and Its Policy Implications* (2003) 6
[310] Bhorat "The impact of trade and structural changes on sectoral employment in South Africa" 2000 *Development Southern Africa* 437.
[311] See e.g. *SA Informal Traders Forum v City of Johannesburg* 2014 4 SA 371 (CC).
[312] Rodrick "Understanding South Africa's economic puzzles" 2008 *Economics of Transition* 769, 782; Servais "The informal sector: Any future for labour law?" 1992 *IJCLLIR* 299.
[313] Collins "The productive disintegration of labour law" 1997 *ILJ (UK)* 295, 308.

turned to alternative approaches in an attempt to interpret and prescribe appropriate modes of regulation. Labour law scholarship has become an inherently unstable enterprise, in which scholars must currently negotiate shifting terrain.[314]

Peter Gahan articulates a provocative insight into labour law under challenge:

> "This decentring has occurred in a number of respects. First and foremost has been the challenge to labour presented by the changing set of economic and social relations it seeks to regulate. The last two decades have witnessed the proliferation of a range of employment structures … Many of these new forms of work relationships are explicitly intended to circumvent the protections that both the common law and statute provide to employees whose work arrangements have been based on a traditional contract of employment. These general labour market changes have been marked by a tendency at the level of the firm to internalise the regulation of work relationships and, where possible, to individualise the terms on which they are established.
>
> In addition, there are the various challenges posed by globalisation to the efficacy of national systems of regulation. The growing internationalisation of executive labour markets has, for instance, created a tendency for the transplantation of managers into unfamiliar environments where they are faced with different national cultures, systems of regulation, and enterprise level relationships between unions and management. These global managers often take a hostile view of regulatory arrangements that do not accord with their own regulatory sensibilities and value orientations. The commitment of such managers to maximising shareholder returns on investment is not easily reconciled with an expansive view of labour law. Regulation by its nature is characterised as impeding competitive forces and the capacity of resources to be devoted to their most efficient use. In this sense, globalisation is said to challenge the capacity of labour law to meet its intended purpose. From this perspective, labour market regulation is claimed to affect adversely those it is intended to protect by 'crowding out' direct foreign investment and employment opportunities."[315]

Alternative methods and narratives have been deployed to challenge or subvert reigning paradigms in labour law discourse.[316] At the heart of this sense of transition is the perceived collapse of classical labour law, understood in primarily *redistributive* terms, and the corresponding rise of alternative regulatory agenda that is overridingly *economic*, concerning itself with goals such as the allocative efficiency and

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[314] For a nuanced exposition, see Bogg *et al The Autonomy of Labour Law* (2014).

[315] Gahan "Work, status and contract: Another challenge for labour law" 2003 *AJLL* 249, 249-250 (internal citations omitted).

[316] Gahan & Mitchell 'The limits of labour law discourse: Some reflections on *London Underground v Edwards'*, in Mitchell (ed) *Redefining Labour Law: New Perspective on the Future of Teaching and Research*, Centre for Employment and Labour Relations, Melbourne, 1995, 62 have suggested that: "The principal of purpose of labour market regulation is to regulate capital and labour for the broad purpose of maximising opportunity for employment, recognising that all forms of work are socially valuable, and providing a working environment and conditions of employment which are respectful of the preferences and needs of the participants." See also Davis "The functions of labour law" 1980 *CILSA* 21; Forrest "Political values in individual employment law" 1980 *MLR* 361.

the promotion of competitiveness.[317] However, some scholars have stoutly contested the talismanic powers of counter narratives of the new economy and their applicability or relevance in a labour law context.[318] On reflection, the current soul searching in the labour law discourse is not surprising. Contemporary South African labour law conversation has morphed into decolonisation discourse.[319] Moreover, the same fields of study from which these alternative approaches are derived are subject to the same time of internal scrutiny by scholars and, perhaps more importantly, consists of various conflicting schools of thought.

The preceding safari through the doctrinal and theoretical landscape has sought to place the disquisition in the context of the wider re-evaluation of labour law as a field of study – a re-evaluation evident in debates both here and overseas. Some of the processes that produce disturbances in the field – (that inverts or scrambles familiar narratives of countervailing workers' power are being displaced by rival perspectives such as those neo-classical economics which favour greater abstentionism, market regulation or self-regulation, and a new economy discourse for appraising developments) are central to the questions that this thesis pursues. These large-scale developments are of practical importance to the challenges of regulating new and emerging work relationships.

1.7 Conclusion

It is clear that globalisation has had an impact on the South African economy, thereby shifting the frontiers of employment. Globalisation has paved way to proliferation of non-standard dimension of employment and informalisation.

The discussion has drawn attention to the shifting frontiers of work in the labour market. It has highlighted the discernible trend towards modes of labouring (of productive relations) outside the complementary paradigm form of employment in a

[317] Finkin "Book Review Essay – The death and transfiguration of labour law" 2011 *Comp. Lab. L & Pol'y J.* 171.
[318] See generally, Hepple "Is South African labour law fit for the global economy?" 1; "Labour law beyond employment" in Le Roux & Rycroft (eds) *Reinventing Labour Law: Reflecting on the first 15 years of the Labour Relations Act and future challenges*" (2012) 21.
[319] Rycroft & Le Roux "Decolonising the labour law curriculum" 2017 38 *ILJ* 173.

vertically integrated production: employment which is full-time, stable and open-ended. Among the salient developments in contemporary labour market worldwide, two stand out: first, the rise of "disguised self-employed", namely a form of work that some jurisdictions recognises as an intermediate category between employment and self-employment whereby some labour protection is extended to the relevant workers as they are found to be in need of protection even if they do not qualify as "employees" under the applicable legislation. Second, the predominance of triangular employment relationship with its potential for amplifying the contours of employment vulnerability. Temporary staffing firms create "triangular employment relationships" between workers, intermediaries, and those end-user enterprises that contract with staffing firms to hire workers.

Precarious work has proliferated to such an extent that it threatens to displace the standard employment relationship as the prevailing model of employment even in high income countries. The rise of in precarious employment and the contraction of standard employment relationship has come to be recognised as "the dominant feature of the social relations between employers and workers in the contemporary world."[320] The forms of precarity are continually expanding because rather than hiring workers as employees, employers acquire personnel in the form of intermediaries. What is undeniable is that the vertical disintegration of production has placed many vulnerable workers beyond the protective ambit of labour and social security legislation. The most important determinants of vulnerability is the general poor climate of employment relations in the workplace and the absence of job.

Most issues at hand are at the core of employment regulation and, more generally, labour protection across jurisdictions require the solution of very complex legal questions on employment status. The District Court of California explicitly remarked this complexity by stating that "*the jury in this case will be handed a square peg and asked to choose between two round holes*" since the "*test the California courts have developed over the 20th Century for classifying works isn't very helpful in addressing the 21st Century*

[320] Kallenberg "Precarious work, insecure workers: Employment relations on transition" 2009 *Am. Soc. Rev*. 1.

problem".[321] These issues inevitably leads us to the next chapter dealing with labour law's beguilingly simple but intractable question: Who is an employee?

[321] *Cotter v Lyft Inc.* 60 Supp. 3d 1067 (ND Cal. 2015) 1081 ("*Cotter*").

CHAPTER TWO

LABOUR LAW'S DILEMMA: DISTINGUISHING EMPLOYEES AND INDEPENDENT CONTRACTORS

2.1 Introduction

Writing in 1944, a US Supreme Court Justice, Wiley Blount Rutledge, observed that

> "Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing." [322]

Despite many legislative developments, judicial pronouncements and academic discourses over the subsequent 74 years, this position remains fundamentally correct. A clear and a succinct statement of the current position is that: "*Abantu badidekile*".[323] Unfortunately, the distinction between employees and independent contractors is no clearer after *Hearst* than before.[324] The contours of the legal definition of employee are difficult to draw.[325]

If there is consensus in the dense body of scholarship[326] over anything associated with the conceptual focus on who is an employee is that it is a forbiddingly

[322] *NLRB v Hearst Publications Inc.* 322 US 111 (1944) 121 ("*Hearst*").

[323] Xhosa expression meaning "people are confused". For further engagement, see Bosch "*Abantu badidekile*: When must an applicant prove that he is an employee?" 2010 31 *ILJ* 809. See also Grogan "Sleight of hand: Now an employee, then not" 2013 *EL* 4.

[324] According to Zimmerman *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1996) 395, even under Roman law, the distinction between the *location condictio operarum* and the *locatio conductio operis* was far from clear.

[325] In *Sagaz Industries* para 47, Major J acknowledged that

> "[T]here -is no one conclusive test, which can be universally applied to determine whether a person is an employee or an independent contractor. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activity will be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her helpers, the degree of financial risk taken by the worker, the degree of responsibility for investments and management held by the worker, and the worker's opportunity for profit in the performance of his or her task" ("*Sagaz Industries*").

[326] For a snapshot of South African literature see: Mureinik "The contract of service: An easy test for hard cases" 1980 *SALJ* 246; Christianson "Defining who is an employee: A review of the law dealing with the differences between employees and independent contractors" 2001 *CLL* 21; Manamela "Employee and independent contractor: The distinction stands" 2002 *SAMLJ* 107; Benjamin "An accident of history: Who is (and who should be) an employee under South African labour law" 2004 25 *ILJ* 787 ("Accident of History"); Mills "The situation of the elusive independent contractor and other forms of atypical employment in South Africa: Balancing equity and flexibility?" 2004 25 *ILJ* 1203; Van

vexing question. "Like the yogi contemplating his navel", observes Drake "although without the same apparent satisfaction, the labour lawyer is necessarily drawn to the contemplation of the mystery in the word 'servant' or 'employee'".[327] Indeed, the serious problem of who is an employee is "a recurring question".[328]

The distinction between independent contractors and employees remains unsettled. All jurisdictions have struggled with the issue of how to distinguish between"employees" and "independent contractors" or worse navigate the zone of ambiguity between genuine self-employment and dependent self-employment.[329] The

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Niekerk "Employees, independent contractors and intermediaries: The definition of employee revisited" 2005 *CLL* 11 and "Personal service companies and the definition of 'employee'" 2005 26 *ILJ* 1909 ("Personal services companies"); Bosch "Can unauthorised workers be regarded as employees for the purpose of the Labour Relations Act?" 2006 *ILJ* 1342 ("Unauthorised workers"); Bosch & Christie "Are sex workers employees?" 2007 28 *ILJ* 804; Theron "Who's in and who's out: Labour law and those excluded from its protection" 2007 *LDD* 25; Le Roux "The worker: Towards labour laws new vocabulary" 2007 *SALJ* 469 ("The worker") and "The meaning of 'worker' and the road towards diversification: Reflecting on *Discovery, SITA* and *Kylie* 2009 30 *ILJ* 49 ("Diversification"); Kasuso *The Definition of an "Employee" under the Labour legislation: An Elusive Concept* (LL.M Thesis UNISA 2015).

[327] "Wage slave or entrepreneur?" 1968 *MLR* 408. Steenkamp J in *Melomed Hospital Holdings Ltd v CCMA* 2013 34 *ILJ* 920 (LC) para 46 echoed the same sentiments: "The question of the true nature of the employment relationship has vexed labour law scholars for decades."

[328] *Smith v Castaways Family Dinner* 453 F.3d 971 (7th Cir. 2006) 975.

[329] The amount of law and volume of literature on this issue is daunting. The most recent exposition in comparative perspective - Australian: Riley "Regulating the engagement of non-employed labour: A view from the Antipodes" in Brodie *et al* (eds), *The Future Regulation of Work: New Concepts, New Paradigms*, (2016) 61 and "Regulatory responses to the blurring boundary between employment and self-employment: A view from the Antipodes" in Kiss (eds.) *Recent Developments in Labour Law* (2013) 131. Canada: Davidov *et al* "The subjects of labour law: 'Employees' and other workers" in Finkin & Mundlak (eds) *Comparative Labour Law* (2015) chp. 4; "The reports of my death are greatly exaggerated: 'Employee' as a viable (though over-used) legal concept" in Davidov & Langille (eds) *Boundaries and Frontiers of Labour Law* (2006) 133; Fudge *et al Marginalizing Workers*. Europe: Wehner *et al Social Protection of Economically Dependent Self-employed Workers* Report No. 54 on a study conducted for the European Parliament (2013) ("*Social Protection of Economically Dependent Self-employed Workers*"); Engblom "Equal treatment of employees and self-employed workers" 2001 17 *IJCLIR* 211; Engels "Subordinate employees or self-employed workers?: An analysis of the employment situation of managers of management companies as an illustration" 1999 *Comp. Lab. L & Pol'y J.* 47; Van Peijpe "Independent contractors and protected workers in Dutch law" 1999 *Comp. Lab. L. & Pol'y J* 127; Weiss "Employment versus self-employment: The search for a demarcation line in Germany" 1999 20 *ILJ* 741. US: Stone "Rethinking labour law: Employment protection for boundaryless workers" in Davidov & Langille (eds) *Boundaries and Frontiers of Labour Law* (2006) 155; Linder "Dependent and independent contractors in recent U.S. labour law: an ambiguous dichotomy rooted in simulated purposelessness" 1999 *Comp. Lab. L. & Pol'y J.* 187 and "Towards universal worker coverage under the National Labour Relations Act: making room for uncontrolled employees, dependent contractors, and employee-like persons" 1989 *University of Detroit LR 555* and "The involuntary conversion of employees into self-employed: the internal revenue service and section 530" 1988 *Clearinghouse LR* 14; Davidson "The definition of "employee" under Title VII: Distinguishing between employees and independent contractors" 1984 *University of Cincinnati LR* 203; Hyde "Employment law after the death of employment" 1998 *University of Pennsylvania J. Lab. & Emp. L* 99; Burdick "Principles of agency permit the NLRB to consider additional factors of entrepreneurial independence and the relative dependence

determination of employee status is not subject to a bright line test and is "a long-recognised rub".[330]. The lack of statutory and juridical clarity has no doubt contributed to the acute problem of false categorisation,[331] at the same time spawning much litigation.[332]

As well as being the main "port of entry" to what has been termed the protective ambit of labour law,[333] the statutory regimes of collective bargaining and a range of benefits from social legislation,[334] employee status is also an important jurisdictional prerequisite for accessing purpose-built labour adjudicative dispute

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and the relative dependence of employees when determining independent contractor status under section 2(3)" 1991 *Hofstra Lab. & Emp. LJ* 75. Japan: Yamakawa "New wine in old bottles?: Employees/independent contractor distinction under Japanese labour law" 1999 *Comp. Lab. L & Pol'y J.* 99.

[330] *FedEx Home Delivery v NLRB* 563 F.3d 492 (DC Cir. 2009) 496.

[331] Deputy Secretary of Labour Seth Harris explained the significance of the problem of worker misclassification in his testimony before Congress:

> "'Misclassification' seems to suggest a technical violation or a paperwork error. But 'worker misclassification' actually describes workers being illegally deprived of labour and employment law protections, as well as public benefits programs like unemployment insurance and worker's compensation because such programs generally apply only to 'employees' rather than workers in general....Misclassification is no mere technical violation. It is a serious threat to workers and the fair application of the laws Congress has enacted to assure workers have good, safe jobs."

Levelling the Playing Filed: Protecting Workers and Business Affected by Misclassification Before the S. Comm. On Health, Education, Labour and Pensions, 111th Cong. (2010) (statement of Seth Harris, Deputy Spec'd of Labour).

[332] See further Deakin "Interpreting employment contracts: Judges, employers, workers" 2004 *IJCLLIR* 201; Carlson "Variations on a theme of employment: Labour law regulation of alternative relations" 1996 *South Texas LR* 661; Dolding & Faulk "Judicial understanding of the contract of employment" 1992 *MLR* 562; Bruntz "The employee\independent contractor dichotomy: A rose is not always a rose" 1991 *Hofstra Lab. & Emp. LJ* 337; Pitt "Deciding who is an employee – Fact or law?" 1990 19 *ILJ* (UK) 252.

[333] S 185 of the LRA provides that "every employee has the right not to be unfairly dismissed". A claimant under this section must be an employee under the definition in s 213 and not excluded by s 2 from the purview of the Act. Soldiers and spies, who fall beyond its embrace, must look to their contract and the Constitution for such safeguards as they might be entitled to claim. In this regard see *Murray v Minister of Defence* 2009 3 SA 130 (SCA); *Masetlha v President of the RSA* 2008 1 SA 566 (CC). Applicants for employment have no claim under the section 213 (contrast item 2(2)(*a*) of Schedule 7); nor have independent contractors. A worker, once brought within the meaning of "employee", is entitled to the rights conferred by the Chapter, however, senior he/she may. See, generally, Brassey *Commentary on the Labour Relations Act* (1999) A8:1-A8:3; Cameron "The right to a hearing before dismissal - part I" 1986 7 *ILJ* 183 and 1988 9 *ILJ* 147; Olivier "The dismissal of executive employees" 1988 9 *ILJ* 519; Campanella "Procedural fairness and the dismissal of senior employees on the ground of misconduct" 1992 13 *ILJ* 14; *Clarke v Ninian & Lester (Pty) Ltd* 1988 9 *ILJ* 651 (IC); *Oosthuizen v Ruto Mills (Pty) Ltd* 1986 7 *ILJ* 608 (IC); *Hanyane/Urban Protection Services* 2005 10 BALR 1086 (CCMA); *SA Taxi Drivers Union v Ebrahim's Taxis 1999* 20 *ILJ* 229 (CCMA).

[334] See Labour Relations Act 66 of 1995 ("LRA"); Basic Conditions of Employment Act 75 of 1997 ("BCEA"); Employment Equity Act 55 of 1998 ("EEA"); Unemployment Insurance Act 63 of 2001("UIA"); Compensation for Occupational Injuries and Diseases Act 130 of 1993 ("COIDA"); Skills Development Act 97 of 1998.

resolution institutions created by the LRA 1995.[335] The employee status is coterminous with the existence of employment relationship thus clothes the CCMA with jurisdiction. If there is no employment relationship between the two parties to the dispute, then the CCMA would have no jurisdiction to determine the matter, and consequently there can be no dismissal or unfair labour practice as contemplated by section 191 of the LRA.[336] By implication the review test as enunciated in *Sidumo*[337] does not apply. Where there is a "jurisdictional" review of CCMA proceedings, the Labour Court is in fact entitled, if not obliged, to determine the issue of jurisdiction of its own accord.[338]

To cut to the chase, a finding that a claimant is not an employee negates both the constitutional right to fair labour practices and the statutory right not to be unfairly dismissed. More importantly, a determination that an applicant is not an employee to a large extent renders the entrenched right to have any dispute that can be resolved by the

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[335] Also relevant is the statutory object of promoting "the effective resolution of labour disputes" (s 1(*d*)(*iv*) of the LRA). See, for example, *Steenkamp* para 33; *CUSA* para 65. See also Van Niekerk "Speedy Social Justice: Structuring the statutory dispute resolution process 2015 36 *ILJ* 837; Wallis "The rule of law and labour relations" 2014 *ILJ* 849; Benjamin "Beyond dispute resolution: The evolving role of the Commission for Conciliation, Mediation & Arbitration Part One: Individual Dispute Resolution" 2013 34 *ILJ* 2441; Steenkamp & Bosch "Labour dispute resolution under the 1995 LRA: Problems, pitfalls and potential" 2012 *AJ* 120.

[336] S191 Dispute about unfair dismissal and unfair labour practice reads:
"1(a) If there is a *dispute* about the fairness of a dismissal, or a *dispute* about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing to-…" [Emphasis added]. It can be gathered from a reading s 191(1) of the LRA that the dispute being referred to the CCMA under s 191(1) should be a dispute about the fairness of a dismissal of an employee. Accordingly, there must have been an employment relationship between the parties for the CCMA to have jurisdiction under s 191.

[337] *Sidumo v Rustenburg Platinum Mines Ltd* 2007 28 *ILJ* 2405 (CC). For a helpful analysis of *Sidumo* and its progeny, see Myburgh "Determining and reviewing sanctions after *Sidumo*" 2010 31 *ILJ* 1; "The LAC's latest trilogy of review judgments: Is the Sidumo test in decline?" 2013 34 *ILJ* 1; Murphy "An appeal for an appeal" 2013 34 *ILJ* 1; Fergus "The distinction between appeals and reviews – Defining the limits of the Labour Court's powers of review" 2010 31 *ILJ* 1556; "'The reasonable employer's' resolve" 2013 34 *ILJ* 2486 and "Reviewing an appeal: A response to Judge Murphy and the SCA" 2014 35 *ILJ* 47; Fergus & Rycroft "Refining review"; Le Roux & Rycroft (eds) *Reinventing Labour Law: Reflecting on the first 15 years of Labour Relations Act and future challenges* (2012) 170.

[338] As said in *Fidelity Cash Management Service v CCMA* 2008 29 *ILJ* 964 (LAC) para 101:

> "…. Nothing said in *Sidumo* means that the CCMA's arbitration award can no longer be reviewed on the grounds, for example, that the CCMA had no jurisdiction in a matter or any other grounds specified in section 145 of the Act. If the CCMA had no jurisdiction in a matter, the question of the reasonableness of its decision would not arise…."

See also *Kukard v GKD Delkor (Pty) Ltd* 2015 36 *ILJ* 640 (LAC) para 12; *Phaka v Bracks NO* 2015 36 *ILJ* 1541 (LAC) para 31 ("*Phaka*"); *Beya v GPSSBC* 2015 36 *ILJ* 1553 (LC) para 20; *Melomed Hospital Holdings Ltd v CCMA* 2013 34 *ILJ* 920 (LC) para 44; *Trio Glass t/a The Glass Group v Molapo NO* 2013 34 *ILJ* 2662 (LC) para 22; *Workforce Group (Pty) Ltd v CCMA* 2012 33 *ILJ* 7738 (LC) para 2; *SARPA* para 40; *Zeuna-Starker Bop (Pty) v NUMSA* 1999 30 *ILJ* 108 (LAC) para 6; *SACCAWU v Specialty Stores* 1998 19 *ILJ* 557 (LAC) para 24.

application of law, decided in a fair public hearing before a court or tribunal in terms of section 34 of the Constitution illusory.[339] Unlike the labour dispute resolution tribunals, litigating in the civil courts is an expensive endeavour. Given the precarious position of a subaltern employee, there is substance in the aphorism "litigation is a rich man's game".[340]

Entwined with employee status, the "employment relationship" has represented the foundation stone around which labour law and collective agreement

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[339] In labour litigation the right of parties in terms of s34 of the Constitution informs courts' approach to condonation and rescission applications. See generally, *City of Johannesburg Metropolitan Municipality v IMATU* 2017 8 *ILJ* 2695 (LAC) para 50; *SA Post Office Ltd v CCMA* 2011 32 *ILJ* 2442 (LAC); *NEHAWU obo Mofokeng v Charlotte Theron Children's Home* 2004 10 BLLR 979 (LAC). See also Loock & De Kock "Variation and rescission of arbitration awards and rulings in terms of section 144 of Labour Relations Act" 2005 *Obiter* 60.

[340] If we train a critical eye on the recurrent declaratory and interlocutory applications in which the Labour Court is asked to intervene in disciplinary proceedings, a yawning gulf between the rank and file employees and employees of superior status is revealed. Affluent employees who can afford a "Rolls-Royce" legal representation are able to raise spurious challenges, thereby delaying disciplinary proceedings. This has incurred the displeasure of Labour Court. Therefore the strident remarks of Francis J in *Mosiane v Tlokwe City Council* 2009 30 *ILJ* 2766 (LC) para 33 are not isolated:

> "A worrying trend is developing in this court in the last year or so where this court roll is clogged with urgent applications. Some applicants approach this court on urgent basis either to interdict disciplinary hearings from taking place, or to have their dismissals declared invalid and seek reinstatement orders. In most of such applications, the applicants are persons of means who have occupied top positions at their places of employment. They can afford lawyers who will approach this court with fanciful arguments about why this court should grant them relief on an urgent basis. An impression is therefore given that some employees are more equal than others and if they can afford top lawyers and raise fanciful arguments, this court will grant them relief on an urgent basis.
>
> All employees are equal before the law and no exceptions should be made when considering such matter. Most employees who occupy much lower positions at their places of employment who either get suspended or dismissed, follow the procedures laid down in the Labour Relations Act 66 of 1995 (the Act). They will also refer their disputes to the CCMA or to the relevant bargaining councils and then approach this court for necessary relief".

The most recent reincarnation of this tendency is the disciplinary process concerning suspended SARS Commissioner Tom Moyane. See Grootes "With Moyane's dismissal, Ramaphosa's slo-mo revoltion claims a crucial scalp" *Daily Maverick* 02 November 2018avalaibe at https://www.dailymaverick.co.za (accessed 02-11-2018); *Legalbrief Today* "Nugent recommendations 'irrational' and 'biased'" – Moyane' 2018/10/31 (accessed 31-10-2018); "Get rid of Moyane Now – judge" 2018/10/17 (accessed 17-10-2018); "Moyane to test disciplinary hearing "fairness" in top court" 2018/09/03 (accessed 03-09-2018); "Moyane trying to sabotage disciplinary process – President" 2018/07/20 (accessed 20-07-2018); "SARS inquiry: Now Moyane threatens legal action" 2018/07/03 (accessed 03-07-2018); "O'Regan removed from Moyane inquiry" 2018/05/23 (accessed 23-05-2018); "Moyane wants 'conflicted' judge removed from inquiry" 2018/07/18 available at: legalbrief@legalbrief.co.za (accessed 18-07-2018); Van Wyk "Bham dismisses suspended SARS commissioner's complaints of unfairness" *Daily Maverick* 01 August 2018 https://www.dailymaverick.co.za (accessed 01-0-2018).

have sought to recognise and protect the rights of workers. Whatever its precise definition in different contexts, the employment relationship has represented "a universal notion which creates a link between a person called the 'employee' (or the worker) with another person, called the 'employer', to whom she or he provides labour or services under certain conditions in return for remuneration".[341] Employment relationship fixes the boundary between the economic sphere of labour protection, economic dependency, and regulation, on the one hand, and the economic sphere of commercial relations, entrepreneurship, and competition, on the other. The concept of employment relationship has always excluded those workers who are self-employed. In the same vein, some categories of dependent workers have increasingly found themselves effectively without labour protection owing to their employment relationship being disguised, ambiguous or not clearly defined.[342] Consequently, an increasingly large share of workers is not protected under labour law.

This chapter examines labour law's traditional dilemma: unmasking who is a true employee in contemporary work environment. The need to probe the normative basis for determining the scope of labour protection is particularly pressing, given the increase in the number of people whose legal and contractual status is that of self-employment but whose actual work status is very far from that of independent entrepreneur. The need to extend effective legal and social protection to all categories of workers irrespective of whether they are in organised sector or wage employment, but also to homeworkers and the self-employed has been the bedrock of international conventions regarding employment.[343]

Many interesting questions of principle and policy emerge in the consideration of labour law's million dollar question: who is an employee? In the remainder of this chapter, these intricate questions are amplified and explored. Before doing so, however,

[341] ILO "The Scope of the Employment Relationship Report V" *International Labour Conference*, 91st Session, Geneva, (2003) available at: http://www.ilo.org/public/english/standards/relm/ilc/ilc91/pdf/re-v.pdf (accessed 27-05-2017).
[342] Dickens "Falling through the net: Employment change and worker protection" 1988 19 *ILJ (UK)* 139.
[343] See ILO *Income Security and Social Protection in a Changing World* Geneva: World Labour Report (2000); *Meeting of Experts on Workers in Situations Needing Protection (The Employment Relationship: Scope)* Basic Technical Document. Geneva: International Office (2000) *Decent Work in the Informal Economy* Geneva: International Labour Office (2002). See also Sen "Work and rights" 2000 *ILR* 119.

it is necessary to say something about the legal institution of the common law contract of employment.

2.2 The Legal Institution of Contract Employment

An indispensable starting point in the legal definition of employee is the institution of the contract of employment. An apt way of putting it is to say that the contract of employment is the "cornerstone of the edifice"[344] of individual employment relationship. Although overshadowed by intervention of statutory regulation into employment law, far from being in decline, the common law contract of employment has lost nothing of its strength or importance.[345] The notion that employment relationship is essentially contractual in nature is an enduring feature of labour law.[346]

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[344] Davies and Freedland (eds) *Otto Kahn-Freund Labour and the Law* 3rd ed (1983) 18. According to Szakats *Law of Employment* (1975) 3 "The legal basis for the employment relationship remains, and cannot be anything else than the contract (of employment). The law of contract, however, should be regarded not as a straightjacket but as a loose garment which must be fitted to the special character of the employment relationship, as distinct from sale and purchase transactions."
See further Collins "Capitalist doctrine and corporatist law" 1982 11 *ILJ (UK)* 78, 83; Forrest "Political values in individual employment law" 1980 *MLR* 361, 362; Mellish & Collis-Squires "Legal regulation and social norms in discipline and dismissal" 1976 *ILJ (UK)* 164.

[345] Deakin "The many futures of the contract of employment' in Conaghan *et al Labour Law in an Era of Globalization Transformative Practices and Possibilities* (2002) 177, 178. Deakin lists various factors which are evident in the 'new world of work,' and which undermine the contractual employment relationship simply because subordination is traded for security. These factors include: (i) the vertical disintegration of production, (ii) the decline of the male breadwinner-family, and (iii) the rise of global regulatory competition. Others have argued that the contract of employment has become largely irrelevant for the regulation of employment relationship, as statutory and collective bargaining measures now fulfil that role. In this regard Riley "The definition of the contract of employment and its differentiation from other contracts and other work relations" in Bogg *et al* (eds.) *The Contract of Employment* (2016) 321; Le Roux "The Foundation of the contract of employment in South Africa" 2010 39 *ILJ* 139; Hepple "Restructuring employment rights" 1986 15 *ILJ (UK)* 69; Rideout "The contract of employment" 1966 *CLP* 11.

[346] Le Roux "Developments in individual labour law" in Cheadle *et al Current Labour Law* (1995) 3-4, noted that, on the face of it, the LRA definition of "dismissal" is essentially limited to employees employed in terms of a contract of employment. See also Du Toit "Oil on troubled waters? The slippery interface between the contract of employment and statutory labour law" 2008 *SALJ* 95, 109-110; Van Staden & Smit "The regulation of the employment relationship and the re-emergence of the contract of employment" 2010 *TSAR* 702; Radley & Smit "The contract of employment in labour law: Obstacle of panacea" 2010 *Obiter* 247. For serious reflection, see Van Jaarsveld *The Interplay of Common Law and Statutory Law in Contemporary South African Labour Law* (Unpublished LLD Thesis, Unisa 2007). A re-emergence of the role and application of contractual principles in individual employment relationships is manifest. See e.g.: *Carter v Value Truck Rental (Pty) Ltd* 2005 26 *ILJ* (SA) 711 (SE) regarding breach of an employment contract and repudiation. *Denel (Pty) Ltd v Vorster* 2004 4 SA 481 (SCA) a dismissed employee claimed contractual damages from his former based on the latter's failure to adhere to its disciplinary procedure. *Buthelezi v Demarcation Board* 2004 25 *ILJ* 2317 (LAC) where an employee's fixed term contract had been terminated prematurely on the grounds of the employer's operational

This is also reflected by the fact that the common law contract of employment still underpins the legal definition of employee and provides axes of differentiation between employees and independent contractors. It has historically served, and continues to serve, as the principal gateway to individual employment relationship.[347] The past two decades have witnessed a renaissance of the role and application of contractual principles in individual employment relationships in South Africa[348] and other Commonwealth jurisdictions.[349]

Sir Otto Kahn-Freund's unforgettable aphorism reminds us that the contract of employment is a figment of the legal imagination,"in its inception it is an act of submission, in its operation it is a condition of subordination".[350] Similar sentiments are echoed by Collins, who evocatively characterise as bitter "vinegar" the residue ofmaster-servant mindset which precludes a progressive development of the common law on the contract of employment.[351] Hence the principal function of labour law is to act as a

requirements. *Swissport SA (Pty) Ltd v Smith NO* 2003 24 *ILJ (SA)* 618 (LC) in respect of the parol evidence rule. *Chevron Engineering (Pty) Ltd v Nkambule* 2003 7 BLLR 631 (SCA) where a claim based on the breach of an employment contract was held possible by the High Court regardless of an unfair dismissal in terms of s 188 of the LRA of 1995. *Coetzee v Comitis* 2001 22 *ILJ* (SA) 331 (C) with regard to express terms in an employment contract; *Fedlife Assurance Ltd v Wolfaardt* 2002 1 SA 49 (SCA) where the court held that the respondent has not been deprived of a common-law remedy for contractual damages based on the breach of a fixed-term contract simply because other remedies under the principles of unfair dismissal in terms of the LRA are also available. *Sappi Novoboard (Pty) Ltd v Bolleurs* 1998 19 *ILJ (SA)* 784 (LAC) where good faith is viewed as an implied contractual term of an employment contract. *Sun Packagings (Pty) Ltd v Vreulink* 1996 17 *ILJ (SA)* 633 (A) in respect of the interpretation of a contractual clause. In the Commonwealth re-interest in and primacy of contract employment is driven by larger trends of flexibisation, deregulation and decollectivisation of employment relations. See Stewart & Riley "Working around Work Choices: Collective bargaining and the common law" 2007 *MULR* 903; Riley "Regulating for Fair Dealing in Work Contracts: A New South Wales Approach" 2007 *ILJ (UK)* 19; "Individual contracting and collective bargaining in the balance" 2000 *AJLL* 92; Anderson "Employment rights in an era of individualised employment" 2007 38 *VUWLR* 417.

[347] Rycroft & Jordaan *A Guide to South African Labour Law* 2 ed (1991) 1-24 ("Rycroft & Jordaan"); Jordaan "The law of contract and the individual employment relationship" 1990 *AJ* 73; Wallis "The LRA and common law" 2005 *LDD* 181.

[348] See further Du Toit 2008 *SALJ* 95; Van Jaarsveld "Contract in employment: Weathering storms in mixed jurisdictions? Some comparative thoughts" 2008 *Electronic J of Comp. L* 1.

[349] For a discussion of developments in the Antipodes see Anderson "Employment rights in an era of individualised employment" 2007 38 *VUWLR* 417; Riley "Individual contracting and collective bargaining in the balance" 2000 *AJLL* 92; Mitchell & Howe"The evolution of the contract of employment in Australia: A discussion" 1999 *AJLL* 113. On Canada and UK, see Fudge "The spectre of *Addis* in Contracts of Employment in Canada and the UK" 2007 36 *ILJ (UK)* 51; Davies & Freedland "Changing Perspectives Upon the Employment Relationship in British Labour Law" in Barnard *et al* (eds), *The Future of Labour Law: Liber Amicorum Bob Hepple QC* (2004) 1.

[350] See Davies and Freedland (eds) *Otto Kahn-Freund Labour and the Law* 3rd ed (1983) 18; Rycroft & Jordaan 11-12.

[351] Collins "Contractual autonomy" in Bog *et al* (eds) *The Autonomy of Labour Law* (2015) 45; 67.

countervailing force to counteract the inequality of bargaining power inherent in the employment relationship.[352] That the contract of employment has seldom been acclaimed for its ability to regulate the complexities of employment relationship is a central point of interest in labour law literature.[353] Academic commentators frequently suggest that the employment contract is an unsuitable vehicle for the legitimation and regulation of the individual employment relationship in the modern economy.[354] The notion that a freedom of contract approach necessarily reinforces and legitimises the social and economic dominance of those parties who enter a market with greater bargaining power is just as true of employment relationship as it is of consumer

[352] Kahn-Freund *Labour and the Law* (1972) 4; *Worker and the Law*, 1st ed (1965) 32; Klare "Countervailing workers' power as a regulatory strategy" in Collins *et al* (eds) *Legal Regulation of the Employment Relation* (2000) 63. For Collins "Labour law as a vocation" 1989 *LQR* 468, 484, this is the "original vocation" of labour lawyers.

[353] Veneziani "The evolution of the contract of employment" in Hepple (ed) *The Making of Labour Law in Europe* (1986) 70 observes:

> "The history of the contract of employment can be seen as the history of a false aspiration. The promise of freedom of contract in the employment relationship was never fully achieved. The freedom of the worker in the labour market was impeded by his social condition – that is, by his status."

Lord Pannick has noted:

> "[E]mployment rights conferred by Parliament over the past 50 years and have been protected by Governments-both Conservative and Labour-precisely because the inequality of bargaining power between employee and employer means that freedom of contract is quite insufficient to protect the employee or the prospective employee. Therefore, to allow these basic employment rights to be traded as some form of commodity frustrates the very prupose of these entitle Ments as an essential protection in the employment context." HL De, col 265 (6 February 2013) (L Pannick) cited in Prassl "Employee shareholder 'status': Dismantling the contract employment" 2013 42 *ILJ (UK)* 307, 336.

Further readings, see: Winder "The contract of service" 1964 *LQR* 160; Wedderburn *The Workers and the Law* 2 ed (1971) 154; Kahn-Freud "'Blackstone' neglected child': The contract of employment" 1977 *LQR* 508; Smith "Is employment properly analysed in terms of contract?" 1975 *NZULR* 341; Elias "The structure of employment contract" 1982 *CLP 95*; Swinton in "Contract and the employment relationship "in Reiter & Swan (eds) *Studies in Contract Law* (1980) 362; Merritt "The historical role of law in the regulation of employment – Abstentionist or interventionist? 1982 *Austral J of Law & Soc* 56; Rycroft & Jordaan 11-12; Dukes "Wedderburn and the theory of labour law: Building on Kahn-Freund" 2015 44 *ILJ (UK)* 357; Freedland "Otto Kahn-Freund, the contract of employment and the autonomy of labour law" in Bogg *et al* (eds) *Autonomy of Labour Law* (2015) 29.

[354] See generally, Freedland *The Contract of Employment* (1976); *The Personal Contract of Employment* (2003) and "Status and contract in the law of public employment" 1991 20 *ILJ (UK)* 72; Brooks "Myth and muddle: An examination of contracts for the performance of work" 1988 11 *USWLR* 48; Cairns "Blackstone, Kahn-Freud and the contract of employment" 1989 *LQR* 300; Kallstrom "Employment and contract work" 1999 *Comp. Lab. L & Pol'y J.* 157; Barmes "The continuing conceptual crisis in the common law of the contract of employment" 2004 *MLR* 435 ("The continuing conceptual crisis"); Deakin & Wilkinson *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (2005); Freedland & Kountaris *The Legal Construction of Personal Work Relations* (2011).

transactions.[355] After all, the common law allows employers a virtually untrammelled right to contract or not to contract with whomsoever they choose.[356]

The common law contract of employment is torn in two directions. On the one hand, like any other commercial contract, it is considered as a kind of letting and hiring; and therefore a commercial contract.[357] So far as the common law is concerned, the contract of employment is a simple commercial or market transaction. This entails equality in the negotiating sphere of employment, where employer and employee are putatively equal parties under the contract law with equal rights to bargain and reach agreement over the terms and conditions of employment.[358] If parties to commercial bargains are able and ought to be able to take responsibility for their own bargains, commercial certainty is best served by holding parties to the terms of their original bargain. Broadly speaking, "sanctity of contract" invariably favours the stronger party to contract negotiations.[359]

[355] For a helpful analysis of consumer law, see Stoop "The Consumer Protection Act 68 of 2008 and procedural fairness in consumer contracts" 2015 *PER/PELJ* 43; Stoop & Churr "Unpacking the right to plain and understandable language in the Consumer Protection Act 68 of 2008" 2013 *PER/PELJ* 518; Jacobs *et al* "Fundamental consumer rights under the Consumer Protection Act 68 of 2008: A critical overview and analysis" 2010 *PER/PELJ* 24.

[356] In *Allen v Flood* 1898 AC 1, 172-173, Lord Davey put the matter thus:

> "An employer may refuse to employ [a worker] for the most mistaken, capricious, malicious or morally reprehensible motives that can be conceived, but the workman has no right of action against him … A man has no right to be employed by any particular employer, and has no right to any particular employment if it depends on the will of another."

[357] Jordaan "Employment relations" in Zimmerman & Visser (eds) *Civil and Common Law in South Africa* (1996) 389, 389-5.

[358] Selznick finds the notion of free and equal contracting parties negotiating at arm's length problematic:

> "To stress that the employment relation [is] a contract [is] to emphasise, (a) limited nature of the commitment made by the parties to each other and (b) the high value to be placed on the freedom of individuals, whatever their station, to enter contractual relations and define for themselves the terms of the bargain".

Selznick *Law, Society, and Industrial Justice* (1969) 131. See further Haysom & Thompson "Labouring under the law: South Africa's farmworkers" 1986 7 *ILJ* 218, 221-222.

Marx referred to the contractual sphere as that "within whose boundaries the sale and purchase of labour goes on … a very Eden of the innate rights of man," where "[t]here alone rule Freedom, Equality, Property, and Bentham." McLellan (ed) *Karl Marx: Selected Writings* 2nd ed (2005) 492. See further

[359] When dealing with the subject of freedom and sanctity of contract, it is almost a matter of legal etiquette to cited celebrated dicta that have fallen from the lips of eminent jurists. For example, Kotze JP in *Osry v Hirsch, Loubser & Co Ltd* 1922 CPD 531, 546. See also *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren* 1964 4 SA 760 (A) 767; *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A) 893-4; *Brisley v Drotsky* 2002 4 SA 1 (SCA) para 22; *Afrox Health Care Bpk v Strydom* 2002 6 SA 21 (SCA) para 7. Henry Maine's famous aphorism in his *Ancient Law* (1861): "The movement of progressive societies as hitherto been a movement from status to contract", while not a universal of legal history, had some

On the other hand, employment contract does not conform very well to the standard contract model. This brings into the equation the contract or status debate.[360] It is generally accepted that the greater part of the framework of the parties' rights and duties, including that of the master over the servant, never arose from agreement, but were incidents status.[361] Fox argues that the employment relationship is essentially a power relationship, conceived in contract terms, but otherwise founded on status.[362] Expressed differently, contract law serves largely as an ideological cloak behind which the realities of domination and subordination are obscured.

It has been implicitly recognised that the employment relationship is not uniformly a relationship between autonomous actors with equal freedom to choose their contract partner and bargain terms. The law of unfair dismissal has been the most influential in eroding any similarity between employment and other commercial contracts under which work is performed.[363] Linked to the legislative restriction on the employer's prerogative to hire and fire at will, is the implied duty not to act in a manner

truth in it: in archaic societies full legal capacity vested only in the head of the family unit; but in a society of equals most social relations are created by contracts between individuals.

[360] The following sources are useful for an introduction to the contract/status debate: Kahn-Freund "A note on status and contract in British labour law" 1967 *MLR* 635; Rideout "The contract of employment" 1966 *CLP* 111; Graveson "The movement from status to contract" 1941 *MLR* 261; Dickson "New conceptions of contract in labour relations" 1943 *Columbia LR* 688; Selznick *Law, Society and Industrial Justice* (1969) 63; Atiyah *The Rise and Fall of Freedom of Contract* (1979) 716, 742; Macneil "Contracts adjustment of long-term economic relations under classical, neoclassical and relational contract law" 1978 *Northwestern U LR* 854 and "Values in contract: internal and external" 1983 *Northwestern U LR* 340; Freedland "Status and contract in the law of public employment" 1991 20 *ILJ (UK)* 72; Gahan "Editorial: Work, status and contract: Another challenge for labour" 2003 *AJLL* 249; Rycroft & Jordaan 18-22.

[361] Selznick states: "The status of the master carried with it the right of command. The master controlled and supervised the work of the servant. This he did of right, under the control of lawful authority…. The master's right to command and the servant's duty to obey, were incident of status and not terms of the agreement." See further Fox *Beyond Contract: Work, Power and Trust Relations* (1974) 184-185; Stanley "Prerogative in private and public employment" 1974 *McGill LJ* 394, 394-395.

[362] *Beyond Contract: Work, Power and Trust Relations* (1974) 183-184.

[363] This is the starting of the discussion on dismissals in all standard labour law texts. See generally, Godfrey *et al Labour Law in South Africa* (2016) part 2; Van Niekerk *et al Law @ Work* 3rd ed (2015) ch 4; Grogan *Workplace Law* 10th ed (2011) ch 9-11; *Dismissal* (2002) chp. 3; Thompson & Benjamin *South African Labour Law* (2006); Du Toit *et al Labour Relations Law: A Comprehensive Guide* 5th ed (2006), Du Plessis & Fouche *A Practical Guide to Labour Law* 6th ed (2006); Van Jaarsveld & Van Eck *Principles of Labour Law* 2ed. (2002); Basson *et al Essential Labour Law* 3 ed. (2002); Du Toit and Potgieter *Labour Relations in the Bill of Rights Compendium* (Service Issue 21 Oct 2002). Australian texts: Creighton & Stewart *Australian Labour Law: An Introduction* 3ed (2000) chp 7 and 11; McCallum & Pittard *Australian Labour Law* 3 ed (1995) part 2. English texts: Selwyn *Selwyn's Law of Employment* 16th ed (2011) chp. 11; Collins *Employment Law* (2003); Anderman *The Law of Unfair Dismissal* 3 ed (2001) chaps. 3-5; Collins *et al* (eds) *Labour Law: Text and Materials* (2001).

calculated or likely to destroy mutual trust and confidence in the relationship.[364] For instance, Brodie describes the duty of mutual trust and confidence as a term "of wide application... capable of addressing many of the issues which may give rise to conflict between employer and employee".[365] It is equally apparent that there is no unfettered freedom to contract when the kind of contract envisaged describes an employment relationship. According to some analyses,[366] it may be opportune to jettison the lexicon and inappropriate assumptions of contract law, and to admit that relationships depend in reality upon other principles. A study of the evolution of the law of employment reveals a number of fallacies and judicial sleight of hand which have contributed to the hybrid nature of the contract of employment. The proposition that the legal relationship between the parties must be gathered primarily from a construction of the contract which they concluded still holds.[367] Generalisations with respect to employment contract must, in consequence be uttered with caution and read with scepticism.

It was postulated earlier that the contract of employment can properly be seen as the "pivot" upon which turns the entire system of labour law. In jurisprudential terms, the employment contract is a strange creature: in part, it is a "simple" contract governed by the same principles as any other commercial transaction. Conversely, it is

[364] Bosch contends that "[I]importing or constructing terms in particular cases involves a more active interference by the courts in parties' autonomy to contract as opposed to simply accepting that the outset there is a duty of good faith implied into every contract of employment which may then be excluded or varied if the parties apply their minds to it" – "The implied term of trust and confidence in South African labour law" 2006 27 *ILJ* 28, 50. See also Sutherland "Regulating dismissals: The impact of unfair dismissal legislation on the common law contract of employment" in Arup *et al* (eds) *Labour Law and Labour Market Regulation* (2006) 242, 252-260; Murray "Conceptualising the employer as fiduciary: Mission impossible?" 337 in Bogg *et al* (eds) *Autonomy of Labour Law* (2015) 377, 346-348.

[365] Brodie *The Contract of Employment* (2008) 65. See further Dukes "Douglas Brodie *The Contract of Employment*: Review" 2009 *Edinburgh LR* 153.

[366] Riley "Beyond contract: Reconceptualising the fundamentals of the law of work" *Labour Law Research Network Conference*, June 2013, Barcelona and "Developments in contract of employment jurisprudence in other common-law jurisdictions: a study of Australia" in Bogg *et al* (eds.) *The Contract of Employment* (2016) 273. But *Martin v Murray* 1995 16 *ILJ* 589 (C) 602 D-F.

[367] See generally, *SABC (Soc) Ltd v CCMA* 2017 ZALCJHB 87 para 34 ("*Burke*"); *Linda Erasmus Properties Enterprises (Pty) Ltd v Mhlongo* 2007 28 *ILJ* 1100 (LC) para 16; *Mandla* 14; *Niselow v Liberty Life Association of Africa Ltd* 1998 19 *ILJ* 752 (SCA) 754C-D; *Niselow v Liberty Life Association of Africa* 1996 17 *ILJ* 673 (LAC) 683D-E; *Borcherds v C W Pearce and J Sheward t/a Lubrite Distributors* 1993 14 *ILJ* 1264 (LAC) 1277H-H; *Smit v Workmen's Compensation Commissioner* 1979 1 SA 51 (A) 64B ("*Smit*"). The contractual element is now of overarching importance especially in the case of workers in tripartite employment relationship. This is because their contracts are constructed so as to minimise the chance of workers whose contracts are terminated at the behest of a client. In this regard see, *Chuma*; *Nape*. See generally Theron "Prisoners of a paradigm"; "Who's in and who's out"; Nkhumise "Dismissal of an employee at the instance of a client"; Maloka "Fairness of a dismissal at the behest of a third party".

also a legal fiction used to rationalise and to legitimate the domination of one social group over another. Far reaching legal and practical consequences flow from a determination that a given contract is or is not an employment contract. This in turn means that it is imperative to be able to differentiate contracts of employment from other analogous legal relationships, such as principal and agent,[368] partnership,[369] landlord and tenant,[370] and, most important of all, independent contractor and entrepreneur.

Before proceeding to an examination of the various approaches to the classification of employment relationships which have been adopted by courts over the years, it is necessary first to say something about the establishment of the employment relationship.

2.3 Work Relationships as Contracts

The fact that the principles governing formation of a contract have not generated a great deal of litigation in the employment context does not alter the fact that they wield overarching influence. Descriptions of the general principles of contract formation can be found in any contract textbook.[371] They include the incantations, so familiar to lawyers, of the need for one party's acceptance to be mirror image of the offer; and of the contractants' intention to bind themselves legally. If an offer and acceptance is subject to fulfilment of a future event, then the contract of employment will only come

[368] See e.g. *Monzali v Smith* 1929 AD 382; *Dicks v SA Mutual Fire & General Insurance Co Ltd* 1963 4 SA 501 (N); *Joel Melamed & Hurwitz v Cleveland Estates (Pty) Ltd* 1984 2 SA 155 (A); *Mavundla v Vulpine Investments Ltd t/a Keg & Thistle* 2000 21 *ILJ* 2280 (LC); *Maye Serobe (Pty) Ltd v LEWUSA obo Members* 2015 ZALCJHB 116.

[369] See e.g. *Cameron-Down v En Commandite Partnership PJ Laubscher* 2015 36 *ILJ* 3086 (LC).

[370] See e.g. *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 3 SA 531 (CC). For a detailed exposition on evictions and alternative discourse, see Ray "Evictions, aspirations and avoidance" 2015 *CCR* 7; Young "The avoidance of substance in constitutional rights" 2015 *CCR* 8; Landau "Aggressive weak form of constitutional remedies" 2015 *CCR* 9; Dugard "Beyond *Blue Moonlight*: The implications of judicial avoidance in relation to the provision of alternative housing" 2015 *CCR* 10; Wilson "Curing the poor: State housing policy in Johannesburg after *Blue Moonlight*" 2015 *CCR* 11; Fowkes "Managerial adjudication, constitutional civil procedure and *Maphango Aengus Lifestyle Properties*" 2015 *CCR* 12; De Villiers "Spatial practices in Lowliebenhof: The case of *Maphango v Aengus Lifestyle Properties (Pty) Ltd*" 2014 *PER/PELJ* 58; Roithmayr "Lessons from *Mazibuko*: Persistent inequality and the commons" 2010 *CCR* 12; McLean "Meaningful engagement: One step forward or two back? Some thoughts on *Joe Slovo*" 2010 *CCR* 8; Chenwi "A new approach to remedies in socio-economic rights adjudication: *Occupiers of 51 Olivia Road and Others v City of Johannesburg and others*" 2009 *CCR* 10.

[371] See e.g. Van der Merwe *et al Contract General Principles* 4ed (2012) chps 2-3; Christie & Bradfield *Christie's The Law of Contract in South Africa* 6th ed (2011) chap 2 ; Bhana *et al Student's Guide to the Law of Contract* 3ed chps 1-3.

into operation upon fulfilment of the suspensive condition.[372] Where employment is concerned, these principles hardly present difficulty. Typically, employment contract is commenced where some form of written agreement is signed by the worker and the employer. The same result can be achieved informally as where an inquiry from one or other side about availability is followed by a positive response and an arrangement on a commencement date. Quite often, the employee starts work immediately. In circumstances of employment "on the nod", the parties have scant regard for the formal requirements of the law of contract.[373] The parties may well have a very limited awareness of the fact that they have created a contract, and have even less awareness of its content. In either situation, a contract of employment may be formed, even if its existence needs to be inferred from the parties' conduct.

Inevitably, there are exceptional cases where the formation of a contract becomes a matter of dispute. The decision of the Labour Court in *Jafta*[374] turned upon whether the acceptance of an offer of employment sent by e-mail or short message service (SMS) resulted in a valid contract? Pillay J held that there was valid acceptance of the offer giving rise to employment contract in terms of section 23 of the Electronic Communication and Transactions Act 25 of 2002.[375]

Following a successful interview, the applicant received an offer for consideration. A day prior to the deadline for acceptance, the applicant received an SMS from the respondent's HR officer, requesting that he respond to the offer immediately. He replied by an SMS as follows: "Have responded to the affirmative through a letter e-

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[372] See e.g. *Wyeth SA (Pty) Ltd v Manqele* 2005 26 *ILJ* 749 (LAC) ("*Manqele*"); *Naidoo and Bonitas Medical Fund* 2005 26 *ILJ* 805 (CCMA); *Bayat v Durban Institute of Technology* 2006 27 *ILJ* 188 (CCMA).

[373] Creighton *et al Labour Law Text and Materials* 2ed (1993) 33.

[374] *Jafta v Ezemvelo KZN Wildlife* 2008 10 BLLR 954 (LC). For a helpful analysis of the case, see Stoop "SMS and e-mail contracts: *Jafta v Ezemvelo KZN Wildlife*" 2009 *SA Merc LJ* 110.

[375] S 23. A data message –

(a) used in the conclusion or performance of an agreement must be regarded as having been sent by the originator when it enters an information system outside the control of the originator or, if the originator and addressee are in the same information system, when it is capable of being retrieved by the addressee;

(b) must be regarded as having been received by the addressee when the complete data message enters an information system designated or used for that purpose by the addressee and is capable of being received and processed by the addressee; and

(c) must be regarded as having been sent from the originator's usual place of business or residence and as having been received at the addressee's usual place of business or residence.

mailed to you this evening for the attention of your CEO". However, the applicant's e-mail letter of acceptance did not enter the respondent's information system because of the malfunctioning server. The respondent had denied that the SMS was an unequivocal acceptance of the offer. In short, the respondent repudiation was unlawful.

Mncube[376] was a case in which the applicant was interviewed and afterwards recommended for the vacant position of crane operator. He received an SMS on 1 December instructing him to start his duties on 3 December. He informed the site manager that he needed to serve a notice period. He was then told to commence his duties on 1 January. On 27 December he reported again to the site manager to confirm whether he should report on the first or second January of the following year and also inquired about collecting his letter of appointment. It was then that he was advised that his employment had been terminated. On 8 January he spoke to the HR manager who advised that all positions had been frozen as at 13 December due to restructuring and that Transnet was retrenching staff and could not offer new positions.

Transnet maintained that no employment relationship could arise unless and until the applicant had received a written offer of employment and had accepted it in writing. The Commissioner found that an offer made in the form of a data message had legal force and effect, and that the SMS message constituted a tacit offer of employment. Further, by reporting on 3 December Mncube had tacitly accepted the offer and an employment relationship had arisen.

Mokhethi[377] is a polar opposite of *Mncube*. The applicant had resigned from the public service to take up a better position elsewhere, when she was offered employment by officials acting on behalf of the third respondent, the Department of Traffic Management, Free State Province. According to the applicant she re-joined the department after she was contacted telephonically by the officials, in particular one Mr Sease who was the Director of Traffic Management and Chief Director Phahlo. She was verbally informed that the submission was approved by the third respondent to "re-appoint" her as the Control Provincial Inspector. She was advised to report at the department in order to resume her duties. On resuming duty she was introduced as a

[376] *Mncube v Transnet* 2009 30 *ILJ* 2009 (CCMA).
[377] *Mokhethi v GPSSBC* 2012 33 *ILJ* 1215 (LC).

"new appointee" after which she was issued with an appointment card and persal number, provided with a new uniform and attended an induction. The respondent disputed the sequence of events leading to the applicant resuming duty.

On review to set aside the arbitration which found that the applicant did not have an employment relation with the Department, the Labour Court was required to determine whether the telephone calls by the officials of the Department established an offer. The court found that the applicant failed to show any elements of the alleged oral agreement. The applicant pointed to the typical elements of employment such as salary and benefits offered, including commencement date and the job description. In the final analysis, it was immaterial that the applicant reported at the station, was given a uniform, attended an induction, obtained an appointment card and was introduced to staff as a new appointee, if the existence of a contract (i.e. the offer made and accepted) has not been established. It was held as follows:

> "It is not disputed that the applicant was not appointed in terms of the selection procedures applicable to public service employees, in that the post in which she was allegedly appointed was not advertised and consequently no applications were received from a pool of candidates. The applicant knew about these procedures. It would therefore be an anomaly for her to be appointed without those being followed and simply on the basis of a telephone call and assurances allegedly made by an official of the third respondent that the submission (which contained misleading information) had been approved."[378]

An important point to note about the principles relating to the formation of contracts have exclusionary effects which need to be critically examined. The ascertainment of the parties' intention have the effect of excluding many work arrangements in a family, social or domestic context, there being a presumption that the necessary intention is lacking in these settings. For instance, typically women who perform "housework" and other domestic "duties" such as child-rearing, even if it seems clear that they are making a full-time commitment to such work to the exclusion of taking up paid employment.[379] Such a case is akin to those who "help out" in a family

[378] *Mokhethi* para 39.

[379] See generally, Fuller "Segregation across workplaces and the motherhood wage gap: Why do mothers work in low-wage establishments?" 2017 *Social Forces* 1. For a nuanced historical perspective, see Siegel "The modernisation of marital status law: Adjudicating wives' rights to earnings, 1860-1930" 1994 *Geo LJ* 2127.

business without having identifiably distinct position; nor, at least in most cases, those who work for religious or "spiritual" organisations.[380]

2.4 Categorising Employment Relationships

In the preceding analysis of the legal institution of contract of employment, it was described how the contract of employment has evolved as the dominant legal relationship regulating the performance of work. It was also shown that a dominant feature of contract of employment is the power of an employer to control over the means and manner of performance of work.

On the surface, statutory definition of an employee in section 213 of the LRA wears "an air of deceptive simplicity".[381] Section 213 defines an employee as[382]

> "(*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."[383]

[380] See e.g. *Schreuder v NGK Wilgespruit* 1999 20 *ILJ* 1936 (LC) ("*Schreuder*"); *Salvation Army (South African Territory) v Minister of Labour* 2004 12 BLLR 12 64 (LC) ("*Salvation Army*"); *Knowles v Anglican Church Property Trust, Diocese of Bathurst* 1999 89 IR 47. Cf. *Greek Orthodox Community of SA Inc. v Ermogenous* 1999 89 IR 188.

[381] Atiyah *Vicarious Liability in the Law of Torts* (1967) 41.

[382] S 1 (a) of the 1983 Labour Relations Amendment Act defined an employee as:

> "any person who is employed by or working for an employer and receiving or entitled to receive any remuneration, and, subject to subsection (3), any other person whomsoever who in any manner assists in the carrying on or conducting of the business of an employer."

In the aftermath of the Wiehahn *Commission Inquiry into Labour Legislation,* s 1(*a*) of the Industrial Conciliation Amendment Act 94 of 1979, as amended by s 1(*f*) of the Labour Relations Amendment Act and s 1(a) of the Labour Relations Industrial Conciliation Amendment Act 2 of 1983. For extended discussion, see Thompson "Twenty-five years after Wiehahn – A story of the unexpected and the not quite intended" 2004 25 *ILJ* iii; Le Roux "The evolution of the contract of employment in South Africa" 2010 39 *ILJ* 139, 161.

[383] A similar definition is also found in sections 1 of the BCEA, Employment Equity Act 55 of 1998 and the Skills Development Act 97 of 1998.

Statutory exclusions aside,[384] the fact that section 213 of the LRA is not necessarily predicated in the common law contract of employment or the conclusion of a valid and enforceable contract[385] masks in fact a hornet's nest of stinging difficulties.

In the following commentary we examine the test used by courts to categorise different legal relationships and, in particular, to distinguish employment relationships from other legal relationships.

It is also important to appreciate from the outset that in the great majority of situations categorisation is perfectly a straight-forward process, which does not entail any legal or practical difficulty whatsoever. The line worker in the factory or the sales assistant behind the counter can readily be seen to be an "employee". The legal practitioner or medical consultant in practice can equally be seen *not* be an "employee". Unavoidably, however, there are "grey areas": managing directors, freelance writers[386]/radio and television presenters,[387] consultants,[388] market research field

[384] Excluded from application of labour legislation are members of the National Defence Force, members of the State Security Agency and South African Secret Service. See section 2 of the LRA, section 3 (1) of the BCEA, section 4 (3) of the EEA and the SDA. Courts have also extended the scope of the statutory exclusions to include: Magistrates and judges, see e.g. *Khanyile v CCMA* 2004 25 *ILJ* 2348 (LC); *Hannah v Government of the Republic of Namibia* 2000 4 SA 940 (NMLC); *President of RSA v Reinecke* 2014 35 *ILJ* 1485 (SCA). Presidential appointments, parliamentarians, see *Parliament of the RSA v Charlton* 2010 10 BLLR 1024 (LAC). Ministerial appointments and members of statutory boards: *Van Zyl v WCPA Department of Transport and Public Works* 2004 25 *ILJ* 2060 (CCMA).

[385] Vettori "The extension of labour legislation protection and illegal immigrants" 2009 21 *SA Merc LJ* 818, 825-828. See also *SANDU v Minister of Defence* 1999 (4) SA 469 (CC); *White v Pan Palladium SA (Pty) Ltd* 2005 (6) SA 384 (LC).

[386] See *Tuck v SABC* 1985 6 *ILJ* 570 (IC).

[387] See, for example *Mvoko v SABC (Soc) Ltd* 2018 2 SA 291 (SCA) ("*Mvoko II*"); *Mvoko v SABC Soc Ltd* 2016 ZAGPHC 269 ("*Mvoko I*"); *Minter-Brown and Kagiso Media t/a East Coast Radio* 2017 38 *ILJ* 1006 ARB) ("*Minter-Brown*"); *SABC (Soc) Ltd v CCMA* 2017 ZALCD 22 ("*Padayachi*"); *SABC (Soc) Ltd v CCMA*2017 ZALCJHB 76 ("*Burke*"); *Kambule v CCMA* 2013 34 *ILJ* 2234 (LC) ("*Kambule*"); *SABC v McKenzie* 1999 20 *ILJ* 585 (LAC) ("*McKenzie*"). Cf the controversial SABC eight case - *Solidarity v SABC* 2016 37 *ILJ* 2888 (LC) concerning the suspension of journalists for flouting the public broadcaster's protest policy. Earlier the High Court in *HSF v SABC (Soc) Ltd* 2016 ZAGPPHC 606 had declared the SABC editorial Protest Policy issued on 26 May 2016 directing that the "SABC WILL NO LONGER BROADCAST FOOTAGE OF DESTRUCTION OF PUBLIC PROPERTY DURING PROTESTS" unlawful. See also Kirwan "Freedom of expression and the employment relationship" 2004 *AJLL* 197.

[388] *Sanlam Life Insurance Ltd v CCMA* 2009 30 *ILJ* 2903 (LAC) ("*Sanlam Life*"); *Volvo (Southern Africa) (Pty) Ltd v Yssel* 2009 6 SA 531 (SCA) ("*Yssel*"); *Starke/Financial Expert Marketing CC* 2005 2 BALR 244 (CCMA); *ABSA Makelars (Edms) Bpk v Santam* 2003 24 *ILJ* 1484 (LC); *FPS Ltd v Trident Construction (Pty) Ltd* 1989 3 SA 357 (A). See also See Havenga "The insurance canvassing agent: A vagrant intermediary" 1998 *SA Merc LJ* 119.

workers,[389] lone operators like salespersons,[390] estate agents,[391] owner drivers in the transportation industry,[392] e-hailing partner-drivers,[393] and sole members of personal service companies.[394] The range of grey areas" in modern work environment is a reflection of the prevalence of artificial arrangements for the acquisition of labour aimed at avoiding obligations which are seen fit to attach to the employment relationship.

2.5 The Various Tests

It will be remembered that for Selznick one of the most striking features of the contract of employment, as it emerged from the melting pot of the industrial revolution, was "the distinctive right of one party to exercise authority over another". So "distinctive" was this element of "control" that for many years it was regarded as the chief determinant of whether the parties had created a contract of employment or some other form of legal relationship. Indeed, it may be that it remains the key consideration in the categorisation process, although as will appear presently, not all observers[395] (or courts)[396] would necessarily agree with that assessment. Ironically, the emergence of digital work has seen the reaffirmation of "control" as the surest guide to whether a person is contracting independently or serving as an employee. From a historical perspective, it seems that the umbilical cord between contemporary individual employment law and its "originating circumstances"[397] is still tight.

[389] *Opperman v Research Surveys (Pty) Ltd* 1997 6 BLLR 807 (CCMA); *Market Investigations Ltd v Minister of Social Security* 1969 2 QB 173.
[390] See, for example, *Liberty Life Association of Africa Ltd v Niselow* 1996 7 BLLR 825 (IC) upheld on appeal *Niselow v Liberty Life Association of Africa* 1996 17 *ILJ* 673 (LAC); *Ongevallekomissaris v Onderlinge Versekerings Gennootskap AVBOB* 1976 4 SA 446 (A).
[391] *Linda Erasmus Properties.*
[392] *Phaka; Re Porter; Re Transport Workers Union of Australia* 1989 34 IR 179 ("*Re Porter*"); *Stevens v Brodribb Sawmilling Co (Pty) Ltd* 1986 160 CLR 16.
[393] See, for example, *Uber SA Technological Services (Pty) Ltd v NUPSAWU* 2018 39 *ILJ* 903 (LC) ("*Uber SA*."); *Uber SA Technological Services (Pty) Ltd v NUPSAW & SATAWU obo Morekure* 2017 (ZACCMA) 1("*Morekure*").
[394] See, for example, *Vermooten v DPE* 2017 38 *ILJ* 607 (LAC) ("*Vermooten*"); *Denel*; *Madingoane v Fibrous Plant* 2004 25 *ILJ* 347 (LC); *Swissport SA*; *Bezer*; *CMS Support Services (Pty) Ltd v Briggs* 1998 19 *ILJ* 271 (LAC) ("*Briggs*"); *Apsey v Babcock Engineering Contractors (Pty) Ltd* 1995 5 BLLR 17 (IC) ("*Apsey*"); *Callanan v Tee-Kee Borehole Castings (Pty) Ltd* 1992 13 *ILJ* 1544 (IC) ("*Callanan*") .
[395] See generally, Benjamin "Accident of history"; Le Roux "Diversification".
[396] See e.g. *Denel* para 19; *SITA* para 12; *Melomed* para 46.
[397] The antecedent of modern labour law is the law of master and servant, see Smith *A Treatise on the Law of Master and Servants: including therein masters and workmen in every description of trade and occupation; with appendix of statutes* (1902). For Arthurs "The dependent contractor: A study of the legal problems

The common law has utilised a number of tests in its attempt to find a suitable basis for distinguishing employees from those performing work on some other basis. It will be seen that the tests have been applied somewhat inconsistently. The most durable of these hinges on the concept of "control and supervision" by the employer.

Since the earliest days, the concept of control has anchored judicial evaluations of workplace relationships.[398] Although the methods for influencing working conditions have changed, the existence of control remains a crucial factor for determining when to hold businesses accountable for employment law violations. Probably the best known exposition of the control and supervision test is as developed from that of Myburgh JP in *McKenzie*:

> "The employee is subordinate to the will of the employer. He is obliged to obey the lawful commands, orders or instructions of the employer who has the right of supervising and controlling him by prescribing to him, what work he has to do as well as the manner in which it has to be done. The independent contract, however, is notionally on a footing of equality with the employer. He is bound to produce in terms of his contract of work, not by the orders of the employer. He is not under the supervision or control of the employer. Nor is he under any obligation to obey any orders of the employer in regard to the manner in which the work is to be performed. The independent contractor is his own master."[399]

Another way of articulating the binary divide is to say that the distinction is between being empowered to tell a person what work is to be done, which may occur in any work relationship, and the more extensive notion of controlling the manner in which that work is done. On this analysis, therefore, what matters is the *right* to control rather than its actual exercise. Put shortly, the issue is that the typical modern employer is a complex organisation in which the systems for the direction of work activities are rarely capable of being reduced to a simple model of one person telling another exactly how to do their job, many skilled workers are simply not amenable to detailed control and supervision.[400] This point was stressed in *Zuijs*,[401] where the High Court of Australia

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of countervailing power" 1965 *UTLJ* 89, 94, "the very terminology – 'master' and 'servant' – evokes a nostalgic Victorian image of authoritarianism which is collective bargaining's antithesis." See also Stevens "The test of the employment relation' 1939 *Michigan LR* 188.

[398] *Colonial Mutual Life Assurance v MacDonald* 1931 AD 412, 434. For details on other Commonwealth antecedents, see *Yewens v Noakes* 1888 6 QBD 530, 532; *Performing Right Society Ltd v Mitchell & Booker Ltd* 1924 1 KB 762, 767-768; *Queensland Stations v Federal Commissioner of Taxation* 1945 70 CLR 539, 545 and 548; *Humberstone v Northern Timber Mills* 1949 79 CLR 539, 396, 399 and 404-405; *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* 1968 2 QB 497 p

[399] *SABC v McKenzie* para 9.

[400] See e.g. *Golding v HCI Managerial Services (Pty) Ltd* 2015 36 *ILJ* 1098 (LC) ("*Golding*"). See also Marshall "An exploration of control in the context of vertical disintegration" Arup *et al* (eds) *Labour Law and Labour Market Regulation* (2006) 542.

[401] *Zuijs v Wirth Bros* 1955 93 CLR 561.

held that a circus trapeze artist was an employee of the circus owner. Even though the precise execution of his act was clearly up to him, he remained subject to the circus owner's control in other matters, such as when and how long to perform.[402]

While the courts have relied heavily upon the concept of "control" over the years, they have compensated for its inadequacies by adopting what has been termed the "integration" or "organisation" test.[403] This entails asking whether the alleged employee is "part and parcel" of the employer's organisation. Early intimations of "organisation or integration" test can be found in *Coggins*[404] and *Locomotive Works*.[405] But in its developed form it is largely the brainchild of Lord Denning.[406] Denning LJ re-stated the outer limits of the "integration" test in slightly different form in *Slatford*.[407] Although the test does indeed appear to side-step some of the difficulties associated with the traditional "control and supervision" approach, it has not attracted widespread judicial support. According to eminent voices it "raises more questions than I know how to answer"[408] and "leaves open the problem of defining the relationship between the employee and the enterprise which employs him".[409] The integration test has not succeeded in displacing control as the principal determinant of the existence of a contract of employment. The test was applied in *A M C A Services*[410] but later discarded as being imprecise.[411] In short, organisational integration is merely a factor which may be relevant in categorising a relationship.

An awareness of conceptual shortcomings of "control" and "organisational integration" approaches led the South African courts to adopt the "dominant impression test".[412] The dominant impression is a different side of the same coin of multi-faceted approach or the so-called "mixed" or "multiple" test that found favour with courts on a

[402] *Zuijs v Wirth Bros* 571.
[403] *Stevens v Brodribb Sawmilling Co (Pty) Ltd* 1986 160 CLR 16.
[404] *Mersey Docks and Harbour Board v Coggins* 1947 AC 1, 12.
[405] *Griffiths and Montreal v Locomotive Works* 1947 1 DLR 161, 169.
[406] *Stevenson, Jordan and Harrison Ltd v MacDonald an*d Evans 1952 1 TLR 101, 11.
[407] *Bank voor Handel en Scheepvaart NV v Slatford* 1953 1 QB 248, 295.
[408] Per MacKenna LJ in *Ready Mixed* 524. See also *Lee Ting Sang v Chung Chi-Keung* 1990 2 AC 374.
[409] Davies & Freedland *Labour Law: Texts and Materials* 2ed (1984) 84.
[410] *R v A M C A Services* 1959 4 SA 270 (SA).
[411] See further *Smit* discussed by Kerr "*Mandaries* and *conductores operis*" 1979 *SALJ* 323.
[412] *Smit* 61A-H; *SABC v McKenzie* para 9.

number of occasions.[413] The dominant impression approach entails asking whether the nature of the relationship between the parties, viewed as a whole, resembles a relationship between an employer and an employee rather than a relationship between an employer and an independent contractor. Whilst there are no hard-and-fast rules as to the number of factual elements or "indicia" that must be examined before a determination is reached, in addition to control, the following factors are particularly relevant: (i) whether the worker supplies their own tools or equipment; (ii) whether the worker is free during the engagement to perform similar work for other "employers"; (iii) whether the nature of the worker's involvement is such as to carry a risk of financial loss or, by the same token, an opportunity to make a profit from the work; and (iv) whether the worker charges for their services by supplying an invoice, rather than regular wages. It is important, to appreciate that no amount of authority to control the way in which work is done can make a person an employee if they are not contracting to supply their own personal labour.[414] Thus, if a person made use of a legal entity such as a company or close corporation to provide services, this is not necessarily an impediment to the conclusion by the court that a particular individual who was contracted to a company or a close corporation, or who owned the entity in terms of which he was obligated to provide services to the alleged employer, was an employee of the company, which was contractually entitled to receive such services.[415] The same is true of an agreement which artificially characterise an employee as an independent contractor where the substance of the relationship remains identical to what it would have been had the contract been worded differently and another label attached.[416]

[413] *Montreal Locomotive Works* 169 Lord Wright identified four rather different indicia:" It has been suggested that a fourfold test would in some cases be more appropriate, a complex involving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss." The multifactorial approach eclipsed and subsumed the "economic reality" test which had attracted judicial support in Britain in the late 1970s and early 1980s. See e.g. *Ferguson v John Dawson & Partners* 1976 1 WLR 1213; *Hitchcock v Post Office* 1980 ICR 100; *Young and Wood Ltd v West* 1980 IRLR 201; *Withers v Flackwell Health Football Supporters Club* 1981 IRLR 307; *O'Kelly v Trust House Forte* 1983 ICR 728 and *Nethermere (St Neots) v Taverna and Gardiner* 1984 IRLR 245.

[414] See generally, *Beya v GPSSBC* 2015 36 *ILJ* 1553 (LC) para 37; *Kambule* para 30; *AVBOB Mutual Assurance Society v CCMA* 2003 24 *ILJ* 535 (LC) 538E-H; *Dempsey v Home and Property* 1995 16 *ILJ* 378 (LAC) 384F-G.

[415] See e.g. *Denel*; *Hunt v ICC Car Importers Services Co (Pty) Ltd* 1999 20 *ILJ* 364 (LC) ("*Hunt*").

[416] See, for example, *Motor Industry Bargaining Council v Mac-Rites Panel Beaters & Spray Painters (Pty) Ltd* 2001 22 *ILJ* 1077 (N) ("*Mac-Rites*") *Shezi*; *Mandlanya*.

Although the dominant impression test is now well established and codified,[417] it has been criticised on a number of grounds. It has been pointed out, for instance, that the dominant impression test provides no guidelines on what weight should be attached to the individual factors and it is difficult to gauge the importance of each factor.[418] Similarly, the pivotal provisions on "presumption as to who is an employee" in both the LRA and BCEA are vulnerable to criticism for circularity:

> "For anyone who supposed there was a more optimistic reading possible regarding the introduction of an earnings threshold in the new presumption, the recently promulgated 'Code of Good Practice: Who is an employee' makes depressing reading. The Code is 53 pages long. Notwithstanding the inclusion of the ILO' 2006 'Recommendation concerning the employment relationship' there is little evidence of a new mindset in it. Instead, it comprises merely another exposition of 'the law' as it stands, including an exposition concerning laws other than the BCEA and LRA."[419]

Apart from the judicial tests, the distinction between an employee and an independent contractor has been formulated over the years in different ways: one must ascertain "whether he renders the service in the course of an independent occupation representing the will of his employer only as the result of the work and not as to the means by which it is accomplished".[420] It is also said that "the independent contractor 'sells the job' whereas the employee 'sells his hands'".[421] By and large, employment is a relationship in which one person is obliged, by contract or otherwise, to place his

[417] Sections 83A of the BCEA and 200A (1) of the LRA introduced a rebuttable presumption as to who is an employee and provides as follows:

> "(1) Until the contrary is proved, for the purposes of this Act, any employment law and section 98A of the Insolvency Act, 1936 (Act No. 24 of 1936) a person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present:[417]
> (a) the manner in which the person works is subject to the control or direction of another person,
> (b) the person's hours of work are subject to the control or direction of another person
> (c) in the case of a person who works for an organisation, the person forms part of that organisation,
> (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months
> (e) the person is economically dependent on the other person for whom he or she works or renders services,
> (f) the person is provided with tools of trade or work equipment by the other person, or
> (g) the person only works for or renders services to one person."

[418] Mureinik "The contract of service: An easy test for hard cases" 1980 *SALJ* 246, 258; Brassey "The nature of employment" 1990 11 *ILJ* 889, 919; Benjamin "An accident of history" 791-794. See too, *Medical Association of SA v Minister of Health* 1997 18 *ILJ* 528 (LC).

[419] Theron "Who's in and who's out" 36.

[420] *Colonial Mutual Life Assurance* 426.

[421] *Smit* 61A-B.

capacity to work at the disposal of an employing entity. This is to be distinguished from an entrepreneurial contractor who undertakes to deliver, not his capacity to produce, but the product of that capacity, the results.[422]

2.6 The Three-fold *SITA* Test for Identifying the Existence of an Employment Relationship

The judgement in *SITA*, now recognised as the leading authority on determining the question of employment relationship, embraced the realities test as enunciated in *Denel*. *Denel* court adopted a "reality test" to a situation where a company or a closed corporation is interposed between an employer and an employee. The court took the view that, even where there was an agreement between one legal entity such as a company or close corporation and the alleged employer for the provision of services, it was open to the court to find that the person who effectively was the owner of the company or a close corporation was an employee of the other company, with which his or her company or close corporation has such an agreement. On this approach the substance of the arrangements between the parties as opposed to the legal form so adopted is dispositive of ascertaining the existence of an employment relationship.

SITA itself had been concerned with a subterfuge perpetrated by three willing parties who carefully choreographed a false trilateral relationship. The third respondent employee was retrenched and was given a severance package by the SANDF. In terms of the package and of the applicable regulations he could not thereafter be employed by the SANDF. However, the appellant agency wished to use his services. As it could not employ him directly an agreement was arranged whereby Inventus CC would employ the third respondent and would supply his services to the appellant. In subsequent proceedings for alleged unfair dismissal the CCMA issued an award making the appellant and Inventus CC jointly and severally liable to pay compensation to the employee. The Labour Court subsequently overturned that award on review and ordered that only the appellant was liable to pay the compensation awarded.

[422] Brassey "The nature of employment" 1990 11 *ILJ* 899, 935-6. See also *Niselow v Liberty Life Association of Africa* 681D-E.

The three-fold *SITA* test directs that when a court determines the question of an employment relationship, it must work with three primary criteria: (1) an employer's right to supervision and control; (2) whether the employee forms an integral part of the organisation with the employer; and (3) the extent to which the employee was economically dependent upon the employer.[423] The approach is best summed up by Benjamin:

> "A starting point is the distinguished personal dependence from economic dependence. A genuinely self-employed person is not economically dependent on their employer because he or she retains the capacity to contract with others. Economic dependence therefore relates to the entrepreneurial position of the person in the marketplace. An important indicator that the person is not dependent economically is that he or she is entitled to offer skills or services to persons other than his or her employer. The fact that a person required by contract, who only provides services for a single client, is a very strong indication of economic dependence. Likewise, depending upon an employer for the supply of work is a significant indicator of economic dependence."[424]

The three-fold *SITA* test is now endorsed as the correct way of determining the true nature of an employment relationship.[425] The potential for evasion could be greatly reduced if adjudicators were prepared to examine the economic realities of the employment arrangements. This means giving appropriate weight to the contract concluded by the parties, and the realities of the relationship between the parties, in so far as they are not reflected in the written contract. Unfortunately, few arbitrators seem able to move beyond arrangements on paper and look at the substance of the work relationships involved.[426]

2.7 The Problem of Embryonic Employees

The very fact that the statutory definition of an employee is underpinned by the precondition that an individual becomes an employee if that person rendered services for which he was entitled to remuneration, if applied rigorously, this results in an enhanced employment vulnerability. Logically, it means that where an offer of employment is made to another and the offer is accepted a contract of employment may

[423] *SITA* para 12.
[424] Benjamin "An accident of history" 803.
[425] See e.g. *Kambule* paras 6-7. *Melomed* paras 51-52; *Padayachi* paras 30-31; *Burke* paras 43-45.
[426] See e.g. *Burke* paras 34; *Sanlam Life Insurance* para 27.

arise but the parties to that contract do not enjoy the protection of the LRA until such time as the offeree actually commences his performance or at least tenders performance in terms of the contract. The manifest hardship of termination of contract before commencement cannot be entirely discounted: such an applicant could not claim to have been dismissed as she was not an employee as defined by section 213. On the face of it this forestalls an unfair dismissal claim, since it is a jurisdictional prerequisite that the claimant before the CCMA or Bargaining Council must either be an employee or have an employment relationship.

This anomalous situation came into prominence in cases concerning claimants for unfair dismissal whose contracts were terminated before commencement of service. In each instance the prospective employer contended that the applicants were not their "employees" because they have not rendered services or worked for them, or assisted in carrying on their business in terms of subsection (a) and (b) of section 213. Such an argument was accepted by the Labour Court in *Whitehead*[427] where it was held that to qualify as an employee for purposes of the Act it is not enough to prove that a contract of employment has come into existence.[428] Ms. Whitehead was offered and accepted a permanent job with Woolworths. Before she commenced employment, she revealed that she was pregnant. She was then offered a fixed-term contract for five months. Ms. Whitehead claimed that she had been dismissed.

An instructive antecedent to *Whitehead* is *Sarker*.[429] Ms Sarker applied for and was offered a post by the respondent employer (the Trust). Subsequent to the offer which she accepted, the Trust sent her a formal letter of appointment to which was attached a document setting out the particulars of employment referring to a commencement date of 1 October 1995. Before she started work, the Trust sought a commitment from her that she would work in the post for a minimum of six months. The particulars of employment in her contract provided that she was required to give two months' notice of termination of employment. A few days thereafter she was told that the Trust was withdrawing the offer of employment. She instituted an action in the Industrial Tribunal alleging breach

[427] *Whitehead v Woolworths (Pty) Ltd* 1999 20 *ILJ* 2133 (LC).
[428] *Whitehead* 2137A-C.
[429] *Sarker v South Tees Acute Hospitals NHS Trust* 1997 IRLR 328.

of contract and wrongful or unfair dismissal on the assertion of her statutory right to notice. She claimed that she was entitled to pursue a claim for damages for breach of contract under the Industrial Tribunal which, in terms of section 131(2)(a) of the Employment Relations Act 1996, has jurisdiction in respect of a "claim for damages for breach of a contract of employment or any other contract connected with employment". The Industrial Court found that she had concluded a contract of employment with the Trust but that her claim was not one which arose or was outstanding on the termination of the employee's employment because as at the date of the alleged breach, there had been no termination of her employment as employment had never begun. She appealed against that decision. The Trust cross-appealed against the finding that the correspondence between the parties, as distinct from an agreement to enter into a contract of employment on 1 October 1995.

On appeal the Employment Appeal Tribunal ("EAT") dismissed the cross appeal, allowed the appeal and remitted the case to the Industrial Tribunal to deal with the unfair dismissal claim. The EAT held that-

> "The Industrial Tribunal had erred in holding that it did not have jurisdiction to consider the appellant's claim for damages for breach of contract in circumstances in which she had contracted to work for the respondent employers but the contract was terminated before she had commenced work under it."[430]

In *Jack*,[431] the question which arose was whether Jack was an employee at the time of breach. Jack had applied for the position and had been told that his application was successful. Two weeks after being informed of the success of his application, the Department sent him a formal letter of appointment. On the basis of such letter Jack handed a notice to his erstwhile employer. Two days before he was due to commence working the Department notified him that his appointment had been revoked. When challenging the dismissal and claiming relief under the BCEA, the Department raised the defence that the Labour Court lacked jurisdiction because Jack was not an employee. Pillay J correctly observed that *Whitehead*, was distinguishable on the facts and the law with *Jack*. She remarked that if the finding in *Whitehead* were to prevail in the circumstances of Jack "the effect will be that the applicant for employment will be better

[430] *Sarker*.
[431] *Jack v Director-General Department of Environmental Affair*s 2003 1 BLLR 28 (LC).

secured by legislation than one who has concluded a contract of employment. Such differentiation is irrational and constitutionally untenable."[432]

In *Manqele*[433] the court was invited to reconsider the issue whether protections of the LRA were available to a person whose contract of employment is terminated prior to commencement of employment. The court disapproved of *Whitehea*d, and held that since section 23(1) of the Constitution guarantees everyone the right to fair labour practices, there was a need to interpret the definition of employee purposively. It follows that the "the definition of employee in s 213 of the LRA can be read to include a person or persons who have or have concluded a contract of employment the commencement of which is or one deferred to a future date or dates."[434] Taking a narrow view, under the common law a contract of employment comes into existence where there is acceptance of an offer of employment. It is only when the offer is conditional or there are self-imposed formalities that employment relationship comes into existence on fulfilment of such condition or formality.[435]

2.8 The Employment Status of the Clergy

An important area with entrenched precariousness is priesthood. Case law concerning employment status of the clergy is illustrative of employment vulnerability.[436]

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[432] *Jack* para 25.

[433] *Wyeth SA (Pty) Ltd v Manqele* 2005 26 *ILJ* 749 (LAC).

[434] *Manqele* para 52.

[435] See e.g. *White v Pan Palladium SA (Pty) Ltd* 2006 27 *ILJ* 2721 (LC); *Schoeman v Samsung Electronics SA (Pty) Ltd* 1997 18 *ILJ* 1098 (LC). In *FCEWU obo Gruza and West Side Trading (Pty) Ltd t/a Labour Link* 2005 26 *ILJ* 794 (CCMA) the employees had been employed by a company which supplied staff to Kerbside Parking (KP), the entity responsible for managing street parking in Cape Town. When this contract terminated the employees were advised to apply for employment with the new contractor, and they were advised by KP that their applications had been accepted. When they started, they were presented with written contracts that differed substantially from those of their previous employment and they refused to sign. When they persisted in this refusal they were locked out and their employment terminated. They alleged unfair dismissal. The CCMA did not accept that the employees had been employed on a temporary basis pending the signing of the contracts. The employer should have ensured that the contracts were in place prior to agreeing to employ the employees. There was no condition that their employment was conditional on the signing of the contracts. The oral contract was in force and even though there was a dispute on remuneration, it did not mean that employment had not commenced. The employees had therefore been unfairly dismissed and were reinstated.

[436] A particularly clear example of vulnerability is provided by *Melnyk v Wiwchar* 2007 SKQB 118 (CanLII). There the plaintiff, a priest of the Ukrainian Catholic Church who by reason of disability became unable to carry out the responsibilities of pastor and was relieved of his duties. Left without determinate income, he launched contract and tort claims against the Episcopal Corporation and against the Bishop, the Most Reverend Wiwchar. Menlyk alleged that he was engaged under a contract

Employment protection has been extended to a range of vulnerable workers including domestic workers, home workers and immigrant workers, the following appropriate questions can be posed: is it tenable to exclude the clergy from the protective domain of labour law simply because of the absence of required intention to create an enforceable obligation when the reality that their working arrangement is roughly analogous to employment relationship? A rhetorical manner of posing the same question is to ask: is it justifiable for the courts to allow ecclesiastical organisations to create something which has every feature of a rooster, but call it a duck and insist that everybody else recognise it as a duck? To elucidate the question, one way is to paraphrase Lady Hale in *Preston*:[437] "everything in this relationship looks like an employment relationship. If it looks like a duck, walks like a duck and quacks like a duck, it is probably one."[438] What about the ILO's initiative[439] to extend or redefine the central notion of "employment" beyond the narrow confines of contract of employment? In other words, to ensure decent conditions for working citizens in the face of increasing employment vulnerability. The ILO Employment Relationship Recommendation 198, 2006, of the ILO states that "a disguised employment relationship occurs when the employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee".[440]

The subtle influence of the doctrine of non-entanglement in religious affairs of ecclesiastical institutions[441] in determination of employment status disputes looms large.

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of employment containing express and implied terms, well as certain statutory terms implied by the Labour Standards Act, R.S.S. 1978, c.L-1 and the Saskatchewan Human Rights Code, S.S. 1979, c.S-24 regarding disabled employees and the requirement to accommodate them. The breach was essentially framed in terms of discrimination on the statutorily prohibited ground of disability, and failure to accommodate the plaintiff's disability and provide him with reasonable security of income. See also Calitz "The precarious employment position of ministers of religion: Servants of God but not of the Church" 2017 *Stell LR* 287 ("Servants of God but not of the Church").

[437] *President of the Methodist Conference v Preston* 2013 UKSC 29 ("*Preston*").

[438] *Preston* para 49.

[439] *Convention Concerning Employment Promotion and Protection against Unemployment*, 1988, C168.

[440] Article 4(b) of Recommendation 197 of 2006, referred to in the *Code of Good Practice: Who is an employee?*

[441] See generally, Weiner "Protected rights and religious reform: when in dialogue, how do the South African secular legal system and the ancient orthodox Jewish law of *Kol Isha* intersect and interact" 2017 *SAJHR* 301; Goldstein "Is there a 'religious question' doctrine? Judicial authority to examine religious practices and beliefs" 2005 *Catholic U LR* 497; Sandberg "Defining the divine" 2014 *Eccl LJ* 198; Ogilvie "The meaning of 'religion' and the role of courts in the adjudication of religious matters: An English and Canadian comparison" 2015 *Can Bar Rev* 303; Lenta "Cultural and religious accommodation to school uniforms regulations" 2008 *CCR* 9; Benson "The case for religious inclusivism and the judicial recognition of religious associational rights: A response to Lenta" 2008 *CCR* 10; Nwauche "Distinction without

Courts generally adopt a modest and restrained approach to matters which are "religious" in the context of internal disputes so as not to be inveigled into the self-evidently sensitive area of religious beliefs.[442] Incidentally, what is not clearly articulated in any of the leading employment cases is the reluctance to adjudicate disputes involving ministers of religion.

In stark contrast, in addressing emerging historical sexual abuse claims arising from religious organisations, the judiciary has readily found the relationship between the clergy and the religious institution concerned to be akin to employment relationship thus, justifying the imposition of vicarious liability.[443] A leading labour commentator has noted that in cases involving a minister of religion, "the courts seem to have opted for 'spatial deference' – refusing to consider cases at all – when a more appropriate option would be 'due deference', which would involve considering the case but respecting the expertise of the primary decision-maker where relevant."[444]

Traditionally, South African courts have shared their British counterparts' view that where a relationship is "pre-eminently of a spiritual character… the necessary contractual element which is required before a contract of service can be found is entirely absent."[445] Put simply, the relationship of ministers of religion with their superiors is not, therefore, a relationship of employer and employee but rather a relationship arising from status.[446] They have not, with exception of commendable Labour Court decision in

difference: The constitutional protection of customary law and cultural, linguistic and religious communities – A comment on *Shilubana and others v Nwamitwa*" 2009 *JLP* 67.

[442] See e.g. *De Lange v President Bishop of the Methodist Chrrch of Southern Africa for the time* being 2016 2 SA 1 (CC); *Taylor v Kurstag NO* 2005 1 SA 362 (W); *R v Chief Rabbi of the United Hebrew Congregation of Great Britain and the Commonwelath* 1992 1 WLR 1036; *R (Boldin) v Registrar General* 2013 UKSC 77; *Shergill v Khaira* 2014 UKSC 33.

[443] Case law in this area of vicarious liability is voluminous, see e.g.: *John Doe (G.E.B.#25) v The Roman Catholic Episcopal Corporation of St John* 2018 NLSC 60 (CanLII); *Various Claimants v Catholic Church* 2012 UKSC 56.

[444] Davies "The employment status of the clergy revisited: *Sharpe v Bishop of Worcester*" 2015 44 *ILJ (UK)* 551, 564 ("The employment status of the clergy revisited").

[445] *Rogers v Booth* 1937 2 All ER 751, 754; *Davies v Presbyterian Church of Wales* 1986 ICR 280; 147A; *President of the Methodist Conference v Parfitt* 1984 ICR 176; 183H; *Diocese Southwark v Coker* 1998 ICR 140; 147A.

[446] See, for example, *In Re: National Insurance Act 1911; Re Church Curates* 1912 2 Ch 563; *Re Employment of Ministers of United Methodist Church* 1912 108 LTR 143; *Santokh Singh v Guru Nanak Gurdwara* 1990 ICR 209; *Sharpe v Bishop of Worcester* 2015 IRLR 663. On Canada, see *Salvation of Army, Canada East v Ontario (Attorney-General)* (1992) 88 DLR (4th) 238. See also *Universal Church of the Kingdom of God v Myeni* 2015 36 *ILJ* 2832 (LAC) ("*Myeni*"); *Moleya/Universal Church of the Kingdom of God* 2014 8 BALR 800 (CCMA); *Salvation Army (Southern Africa Territory); Church of the Province of Southern Africa (Diocese of Cape Town) v CCMA* 2001 22 *ILJ* 2274 (LC) ("CPSA"); ("*Mathebula*").

UCKG,[447] perhaps been as imaginative as their British counterparts in attempting to extend employment rights to the clergy by suggesting that there is no actual rule against employment status but equally there is a strong presumption against it (which had not been displaced on the facts).[448]

The sea of change which blew in *Percy*[449] and *Stewart*[450] was abruptly swept away in *Preston* and *Sharpe*. *Percy* involved an associate minister in a Church of Scotland parish. The complaint was under the Sex Discrimination Act 1975 but the decision of the House of Lords involved construing the word "employment". She accepted that she was not an "employee" and so could not claim unfair dismissal.[451]. In a marked departure from the orthodox position, the House of Lords held that she did come within the wider statutory definition more akin to the worker definition in section 82 of the 1975 Act (under contract personally to execute any work or labour) and so could maintain an action against the church for sex discrimination. This decision deliberately did not pronounce on employment status under section 230 of the Employment Relations Act 1996.

The question came directly before the Court of Appeal in *Stewart,* where it upheld a tribunal chairman's finding that a pastor was an employee of the church for which he worked. It held that the previous case law established that a tribunal is no longer required to approach an assessment of a relationship between a minister and their church, presuming that there had been no intention to create legal relations between the parties. Provided that they undertake careful and conscientious scrutiny of the evidence, it is open to a tribunal to conclude that there had been an intention to create legal relations between a church and one of its ministers. The Court of Appeal made it clear that its decision in the case at hand does not entail a general finding that ministers of religion are employees. The Tribunal will have to carefully analyse the particular facts before them before arriving at a conclusion, and these are likely to vary from church to church, and from religion to religion. The approach exemplified in *Stewart* affirms both the Ontario Court of Appeal

[447] *Universal Church of the Kingdom of God v CCMA* 2014 35 *ILJ* 1678 (LC).
[448] See e.g. *Coker*. It should be noted that the presumption in s 200A goes the other way: i.e. in favour of the relationship being that of employment.
[449] *Percy v Church of Scotland Board of National Mission* 2015 UKHL 195. For nuanced exposition, see, Brennan *et al Harvey on Industrial Relations and Employment Law* (2012) paras 113-115.
[450] *Stewart v New Testament Church of God* 2008 IRLR 134.
[451] *Percy* para 13.

decision in *McCaw*[452] and an earlier South African case of *Schreuder*. The plaintiff in *McCaw*, an ordained minister of some twenty years, was struck from the Church rolls because he refused or neglected to take a directed programme for the improvement of pastoral skills. However, the programme he was supposed to take over was never identified by his superiors. The removal of the plaintiff's name from the Rolls meant that he could no longer serve in a pastoral capacity. In sum, the action destroyed his capacity to earn his living as a minister. A similar fate was to befall the pastors in *Mathebula* and *Myeni*.

The plaintiff sued the United Church for wrongful dismissal. The trial judge found McCaw was an employee of the church and awarded him damages for wrongful termination. On appeal, the Church argued that a minister carrying out duties in a pastoral charge was not an employee and therefore the award for damages should not be upheld. In holding that the church unlawfully compromised McCaw's ability to earn his livelihood rendering it liable in damages for the loss sustained by him, the Court of Appeal sidestepped the question whether a relationship of master and servant exists between the church and one of its ministers carrying out a pastoral charge.[453] At the end of the judgment, the court remarked that the issue should remain open until it arises in a case where it is necessary to decide it.

In *Schreuder,* Basson J examined the "*beroepsbrief*" setting out the minister's duties; his duties with regard to home visits ("*huisbesoek*") and sermons; his remuneration in the form of a "*traktement*",[454] and the fact that he fulfils a "calling", does not detract from him being an employee.[455] In *Rev Petrus*[456] the Labour Court reiterated that each matter must be considered on its own merits and its own facts to establish if the parties intended an employment relationship. Crucially, it added that there need not be a written contract to establish an employment relationship. This is in sharp contrast to the law expressed in the English cases. This line of reasoning commended itself to the Labour Appeal Court in *Discovery Health*, where the court said the following:

> "Taking into the provisions of s 23(1) of the Constitution, the purpose, nature and extent of relevant international standards and the more recent interpretations of the definition

[452] *McCaw v United Church of Canada* 1991 4 OR 3d 481 (CA) on appeal from 1988 OR 2d 513 (HC).
[453] *McCaw* paras 24-26.
[454] An amount paid to a person who occupies an office.
[455] *Schreuder* para 20.
[456] *Rev Petrus v Evangelical Lutheran Church* Case no JR 804/10, unreported, 29 June 2012.

> of 'employee' by this court, I do not consider that the definition of 'employee' in s 213 of the LRA is necessarily rooted in a contract of employment. It follows that the person who renders work on a basis other than recognised as employment by the common law may be an 'employee' for the purposes of the definition."[457]

The approximate South African counterparts to *Preston* and *Sharpe* are *Mathebula* and *Myeni*. *Preston*[458] concerned a Methodist minister who took up a role on the Redruth circuit. After approximately two years, performance concerns arose. It was alleged that the Church reorganised the circuits to make any investigation of the complaints impossible and effectively organised Ms Preston's post out of existence. She resigned and sought to claim constructive dismissal. A preliminary point arose as to whether the Tribunal had jurisdiction to hear the complaint and specifically whether she was an employee. They held that she was not, but the EAT reversed that decision which was upheld by the Court of Appeal. The Court of Appeal held that a Methodist minister was an employee and so able to claim unfair dismissal. The judgement went on further appeal to the UK Supreme Court. The Supreme Court in *Preston* allowed the appeal by majority of four to one (Lady Hale dissenting), and held that Ms Preston – was a superintendent minister "pursuant to the lifelong relationship into which she had already entered when she was ordained".[459]

Delivering the majority judgement, Lord Sumpton used as his starting point, section 230 of the Employment Rights Act 1996, which defines an employee as someone who has entered into, or works under a contract of service or apprenticeship. That section is narrower than section 213 of the LRA. Having considered the decisions in *Coker*, *Davies*, *Parfitt*, and *Percy*, Lord Sumpton came to the conclusion that the question whether a minister of religion serves under a contract of employment can no longer be answered simply by classifying the minister's occupation by type: office or employment, spiritual or secular. Nor, in the generality of cases, can it be answered by reference to any presumption against the contractual character of the service of ministers generally. The following extract is from the judgement of Lord Sumpton:

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[457] *Discovery Health* para 51, See also *Kyle* para21-27; *Southern Sun Hotel Interests (Pty) Ltd v CCMA* 2011 23 *ILJ* 2756 (LAC) para 27-29.
[458] For further analysis, see Butlin "The missed opportunity of *President of the Methodist Conference v Preston*" 2014 *ILJ (UK)* 485 ("The missed opportunity").
[459] *Preston* para 26.

> "The primary considerations are the manner in which the minister was engaged, and the character of the rules or terms governing his or her service. But, as with all exercises in contractual construction, these documents and any other admissible evidence on the parties' intentions fall to be construed against the factual background."[460]

Having considered the facts of the relationship between Ms Preston and the church, Lord Sumpton held that the question whether an arrangement is a legally binding contract depends on the intentions of the parties. The question is whether the parties intended the benefits and burdens of the ministry to be subject of a legally binding agreement between them.[461]

Lady Hale, in her dissent, pointed out that there is nothing intrinsic to religious ministry which is inconsistent with there being a contract between the minister and the church. Priests appointed in the Church of England are now engaged on terms which expressly provide that they have the right to complain to an employment tribunal. She also pointed out that it is possible to hold an office and also to be employed. An obvious example is University teachers, who may hold the office of (say) Professor at the same time as having a contract of employment.[462]

In brief, then, the UK Supreme Court has accepted that a minister can be an employee; but the question in each case must be answered according to the manner in which the minister is engaged and the rules governing his or her service. This depends on the intentions of the parties and, as with all such exercises any evidence of the parties' intentions must be examined against the factual context.

In *Sharpe*,[463] the Court of Appeal had to reconsider the vexed question of the employment status of ministers of religion, specifically a "rector" with a freehold office in the Church of England. Sharpe was appointed Rector in the Diocese of Worcester in 2005. He resigned in 2009. He brought proceedings alleging that he had suffered detrimental treatment as a result of making a protected disclosure (a

[460] *Preston* para 10.
[461] *Preston* paras 26.
[462] *Preston* paras 36-37.
[463] For helpful analysis, see Davies "*Sharpe v Bishop of Worcester*" 2015 44 *ILJ (UK)* 551; Sandberg "Not a *Sharpe* turn" 2 May 2015, SSRN: http://ssrn.com/abstract=2611901 (accessed 29-07-2018) ("Not a *Sharpe* turn").

"whistleblowing" claim) under section 43K of the ERA 1996,[464] for which he needed to prove "worker" status and a claim for constructive unfair dismissal, for which he needed to prove that he had a contract of employment. The Employment Tribunal Judge held that there was no jurisdiction to hear the substance of Sharpe's claim because he was neither an employee nor a worker.

The Employment Appeals Tribunal held that the Employment Tribunal Judge had fallen into a number of errors. Cox J criticised the Employment Tribunal's findings that an employment relationship governed by a church law could not also be subject of a contractual relationship. She considered that this had led the Employment Judge to focus solely on whether it was "necessary" to imply a contract and that he had not given proper consideration to the possible presence of an express contract between Sharpe and the Bishop. The ET had failed to conduct full factual analysis mandated by *Preston*. Cox J held that Sharpe could be regarded as a "worker" for the purposes of the whistleblowing claim because the definition of worker did not require the presence of a contract of any kind. The claim was remitted to a freshly constituted Employment Tribunal.

The Court of Appeal found against Sharpe on all points. It held that the Employment Tribunal Judge had not erred in law in concluding that Sharpe did not have a contract and, that even if he did, it was not one of employment. Given that he did not have a contract, he could not be regarded as worker either. The consequences of the courts' tendency to confine cases involving the clergy to their own facts is that *Sharpe* may not have much impact beyond the Church of England.

English case law illustrates the extent to which the absence of an intention to create contractual relationship exerts a vice-like grip on the determination of the employment status of the clergy. Speaking of the subtle and possibly significant difference between the wording of section 230 of the ERA 1996 and of section 213 of the LRA, indicate that the latter provision does not employ the language of contract.

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[464] The South African legislative equivalent is Protected Disclosures Act 26 of 2000. See for e.g. *Minister for Justice & Constitutional Development v Tshishonga* 2009 30 *ILJ* 1799 (LAC); *Potgieter v Tubatse Ferrochrome* 2014 35 *ILJ* 2419 (LAC); *Van Alphen v Rheinmetall Denel Munition (Pty) Ltd* 2013 34 *ILJ* 3314 (LC); *CWU v MTN* 2003 24 *ILJ* 1670 (LC). See also Botha & Siegert "*Minister for Justice and Constitutional Development v Tshishonga* 2009 9 BLLR 862 (LAC)" 2009 *De Jure* 30.

And when section 200A creates a rebuttable presumption "regardless of the form of the contract" that does presuppose the existence of a written contract. Granted that the absence of a contract does not mean that an employment relationship could not be established, has South African approach to the determination of the employment status of the clergy broken free of the contractual approach manifested in *Preston* and *Sharpe*? This question has been answered against the aggrieved pastors in *Mathebula* and *Myeni*. A common under current permeating through *Preston*, *Sharpe*, *Mathebula* and *Myeni* is that the disputes concerned personality clashes or behaviour in breach of conduct rules.[465] In a similar vein to *McCaw*, in *Mathebula*[466] a priest's licence to practice was revoked after he was found guilty of misconduct, this was equivalent of labour law's capital punishment - dismissal. In effect, he was deprived of the means to earn his living as a minister. He brought an unfair dismissal claim before the CCMA. The arbitrating commissioner found that the priest was an employee and this finding was taken on review. The Labour Court concluded that the agreement between the church and the priest was a spiritual agreement aimed at regulating the priest's devotional obligations and there was no intention on the part of the church or priest to enter into a legally enforceable employment contract. Waglay J held that a contract of employment is necessary for purposes of establishing an employment relationship; the priest could not be regarded as an employee of the LRA.

It has been posited that the validity of the *Mathebula* and *Salvation Army (South African Territory*) rest on insecure foundations in the light of the Labour Appeal Court's emphasis on substance rather than form in *Denel*, but this proposition seems doubtful in view of *Myeni*. The pastor in *Myeni* was dismissed from the church and subsequently referred an unfair dismissal dispute to the CCMA. The church raised a point *in limine* that the pastor was not an employee. The commissioner disagreed. The arbitrator also found the pastor's dismissal was fair. On review to set aside the award, the Labour Court

[465] See also *Paxton v The Church of the Province of Southern Africa, Diocese of Port Elizabeth* (unreported case noNH11/2/2/1985 (PE); *Mankatshu v Old Apostolic Church of Africa* 1994 2 SA 458 (TkA); *Sajid v The Juma Trust* 1999 20 *ILJ* 197 (CCMA); *Sajid v Mahomed NO* 2000 21 *ILJ* 1204 (LC).
[466] For a helpful analysis of the case, see Grogan "Workers of the lord: The church versus the CCMA" 2001 *EL* 12.

was asked to first decide whether the pastor was an employee. The court upheld the arbitrator's finding that the pastor was an employee.[467]

In overturning the Labour Court judgment and setting aside the CCMA jurisdictional ruling, the unanimous bench of the Labour Appeal Court determined that section 200A required that there must be a legally enforceable agreement or some contractual working arrangement in place between the parties, for it to apply. The expression "regardless of the form of contract", Jele JA explained simply means that a contract does not have to be formal or in writing.[468] Since, on the facts the parties never intended to engage in any form of legally binding agreement, including an employment contract, section 200A was inapplicable to *Myeni* and for that reason, no employer-employee relationship existed.

Myeni highlights the fact that, while our courts have a wide array of tools to deal with disguised employment relationship, gaps remain in the legal protection of the clergy that the Labour Appeal Court was unwilling to find that the ministers of religion were employees. The outcome in *Mathebula* and *Myeni* have depressingly familiar resonance with *Preston* and *Sharpe*. In short, *Myeni* represents a missed opportunity by the Labour Appeal Court to get to grips with opacities of form. Although the progressive trend displayed in *CPSA* has been curtailed by the esteemed full bench in *Myeni*, it respectfully submitted that the purposive approach displayed in the judgment of Steenkamp J remains a lodestar for dealing with disguised employment relationship.

The point is that what differentiates the clergy in question from employees in standard employment and most other forms of work is the absence of a contract in any form. However, while they may ultimately serve a divine employer, the manner in which they execute their devotional responsibilities, as emerged from *Mathebula/Myeni*, is indistinguishable from any other standard secular employment.[469] The only

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[467] *UCKG* para 3.

[468] *Myeni* paras 36 and 41.

[469] Lady Hale in *Percy* para 146 articulates point most starkly:

> "The fact that the worker has very considerable freedom and independence in how she performs the duties of her office does not take her outside the definition. Judges are servants of the law, in the sense that the law governs all that they do and decide, just as clergy are servants of God, in the sense that God's word, as interpreted in the doctrines of their faith, governs all that they practise, preach and teach. This does not mean that they cannot be

conclusion that may safely be drawn from these cases is that the last word has yet to be spoken on the focal question whether a pastor who signed a document that he is in a voluntary service of church is an employee or not . This is an unfortunate state of precariousness, and it is ardently hoped that, when next it has an opportunity to pronounce on the matter, the court of last resort will unequivocally declare that the relationship of ministers of religion and their faith based organisations is akin to employer-employee relationship. To put it plainly, if it looks like a duck, walks like a duck and quacks like a duck, it is probably one. Such a pronouncement would not only reflect the preponderant weight of academic opinion today[470] as well as ILO Recommendations,[471] it would also finally conclude an aspect of labour law's traditional dilemma that has dragged on for too long. In sum, the clergy represents something of a resistant frontier on the journey towards the legal protection of all workers.

2.9 Send Me (*Thuma Mina*) – Volunteering and Vocational Work

It is remarkable that the notion of volunteering has been reignited following the incoming President Cyril Ramaphosa's quotation of the lyrics of the late Hugh Masekela's song, *Thuma Mina/Send Me*[472] at the end of his *State of the Nation Address*. Later the President told parliament in his reply to the debate on his speech, that many

'workers' or in the 'employment' of those who decide how their Ministry should be put to the service of the Church."

[470] See generally, Le Roux *The World of Work* 28-29; Brennan *et al Harvey on Industrial Relations and Employment Law* (2012); Davies "The employment status of the clergy revisited"; Sandberg "Not a *Sharpe* turn"; Butlin "Missed opportunity"; Calitz "Servants of God but not of the Church".

[471] ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998) Geneva.

[472] *Thuma mina* lyrics by the late Hugh Masekela: [Verse 1]
I wanna be there when the people start to turn it around
When they triumph over poverty
I wanna be there when the people win the battle against AIDS
I wanna lend a hand
I wanna be there for the alcoholic
I wanna be there for the drug addict
I wanna be there for the victims of violence and abuse
I wanna lend a hand
Send me
[Chorus]
Thuma mina (*thuma m'na*).
"*And I heard the voice of the Lord saying, "Whom shall I send, and who would go for us? Then I said, "Here am I! Send me*" – Isaiah 6:8.

South Africans sent him messages consisting only of two words – "Send Me".[473] The "Send Me" campaign, however inspirational conceals the fact that the idea of volunteering is fraught with difficulties. Paid work remains the main *foci* of labour law to the exclusion of other forms of work such as domestic work, child-caring responsibilities, subsistence work, or community work. It is clear from feminist scholarship[474] that a valid claim can be put forward that at least in some cases volunteers have a place in the labour market because they provide a service that must normally be paid for, they often render services in the same workplace as those in gainful employment, and their involvement often impacts on the duties in paid employment.

According to Murray, genuine workers[475] include those who offer their services to religious, charitable, benevolent or sporting organisations. Although volunteer work may be one-off, if it entails continual commitment, it can very easily shift from genuine volunteering work to precarious volunteer work. The boundaries between genuine volunteering work and precarious volunteer work are blurred. So the problem of precariousness is manifest in vocational work.[476] Genuine volunteer workers are distinguished from students undergoing vocational training on the basis that the former has an element of communitarianism, whereas the latter primarily

[473] Maluleke "Op-Ed: The deep roots of Ramaphosa's '*Thuma Mina*'" *Daily Maverick* available at https://www.dailymaverick.co.za/.../2018-02-22-op-ed-the-deep-roots-of-ramaphosa (accessed 30-02-2018).

[474] See e.g. Delaney *et al* "Comparing Australian garment and childcare homeworkers' experience of regulation and representation" 2018 *Econ. & Lab. Re. Rev.* 1; McCann & Murray "Promoting formalisation through labour market regulation: A 'framed flexibility' model for domestic work" 2014 43 *ILJ (UK)* 319; Conaghan "Work, family, and the discipline of labour law" in Conaghan & Kittich (eds) Labour *Law, Work and Family* (2005) 32.

[475] Murray "The legal regulation of volunteer work" in Arup (eds) *Labour Law Market Regulation* (2006) 696; Morris "Volunteering and employment status" 1999 29 *ILJ (UK)* 249.

[476] Landman "Vocational work – Basic rights for students" 2003 24 *ILJ* 1304, 1304 makes the case for protecting students in this context as follows:

> "Student are particularly vulnerable when confronted with the requirements that they perform practical work. The requirement is invariably non-negotiable. Students, when performing this work, may be disadvantaged by long hours, inadequate spread overs, unreasonable overtime, and other unfavourable working conditions. The student may be reluctant to complain about these deficiencies. Like the conventional employee, they occupy a subordinate position in the workplace. Moreover students have an overarching desire to obtain the important certificate, diploma or degree. The possibility of victimization is an over present insidious fear (if only in the mind of the student)."

serves an educational purpose and is often part of the requirements for a formal educational qualification.[477] The distinction is maintained because legislative attention is accorded to students undergoing vocational training and to contracts of learnership, even though limited, as opposed to the position with regard to genuine volunteer workers.

To the extent that it would be difficult to categorise volunteers as employees for purposes of most labour legislations, the problem of precariousness remains unresolved. The finding that an injured volunteer worker is not an employee for the purposes of COIDA, and hence ER24 was delictually liable for the volunteer's claim, was clearly part of the *ratio decidendi* in the *ER24 Holdings*[478] decision. The Supreme Court of Appeal considered the definition of an employee in section 1 of COIDA, which states that an employee is a person who works under a contract of services for remuneration in cash or in kind. In the case at hand the volunteer was not paid and since the court was not prepared to regard the opportunity to travel in the ambulance and to acquire experience and guidance at an accident scene as remuneration in kind.

Section 3(1) of the BCEA provides that the statute does not apply to unpaid volunteers working for an organisation serving a charitable purpose. Equally, students undergoing a vocational training are outside the protective ambit of the BCEA.[479] "Vocational training" is not defined in the BCEA. With respect to the outcome in *Dankie*,[480] it is unclear whether someone outside the formal educational structures, offering his or her services for the sake of gaining experience will be covered. The arbitrator in *Dankie* held that a student undergoing a vocational training in terms of a sponsorship agreement was not an employee for purposes of the BCEA. The student in the case was sponsored by the "employer" to undergo vocational training, at the end of which, the employer would have the first option of offering the student employment. The sponsorship agreement required the student to render services in the laboratory and to perform other functions while undergoing training.

[477] For a detailed analysis of the question of students undergoing vocational work, see Le Roux *The World of Work* 43-46.
[478] *ER24 Holdings v Smith NO* 2007 SA 147 (SCA).
[479] S 1 of the BCEA.
[480] *Dankie and Highveld and Vanadium* 2005 26 *ILJ* 1553 (BCA).

The student approached the bargaining council on the basis that the employer's failure to offer him the same conditions of employment (such as hours of work and paid leave) as the other employees constituted an unfair labour practice in terms of the LRA. According to Le Roux "the commissioner's approach is problematic since the student approached the tribunal in terms of the LRA, but the commissioner dealt with the issue in terms of the BCEA."[481] In addition, the commissioner did not consider the presumption as to who is an employee at all as encapsulated in section 200A of the LRA and section 83A of the BCEA. It is possible that reliance on the presumption may have been beneficial to the student's case.

2.10 Illegality and Public Policy

The hoary question of illegality will always be bound by considerations of public policy.[482] Ample authority[483] makes clear the implications of a statutory prohibition and the applications of the *ex turpi causa* rule. While the corollary to the *ex turpi causa rule*, the *in pari delicto* rule, does, on occasion, relax the former rule, provided that relaxation does not compromise the underlying policy of discouraging illegality of contractual relationships. Whether the court can relax *ex turpi causa* in order to do "a simple justice between man and man"[484] depends upon public policy, ultimately sourced in the Constitution, which, in this context, promotes a society based on freedom, equality and dignity and hence care, compassion and respect for all members of the community.[485] More generally, an employment contract may be unenforceable to the extent that it

[481] Le Roux *The World of Work* 44.
[482] The literature on the illegality is voluminous, see Aquilius "Immorality and illegality in contract" 1941 *SALJ* 337, 1942 *SALJ* 20 and 1943 *SALJ* 59; Macqueen & Cockrell "Illegal contract" in Zimmerman *et al* (eds) *Mixed Legal Systems in Comparative P*erspective (2005) 143; Visser *Unjustified Enrichment* (2008) 44; Kahn (ed) *Contract and Mercantile Law* 2ed (1988) 443-444; Christie & Bradfield *Christie's The Law of Contract in South Africa* 6th ed (2011) 406-417; Van der Merwe *et al Contract: General Principles* 4ed (2012) 177-182; Van der Merwe & Lubbe "*Bona fides* and public policy in contract" 1991 *Stell LR* 91.
[483] See generally, *Jajbhay v Cassim* 2937 AD 539; *Petersen v Jajbhay* 1940 TPD 82; *Swart v Swart* 1971 1 SA 819 (A); *Dhlamini v Protea Assurance Co Ltd* 1974 4 SA 906 (A); *Essop v Abdullah* 1988 1 SA 424 (A); *Brummer v Gorfil Investments (Pty) Ltd* 1999 3 SA 389 (SCA); *Klokow v Sullivan* 2006 1 SA 259 (SCA).
[484] *Jajbhay v Cassiem* 545.
[485] *Kylie III* para 56.

requires the performance of an illegal act, or is linked in some way to illegal activity.[486] Given globally large scale labour migration, the problem regulation of migrant workers has stretched the limits of immigration and labour law.[487]

If the principle is that where illegality exists, and a party may be precluded from taking the benefit of a statutory entitlement, does it mean that many illegal foreign nationals active in South Africa are beyond the protective ambit of labour legislation? For most part, contravention of the provisions of the Immigration Act of 2002 will be a significant factor.[488] Here, there is an intersection of labour and immigration laws. So the central conundrum is that an employer is able to avoid responsibilities under the labour law in the case of unfair dismissal simply on account of the status of the foreigner being illegal.[489] The important question is: Does a constitutional protection of fair labour practices as enshrined in section 23 of the Constitution apply to a person who would, but for an engagement in illegal employment, enjoy the benefits of this constitutional right. Put in another way, the critical question is whether the enforcement of the constitutional right to fair labour practices will sanction or encourage the prohibited conduct, in particular, the right to be compensated for unfair dismissal.

2.10.1 Illegal Foreign Workers

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[486] See generally, Kaganas "Exploiting illegality: Influx control and contracts of service" 1983 4 *ILJ* 254; Jordaan "Influx control and contracts of employment: A different view" 1984 5 *ILJ* 61; Mogridge "Illegal employment contracts: Loss of statutory protection" 1981 10 *ILJ (UK)* 23.

[487] ILO *International Labour Standards - A Global Approach ILO* Geneva (2002) 142. Further readings, see Klaaren "Human rights protection of foreign nationals" 2009 30 *ILJ* 82; Vettori "The extension of labour legislation to illegal immigrants" 2009 *SA Merc LJ* 818; De Jager "The right of asylum seekers and refugees in South Africa to self-employment: a comment on *Somali Association of South Africa v Limpopo Department of Economic Development, Environment and Tourism*: current developments/case notes" 2015 *SAJHR* 401; Costello "Migrants and forced labour: A labour law response" in Bogg *et al* (eds) *Autonomy of Labour Law* (2015) 189.

[488] S 38 of the Immigration Act of 2002 provides that no person shall employ an illegal foreigner or a foreigner whose status does not authorise employment or employ such foreigner in terms and conditions or contrary to his or her status. S 39 provides that it is an offence to knowingly employ an illegal foreigner in contravention of the Act.

[489] For a helpful analysis, see Norton "In transit: The position of illegal foreign workers and emerging labour law jurisprudence" 2009 30 *ILJ* 66 ("In transit") and "Workers in the shadows: An international comparison on the law of dismissal of illegal migrant workers" 2010 31 *ILJ* 1521 ("Workers in the shadows").

At the heart of any employment dispute involving the illegal foreign worker is the effect of the immigration statute. Contracts of employment concluded in contravention of the statute are null and void. Generally, the labour courts and tribunals have declined to intervene where foreigners employed contrary to the provisions of the immigration statute, had been dismissed.[490] The CCMA directive issued on 27 February 2008 in which it instructed commissioners that in the case of disputes involving foreigners, the CCMA should accept all referrals for illegal foreigners; accept jurisdiction; order compensation only in successful disputes and should oppose any review application challenging approach up to the apex court.[491]

Discovery Health[492] is a touchstone case on illegal foreign workers and their protection against unfair dismissal. The facts of the case were the following: a foreigner was dismissed for not being in possession of a valid work permit. The employer raised serious counter argument that since section 38(1) of the Immigration Act prohibits employment of an illegal foreigner, it could no longer employ the foreigner. It also argued that the CCMA did not have jurisdiction to arbitrate the matter because of the invalidity of the underlying contract of employment. The Labour Court upheld the commissioner's ruling that the tribunal had no jurisdiction to determine the fairness of the dismissal of an Argentine national with an expired work permit. In arriving at its decision, the court considered the provisions of the Immigration Act that sanction the employment of illegal immigrants in conjunction with section 39(3) of the Constitution and concluded that foreigners need to be protected because

> "an unscrupulous employer, prepared to risk criminal sanction [under the Immigration Act]… might employ a foreign national and at the end of the payment period, simply refuse to pay her the remuneration due, on the basis of the invalidity of the contract. In these circumstances, the worker would be deprived of a remedy in contract, and [be] … without a remedy in terms of labour legislation."[493]

The judge found that the provisions of the Immigration statute are such that they do not invalidate the contract of employment. Since the contract of employment was not

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[490] See e.g. *Dube v Classique Panelbeaters* 1997 7 BLLR 868 (IC); *Mthethwa v Vorna Valley Spar* 1996 7 11 SALLR 83 (CCMA); *Moses v Safika Holdings (Pty) Ltd* 2001 22 *ILJ* 1261 (CCMA); *Georgiva-Deyanova/Craighall Spar* 2004 9 BALR 1143 (CCMA); *Vundla and Millies Fashions* 2003 24 *ILJ* 462 (CCMA).
[491] Le Roux *The World of Work* 33.
[492] *Discovery Health Ltd v CCMA* 2008 29 *ILJ* 1480 (LC). For further discussion, see Le Roux "Diversification" 2009 30 *ILJ* 49; Dass & Raymond "A consideration of the employment rights of asylum seekers and refugees within South Africa as contextualised by *Watchenuka* and *Discovery Health* judgments" 2017 38 *ILJ* 26.
[493] *Discovery Health* para 40.

invalid, the foreigner was held to be an employee as defined in section 213 of the LRA. The judge summed up the position by concluding that "[the foreigner] was nonetheless an 'employee' as defined by s 213 of the LRA because that definition is not dependent on a valid and enforceable contract of employment."[494]

Discovery Health and *Drzyzga*[495] are first cousins. In the Australian case, a casual truck driver worked irregularly at a meat works. He was notified of his engagement by telephone the night before a shift was to commence. At some point, the driver asked his employer if he could ride along with one of the other driver to learn that unfamiliar route. The employer agreed. The worker's leg was crushed while he was helping the other driver unload meat whilst on his route. The court found that there was no intention to create legal relations, but also there was no valid consideration. Counsel for the worker argued that there was the necessary exchange: the driver was gaining better prospects for casual work at that workplace by learning a new route, and the employer was benefitting because it "would acquire a better and more knowledgeable employee". The court held "the only thing of value which could be said to be produced to [the employer] would be a worker who knew the inner west run if he ever decided to offer [that driver] more casual work or a permanent position."[496]

While *Discovery Health* stands as a high watermark, one commentator[497] is of the view that unless the courts are prepared (relying on section 23 of the Constitution which guarantees a right to fair labour practices to *everyone*) to "read into" the definition of dismissal words to the effect that it also includes the termination of an employment relationship (and not only an employment contract), illegal foreign workers may remain unprotected against unfair dismissals. Even if "reading in"[498] does take place, the real

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[494] *Discovery Health* para 42.
[495] *Drzyzga v G&B Silver Pty Ltd* 1994 10 NSWCC 191. For detailed account, see Orr "Unauthorised workers: Labouring beneath the law? Arup *et al* (eds) *Labour Law and Labour Market Regulation* (2006) 677.
[496] *Drzyzga* 198.
[497] Bosch "Unauthorised workers" 1361-1362.
[498] For insight into "reading in", see Okpaluba "Judicial attitude towards unconstitutionality of legislation: A Commonwealth perspective (part II)" 2000 *SAPL* 437, 454-460 and "Of 'forging new tools" 469-476; Okpaluba & Mhango "Between separation of powers and justiciability: Rationalising the Constitutional Court's judgement in the Gauteng E-tolling litigation in South Africa" 2017 21 *LDD* 1, 9-11.

difficulty lies in the fact that the remedies of reinstatement or re-employment will still be unavailable. The fallback remedy will be compensation.[499]

Just a few years later, the Labour Court had another opportunity to consider the plight of a dismissed foreign national. In *Ndikumdavyi*[500] the employer had offered a Burundian national with refugee status a permanent position in contravention of legislation, but withdrew the offer when the employee's refugee status was about to expire. Rabkin-Naicker J held that a contract concluded in contravention of a statute but involving lawful work gave rise to an employment relationship and that the termination of that relationship constituted a dismissal.

The US Supreme Court decision in *Hoffman Plastics Inc.*[501] provides an illuminating photographic negative to *Discovery* and *Ndikumdavyi*. This case concerned the payment of back pay to a dismissed worker who had not complied with US immigration laws and was thus classified as an "undocumented worker". Chief Justice Rehnquist, who wrote the majority opinion, drew an analogy between employees who worked without immigration authorization and employees who were ineligible for reinstatement or back pay because, they have "committed serious criminal acts", such as trespass or violence against the employers property.

The majority then went on to hold that back pay award could undermine a "federal statute or policy outside of the competence" of the National Labour Relations Board, in this case, immigration laws. The majority characterized the dismissed employee's conduct in completing the relevant immigration laws as "criminal" and hence awarding back pay would condone and encourage future violations of the relevant immigration laws.

Justice Breyer, who dissented with three other justices, held that an award of back pay is consistent with labour law and immigration policy as it would help to deter unlawful activity that both labour and immigration laws seek to prevent. Further, the

[499] Bosch "Unauthorised workers" 166. See also Norton "Workers in the shadows" 167.
[500] *Ndikumdavyi v Valkenberg Hospital* 2012 8 BLLR 795 (LC).
[501] *Hoffman Plastics Inc. v NLRA* 53545 137 (2002) cited in *Kylie III* paras 47-5.

dismissal of the employee was motivated by the employer's anti-union conduct and not by the employee's own conduct.

2.10.2 Sex workers: The Problem of Interactive Service Work and Third Party Involvement in the Service Relationship

Aside depressingly vexed and longstanding problems of legal regulation,[502] sex work coexists side by side with discriminatory enforcement of prostitution laws,[503] gendered precariousness[504] and human trafficking.[505] Crucially, sex work brings us to the sharp end of one of ILO's critical area of importance, namely, "protecting workers from unacceptable forms of work (UFW)".[506] UFW have been identified by the ILO as work in conditions that deny fundamental principles and rights, put at risk the lives, health, freedom, human dignity and security of workers or keep households in conditions of poverty.[507] Sex work, although distinctive in many respects, is part of the increased scope of work to fulfil the bodily needs of others that typifies the past few decades.[508] It is prone to precariousness for social justice (gender, race, migration and social class), psychological (intimacy and stigma) and also economic reasons.

[502] This touches on issues that have arisen in seminal cases: *S v Jordan* 2002 6 SA 642 (CC); *De Reuck v DPP* 2004 1 SA 406 (CC); *SWEAT v Minister of Safety & Security* 2009 6 SA 513 (WCC); *Canada (AG) v Downton Eastside Sex Workers* 2012 SCC 45 (CanLII).

[503] For analysis of the historical roots of discriminatory criminalization of prostitution, see Lefler, Note "Shining the spotlight on Johns: Moving toward equal treatment of male customers and female prostitutes" 1999 *Hasting Women's LJ* 11, 12. As Lefler writes:

> "Much of the differential treatment of prostitutes and johns in the United States today can be traced to the sexual double standard present throughout this country's history. America's past is fraught with sympathy and excuses for the sexual appetites of men, yet condemnation of women for essentially the same behaviour."

[504] For further reflection, see Kruger "Sex workers from a feminist perspective: A visit to Jordan case" 2004 *SAJHR* 149; Fritz "Crossing *Jordan*: Constitutional space for (un) civil sex" 2004 *SAJHR* 230; Le Roux "Sex work, the right to occupational freedom and the Constitutional politics of recognition" 2003 *SALJ* 452.

[505] For a sampling of immense literature, see Waltman "Prohibiting sex purchasing and ending trafficking: The Swedish prostitution law" 2011 *Mich J Int'l L* 133; Pope "A free labour approach to human trafficking" 2010 *University of Pennsylvania LR* 1849; Chacon "Misery and myopia: Understanding the failures of US efforts to stop human trafficking" 2006 *Fordham LR* 2977; Sutherland "Work, sex, and se work: Competing feminist discourses on the international sex trade" 2004 *Osgoode Hall LJ* 139; Farrior "The international law on trafficking in women and children for prostitution: Making it live up to its potential" 1997 *Harv Hum Rts J* 213.

[506] *The Director-General's Programme and Budget proposals for 2014-15*, Report II (Supplement), 2012 International Labour Conference, 102nd Session, Geneva.

[507] Fudge & McCann "Unacceptable forms of work: A global and comparative study" ILO 2015, xiii.

[508] McDowell *Working Bodies: Interactive Service Employment and Workplace Identities* (2009).

Hence, sex workers are an especially vulnerable class exposed to exploitation and abuse by a range of people with whom they interact, including their employers.[509]

Unfortunately, it is equally clear that the fact that sex work is gendered more or less accurately reflects reality, for better or for worse.[510] The question of employment status of sex workers is complicated by turpitude associated with commercial sex.[511] What compounds the difficulty is that the sex worker invites the public generally to come and engage in unlawful conduct.

Undoubtedly, a lot of ink has been spilled over *Kylie*,[512] but the Australian predecessor *Phillipa*[513] offers a better entry point into the vexed question of whether the illegal activity of sex workers does not *per se* prevent the latter from enjoying a range of constitutional rights. The inquiry inevitably entails asking what constitutional protections are necessarily removed from a sex worker, given the express criminal prohibition of their employment activities in terms of the penal code.

As much as sex workers cannot be stripped of the right to be treated with dignity by their clients, by logical extension, this should also mean that their

[509] For a vivid picture 19th century global sex trade, see Van Onselen's fascinating biography of the life of Joseph Silver - *The Fox & The Flies – The Criminal Empire of the Whitechapel Murderer* (Vintage Books, 2007). See also Shucha "White Slavery in the Northwoods: Early U.S. anti-sex trafficking and its continuing relevance to trafficking reform" 2016 *Wm & Mary J Women & L* 75.

[510] Johnson, Note "Buyers without remorse: Ending the discriminatory enforcement of prostitution laws" 2014 *Texas LR* 7171, 720.

[511] The appellant in *Kylie and Van Zyl t/a Brigitte's* 2007 28 *ILJ* 470 (CCMA) ("*Kylie I*"); *Kylie v CCMA* 2008 29 *ILJ* 1918 (LC) ("*Kylie II*") and *Kylie v CCMA* 2010 31 *ILJ* 1600 (LAC) "*Kylie III*") was a sex worker who was employed in a massage parlour to perform various sexual services for a reward. On 27 April 2006, appellant was informed that her employment was terminated, apparently without a prior hearing. She then refer a dispute for arbitration before the tribunal. Before evidence could be heard, respondent "employer" enquired as to whether the CCMA had jurisdiction to hear the matter in the light of the fact that the appellant had been employed as a sex worker and accordingly her employment was unlawful. On the basis that prostitution still constitutes a criminal offence in terms of the Sexual Offences Act of 1957, the arbitrator in *Kylie I* ruled that the CCMA did not have jurisdiction to arbitrate on an unfair dismissal in a case of this nature. For analysis of the award, see Bosch & Christie "Are sex workers employees?" 2007 28 *ILJ* 804. See generally, Bonthuys & Monteiro "Sex for sale: The prostitute as businesswoman" 2004 *SALJ* 659; Murray "Labour regulation in the legal sex industry in Victoria" 2003 *AJLL* 321; De Vos "Sex workers and the right to fair labour practice" February 5th 2008 http://www.constitutionallyspeaking.co.za (accessed 2-04-2018).

[512] For helpful analysis of the case, see Pillay "Wither the prostitution industry?" 2014 35 *ILJ* 1749; Selala "The enforceability of illegal employment contracts according to the Labour Appeal Court: Comments on *Kylie v CCMA* 2010 (4) SA 383 (LAC)" 2011 *PER/PELJ* 207; Muswaka "Sex workers and the right to fair labour practices: *Kylie v CCMA*" 2011 *SA Merc LJ* 33; Bosch & Christie 2007 28 *ILJ* 804.

[513] *Phillipa v Carmel* 1997 AILR WI 2523 of 1995.

employers incur a similar obligation. Since the prohibition with regard to sex work concerns the nature of the job, unlike foreign and child workers, who are prohibited from assuming certain forms of employment because the prohibition is directed at "who does the job rather than the job itself",[514] a number of questions require further consideration. In particular, does recognising a sex worker's claim based on "a constitutional right" mean that the court would be sanctioning or encouraging activities that the legislature has constitutionally decided should be prohibited? A different way of posing the essential question is to ask, as matter of public policy, court (and tribunals) by their actions ought to sanction or encourage illegal conduct in the context of statutory and constitutional rights. The intriguing question then becomes what discretion do the courts have in the determination of a remedy, for an alleged unfair dismissal of a sex worker? If reinstatement is not practicable, can the court order compensation?

In *Phillipa* the Judicial Registrar–Ritter, in the Industrial Court of Australia had to determine a number of legal questions about the nature of the employment relationship and the so called "illegality" of the sex industry before he could determine whether or not Phillipa had been unfairly dismissed. In this matter the fact that the sex worker was working in a brothel in an area subject to the containment policy assisted the case. The fact that (the respondent) Carmel, the madam, applied certain rules and policies also strengthened Phillipa's case that she was an employee.

Ritter found that Phillipa was an employee, even though the relationship between a madam and a sex worker does not neatly fit into standard definitions. However, based on the total picture of evidence before him, Ritter concluded that in this case Phillipa was an employee.

Ritter had to determine whether the fact that the industry was "illegal" or "immoral" had the effect of denying Phillipa the right to compensation under the law. Ritter determined that previous judgments, and the fact that the Taxation Office was

[514] *Kylie III* para 29.

prepared to tax so called "illegal" earnings, meant that Phillipa should not be denied compensation.

Ritter finally looked at the particular reasons that led to Phillipa's dismissal – alleged drunkenness and disruptive behaviour. Ritter determined that evidence by another sex worker that everyone had to drink to deal with the work, was reasonable and not a valid reason to dismiss a sex worker and that Phillipa was not unreasonably disruptive. Ritter took the view that these particular circumstances were probably just excuses for what was really a power struggle between the two. He awarded Phillipa compensation of 8 weeks pay. In this regard *Phillipa* provides an engaging contrast to the approach adopted by the Labour Court and Labour Appeal in *Kylie*. In so as far redress is concerned, *Phillipa* fared far much better than her South African counterpart.

If we turn to *Kylie*[515] on review, Cheadle AJ held that the definition of employee in section 213 of the LRA was wide enough to include a person whose contract of employment was unenforceable in terms of the common law. However, he held that a sex worker was not entitled to protection against unfair dismissal as provided in terms of section 185 (a) of the LRA because it would be contrary to a common law principle which had become entrenched in the Constitution that courts "ought not to sanction or encourage illegal activity".[516] As a constitutional imperative, the statutory rights are trumped which "renders a sex worker's claim to statutory right to fair dismissal and LRA unenforceable."[517]

On appeal Davis JA, observed that courts have not always espoused the inflexible approach adopted by Cheadle AJ to illegal transactions but have on occasion, considered whether to refuse to recognise any implication of an illegal act after an inquiry into the purpose of the criminalizing statute and the effect of the prohibition.[518] As to the fascinating question concerning discretion to grant primary remedy for an alleged unfair dismissal of a sex worker, Davis JA held that "this judgement does not hold that, when a sex worker has been unfairly dismissed, first

[515] Further on the case, see Le Roux "Diversification" 2009 30 *ILJ* 49.
[516] *Kylie* paras 62-63.
[517] *Kylie II* para 91.
[518] *Kylie III* para 46.

respondent or a court should or can order her reinstatement, which would manifestly be in violation of the provisions of the Act." What is clear is that the prospects of reinstating an "employee" such as Kylie in her employment even she could prove on the evidence, that her dismissal was unfair is effectively obliterated because to do otherwise is manifestly against public policy. Could Kylie secure compensation like her Australian counterpart, Phillipa? In the words of Davis JA "such compensation would be inappropriate in a case where the nature of the services rendered by the dismissed employee are illegal."[519] When it comes to the question of remedy, having regard to the "on the one hand the *ex turpi causa* rule which prohibits enforcement of illegal contracts and on the other public policy sourced in the values of the Constitution, which, in this context, promotes a society based on freedom, equality and dignity and hence care, compassion and respect for all members of the community",[520] it is fair to say that unlike Phillipa, Kylie's victory was illusory.

The English Court of Appeal decision in *Quashie*[521] sheds a light on the tight link that British labour law creates between service workers, gender and precariousness in the context of sex work.[522] The case concerned whether Quashie, a lap dancer, was self-employed or whether she was an employee under a contract of employment. Quashie worked few times a week in a club, paid a fee to work there, was defined as an independent contractor in the club owner's manual and the clients took part in the process of payment. The Court of Appeal overturned the decision of the Employment Tribunal and stated that there was no mutuality of obligations such as to constitute a contract of employment, since there was no wage-work bargain between the parties. The club had no obligation to pay the dancer "anything at all",[523] and therefore, as the court explained, "the dancer took the economic risk".[524] Under the guise of dubious lack of mutuality of obligations, *Quashie* as compared to *Phillipa* and *Kylie* is not sympathetic to the fact that sex workers form part of a vulnerable class

[519] *Kylie III* para 53.
[520] *Kylie III* para 56.
[521] *Stringfellow Restaurants Ltd v Quashie* 2012 EWCA Civ 1735.
[522] For a helpful analysis of the case, see Albin "The case of *Quashie:* Between the legislation of sex work and precariousness of personal service work" 2013 42 *ILJ (UK)* 180 ("The case of *Quashie*").
[523] *Quashie* para 45.
[524] *Quashie* para 51.

by the nature of the work. Sex workers perform and the position they hold means that they are subject to potential exploitation, abuse and assaults on their dignity,

Phillipa, *Kylie*, *Quashie* trilogy invites consideration of discourses of emotional labour and the multiple work relations in the form of worker-employer-customer triangle. As already noted, lap dancing is an integral part of what is termed as "sex work". What is also clear is that sex work is a form of personal service, which is embodied and interactive.[525] Addressing the complex and elusive issue of emotional labour, Albin writes:

> "Studies on service work stress that with growth of services, there has been a transformation of the embodied attributes of workers. These have become part of the service: 'their height, weight, looks, attitudes are part of the exchange, as well as part of the reason why some of them get hired and others do not'. Emotions too are central to personal service work. The management of feeling needed by workers in their work, especially in contract with clients or customers requires manipulation by the worker herself in the process of producing these emotions. The embodiment of service work and the production of emotions are interconnected with the interactive feature of personal service work, i.e. the contact between workers and clients. In interactive service work, a triangle of relationship is constructed between the worker, the employer and the client. Not all forms of work require such contact (working on the assembly line being a prominent example), but in service work such contact with customers or clients is very much in evidence – salons, fast-food restaurants, bars, childcare, nursing etc."[526]

Lap-dancing like e-hailing driving brings the sharp end of the overarching role customers take in diverse employing functions that impact the traditional personal and bilateral worker-employer relationship. The entry of third parties into the bilateral and personal work relationship has been a central point of interest in labour law literature in recent times.[527] The effects of consumption and of consumers on work relationships is generally neglected in labour law theory.[528]

The provision of tips is a familiar method through which customers contribute to worker's remuneration. This impacts on precariousness of workers because it

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[525] See Hochschild *The Managed Heart: The Commercialisation of Human Feeling* (1983); Fogel & Quilan "Dancing naked: Precarious labour in the contemporary female strip trade" 2011 *Can Soc. S* 51.
[526] Albin "The case of *Quashie"* 7-8 (footnotes omitted).
[527] Albin "A worker-employer-customer triangle: The case of tips" 2011 40 *ILJ (UK)* 181 ("The case of tips").
[528] Albin "Labour law in a service world" 2010 *MLR* 959; Fudge "The legal boundaries of the employer, precarious workers, and labour protection" in Davidov & Langille (eds) *Boundaries and Frontiers of Labour Law* (2006) 295.

heightens the latter's involvement in the management of the service relationship. The lure of tips means that workers adopt specific posture to please customers and fulfil their wishes, not only for the benefit of the establishment owner but also in the hope that, by responding to the customer whims, their earnings will rise, a goodwill be said to the employer, etc.[529] Most often, of course, in service work like lap-dancing customer involvement is most amplified. Once the worker is overly dependent on a third party for earnings, she becomes less loyal to her employer and more biased towards the paying customer.

In case of Uber/Lyft partner-drivers, although no supervisor physically observes drivers' work, the star-rating system casts customers as virtual supervisors who facilitate the monitoring and enforcement of conduct codes. If a driver does not maintain star-rating, he or she is archived, a metaphor for being booted off the app. This is a common thread running through a companion Uber/Lyft cases across jurisdictions.[530] Clearly, the precariousness resulting from customer involvement in the work of tip receivers or customer ratings in the case of e-hailing drivers warrants incorporation of consumers into labour law theory.

2.11 Judicial Officers

At first blush, the position of a judicial office holder has many characteristics of employment, and in particular judges do not have freedom to work as they please and the detailed terms of their appointment are akin to employment. However, there are features untypical of employment. At the most profound level, a judge's obligations derive from the office itself, personified by the taking of the judicial oath.[531] There are substantial safeguards in place to maintain and preserve the constitutional independence of the judiciary. These include the guarantee of continued judicial independence pursuant to sections 174-177 of the Constitution; the fact that an independent body exists to investigate allegations of judicial misconduct in terms of the

[529] Albin "The case of tips" 184
[530] See e.g. *Cotter*; *O'Connor*; *Aslam v Uber BV* 2016 UKET 2202551/2015 ("*Aslam*"); *Uber BV v Aslam* 2017 UKEAT ("*Uber BV*"); *Morekure*; *Uber SA*.
[531] *Gilham v Ministry of Justice* 2017 EWCA Civ 2220 para 66 ("*Gilham*").

procedures under Judicial Service Commission Act 9 of 1994;[532] and the fact that separation of powers between the judiciary, executive and legislature is protected by constitutional practice whereby the executive or legislature abstains from interference with the judicial function and vice versa. This is reinforced by security of tenure for judges. A judge can only be removed in the limited circumstances of incapacity or misconduct.[533]

The starting point of analysis, uncontentiously, is the recognition that the constitutional and institutional independence of the judiciary[534] as well as questions pertaining to separation of powers,[535] constitutionalism and the rule of law[536] place

[532] *Nkabinde v Judicial Service Commission* 2016 4 SA 1 (SCA) paras 42-50.

[533] This brings to mind an intricate tale of byzantine twists and turns concerning Hlophe/Jafta/Nkabinde controversy. Paradoxically, this conundrum continue to generate copious case law. In this regard, see *Hlophe v JSC* 2009 4 All SA 67 (GJ); *Langa CJ v Hlophe* 2009 4 SA 382 (SCA); *FUL v Acting Chairperson of the JSC* 2011 1 SA 546 (SCA); *Acting Chairperson: JSC v Premier of the Western Cape Province* 2011 3 SA 538 (SCA); ***Hlophe v Premier Western Cape*** 2012 6 SA 13 (CC); *Nkabinde v JSC President of JCC* 2011 1 SA 279 (GJ); *Nkabinde v JSC* 2016 4 SA 1 (SCA); *Nkabinde v JSC* 2017 3 SA 119 (CC). See also Maloka "Protecting the foundation and magnificent edifice of the legal profession: Reflections on *Thukwane v Law Society of the Northern* Provinces 2014 5 SA 513 (GP) and *Mtshabe v Law Society of the Cape of Good Hope* 2014 5 SA 376 (ECM) 2015 *PER/PELJ* 2643, 2646-2649. The *Report of the Judicial Conduct Tribunal: In Re Judge NJ Motata* (20 April 2018) read together with the pronouncement in *Mulaudzi v Old Mutual Life Insurance Co (SA) Ltd* 2017 6 SA 90 (SCA) ("*Mulaudzi*") represent deep cracks in the judicial edifice. In *Law Society of Upper Canada v Kerry Parker Evans* 2006 ONLSHP 4, the resignation of Judge Kerry Parker Evans in the face of virtually finding of guilt for sexual misconduct averted judicial nightmare for the Canadian judiciary The unprecedented events giving rise to the ongoing Hlophe/Jafta/Nkabinde saga have their genesis in four related cases which were heard by the Constitutional Court during March 2008, conveniently referred to as the "Zuma/Thint cases" - *Zuma v NDPP* 2009 2 SA 277 (SCA); *Zuma v NDPP* 2009 1 SA 1 (CC). For analysis of the Thint/Zuma search and seizure case law, see Okpaluba "Constitutional protection of the right to privacy: Evaluating the contributions of Chief Justice Pius Langa" (2015) *AJ* 407. However, for a decade there is still no signs of a let up on the Zuma litigation, see *Zuma v NDPP* 2018 1 SA 200 (SCA); *Zuma v DA* 2014 All SA 35 (SCA).

[534] Chapter 8 of the Constitution, s 165. See *SA Association of Personal Injury Lawyers v Heath* 2001 1 SA 883 (CC) paras 45-46; *Mhlekwa v Head of the Western Tembuland Regional Authority: Feni v Head of the Western Tembuland Regional Authority* 2001 1 SA 574 (TkD); *Van Rooyen v S* 2002 5 SA 246 (CC). See generally, Siyo & Mubangizi "The independence of South African judges: A constitutional and legislative perspective' 2015 *PER/PELJ* 42.

[535] *Justice Alliance of SA v President of the RSA* 2011 5 SA 388 (CC) paras 38-40; *Dawood v Minister of Home Affairs* 2000 8 BCLR 837 (CC) para 7; *Minister of Public Works v Kylami Ridge Environmental Association* 2001 7 BCLR 652 (CC) para 36.

[536] See e.g. *EFF v Speaker of the National Assembly* 2018 2 SA 571 (CC); *UDM v Speaker of the National Assembly* 2017 5 SA 300 (CC); *EFF v Speaker of the National* Assembly 2016 3 SA 580 (CC); *Pharmaceutical Manufacturers Association of SA: Ex parte President of the RSA* 2000 1 SA 674 (CC) para 85; *President of the RSA v SARFU (3)* 1999 10 BCLR 1059 (CC); *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1991 1 SA 374 (CC) para 56-58; *President of the RSA v Hugo* 1997 4 SA 1 (CC) paras 6-8 (CC). For helpful analysis, see Okpaluba "Constitutionality of legislation relating to the distribution of governmental powers in Namibia: A comparative approach" in Hinz *et al* (eds) *The Constitution at work: 10 years of Namibian nationhood* (2002) 110, 115-119.

members of the "least dangerous branch"[537] outside the purview of labour regulation. Issues regarding independence of the judiciary and the contours of separation of powers remain as ever the staple diet of generations of constitutional law scholars.[538] It goes without saying that these cursory remarks on the judiciary are no more than an introduction to a vast and complex subject, raising questions which can only be pursued further by subject specialists.[539] What can be distilled from the judiciary cases on the employment status is that the exclusion of judicial office holders from labour law regulation may not always prove to their advantage.

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[537] Bickel *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962) 1. To this should be added the eloquent words of O'Linn J in *S v Heita* 1992 NR 403, 409G-I:

> "The judiciary has no own defence force or police force. They are not politicians. They cannot descend into the arena to defend themselves. They can, but they should not, generally, descend into the arena by making use of the remedy of an ordinary citizen to institute actions for damages or *injuria*."

[538] The literature is immense. Only a select list of the more recent writings on twenty years of constitutional enterprise can be given. See *Special Issue of SAPL* 2017: Sachs "Recalibator of axioms: a tribute to Justice Sandile Ngcobo" 2017*SAPL* 1; Calland "Sandile Ngcobo: a short study in judicial leadership" 2017 *SAPL* 1; Brundige "Adjudicating the right to participate in the law-making process: a tribute to retired Chief Justice Ngcobo" 2017 *SAPL* 1; Mhango "Chief Justice Sandile Ngcobo's separation of powers jurisprudence" 2017 *SAPL* 1; Marcus & Du Plessis "The importance of process and substance" 2017 *SAPL* 1; Albertyn "Introduction to special issue: symposium in honour of retired Deputy Chief Justice Dikgang Moseneke" 2018 *SAJHR* 1; Hodgson "The mysteriously appearing and disappearing doctrine of separation of powers: toward a distinctly South African doctrine for a more radically transformative Constitution" 2018 *SAJHR* 57; Wolf "The removal from office of a President: Reflections on section 89 of the Constitution 2017 *SALJ* 1; Ngcobo "Sustaining public confidence in the judiciary: An essential condition for realising the judicial role" 2011 *SALJ* 147; Price & Bishop *A Transformative Justice: Essays in Honour of Pius Langa* (2015); *Special Issue Marking the 120th Anniversary – The Impact of the Constitution on South African Law: Ten Years* 2004 *SALJ* 1

[539] This has also spawned a rich legacy of scholarship. See generally, Beach & Lagoonbay " The Constitutional Court in muddy waters?: Some comparative reflections on the benefits of an active judiciary" 2016 *CCR* 3; Klug " Finding the Constitutional Court's place in South Africa's democracy: the interaction of principle and institutional pragmatism in the court's decision making" 2010 *CCR* 1; Moseneke "Courage of principle" 2015 *CCR* 4; Swart & Coggin "The road not taken: Separation of powers, interim interdicts, rationality review and e-tolling in *National Treasury v Opposition to Urban Tolling* 2015 *CCR* 14; Barolsky *"Glenister* at the coalface: Are the police part of an effective independent security service?" 2015 *CCR* 15; Raboshakga "The separation of powers in interim interdict application" 2015 *CCR* 2; Corder "Principled calm amidst a shameless storm: Testing the limits of the judicial regulation of legislative and executive power" 2009 *CCR* 7; Okpaluba "Can a court review the internal affairs and processes of the legislature? Contemporary developments in South Africa" 2015 *CIJSA* 183; "Justiciability, constitutional adjudication & the lawmaking process: A Commonwealth reflection I" 2003 *SJ* 146 and 2004 *SJ* 57; "Justiciability, constitutional adjudication and the political question doctrine in a nascent democracy: South Africa (part 1) 2003 *SAPL* 331 and "(part 2)" 2004 *SAPL* 114; "Institutional independence & the constitutionality of legislation establishing lower courts & tribunals I" 2003 *JJS* 109 and 2004 *JJS* 149; "Justiciability and constitutional adjudication in the Commonwealth: The problem of definition I and II" 2003 *THRHR* 424; and 2003 *THRHR* 610; Carpenter "Without fear or favour – Ensuring the independence and credibility of the weakest and least dangerous branch of government" 2005 *TSAR* 499 and "Judiciaries in the spotlight" 2006 *CILSA* 361.

A discussion whether the judicial office is inconsistent with employee status and judicial independence must inevitably take account of the judiciary case law from England.[540] The leading decision of the Northern Ireland Court of Appeal in *Percival-Price*[541] concerned the employment status of judges. In this case, the chairmen of a number of statutory tribunals brought proceedings in the Industrial Tribunal claiming that the terms of the judicial pension scheme were discriminatory on the ground of sex. The definition of employment in section 1(7) of the Equal Pay Act (Northern Ireland) 1970 was identical to that in the Sex Discrimination Act 1975. It covered employees in the extended sense and section 1 (9)(*a*) provided that it extended to Crown service, "other than service of a person holding a statutory office". The Industrial Tribunal held that it had jurisdiction to determine the claims, and that decision was upheld by the Northern Ireland Court of Appeal. The court held that the applicants were "workers" within the meaning of article 119 of the Treaty of Rome (now article 157 of the Treaty on the Functioning of the European Union).[542] However, Sir Robert Carswell also went on to note that the position of district judges was distinctly different from paradigmatic employment. He concluded that "the position of District Judge is not a role which in my view can properly be defined in terms of any contractual relationship". In short, the answer lies in the absence of any contractual relationship. There was no intention by the parties to create any such relationship.

The threshold issue which arose recently for determination before the Court of Appeal in *Gilham* was whether the judge was a "worker" as defined in section 230 of Employment Rights Act of 1996 ("ERA"). The decision of Lord Underhill in *Gilham* is of crucial importance and the facts and history require careful examination. The appellant a District Judge brought proceedings in the Employment Tribunal against the Ministry of Justice under Part IVA of the Employment Rights Act 1996 claiming that she had been subjected to various detriments contrary to section 47B of the Act – that is, for whistleblowing (or, more formally, making protected disclosures). The detail of the

[540] See e.g. *Terrel v Secretary of State for the Colonies* 1953 2 QB 482*; Knight v Attorney-General* 1979 ICR 194; *Shaikh v Independent Tribunal Service* UKEAT/0656/03; *Christie v Department of Constitutional Affairs* 2007 ICR 1553; *O'Brien v Ministry of Justice* 2008 EWCA 1448.
[541] *Percival-Price v Department of Economic Development* 2000 IRLR 380.
[542] *Percival-Price* para 26.

disclosures broadly concerned what were said to be poor and unsafe working conditions and an excessive workload in the courts where the appellant worked, affecting both herself and the other judges working there. She also brought a claim for disability discrimination.

The crisp question was whether a judicial whistle-blower was a "worker" within the ambit of section 230 of ERA. Workers are defined in section 230(3)(*b*) of the ERA as those working under "any other contract… whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual." To spell it out, it was her primary contention that she fell within the purview of section 230(3) because she indeed worked under a contract with the Ministry of Justice or the Lord Chancellor. Another string to the appellant's bow was that the court should invoke section 3 of the Human Rights Act to achieve a construction of section 230(3) under which she could be treated as a worker in order to avoid a breach of her rights under article 10 of the European Convention on Human Rights.

The answer of Lord Chancellor to these submission was that the relationship established by the appointment of a district judge – or indeed any judge – is not contractual in nature, so that the appellant's case accordingly falls at step (i). It is also his case that he is not a party to any such contract as might be found (step (ii)), nor are the work or service which a judge performs done "for" him (step (iv)); but although those points are in principle capable of being free-standing answers to the claim he treats them mainly as feeding into the primary question of whether there is a contract at all.[543]

The Employment Tribunal dismissed Gilham's complaint under Part IVA on the grounds that she was not a worker within the meaning of the 1996 Act, because she was an office-holder and not a party to a contract falling under either limb of section 230(3). The same conclusion was reached by Simler P in the Employment Appeal Tribunal. After analysing the clergy cases, Lord Justice Underhill noted that the central proposition principle established by the clergy cases is that there is nothing inconsistent

[543] *Gilham* para 8.

in the holder of an office being party to a contract to perform the duties of that office.[544] Next, the court then turned attention to the judiciary cases. In assessing the kind of legal relationship, court found that the appellant must be taken to have understood that judges were in a different position from ordinary civil servants or Crown employees. Consequently, Gilham was not a worker within the meaning of section 230(3).

The judgement of the Indian Supreme Court in *Pratibha Bonnerjea*[545] offers some insight into the main reason why a holder of a constitutional office cannot fall into the definition of an employee. The Indian Supreme Court summarised the position in these words:

> "Independence and impartiality are two basic attributes for a proper exercise of judicial functions. A judge of a High Court is, therefore, required to discharge his duties consistently with the conscience of the Constitution and the laws and according to the dictates of his own conscience and he is not expected to take orders from anyone. Since a substantial volume of litigation involves Government interest he is required to decide such cases independently and impartially without in any manner being influenced by the fact that the Government is a litigant before him. In order to preserve his independence his salary is specified in the Second Schedule, vide, article 221 of the Constitution. He, therefore, belongs to the third organ of the State which is independent of the other organs, the Executive and the Legislature. It is, therefore, that a person belonging to the judicial wing of the State can never be subordinate to the other two wings of the State. A Judge of the High Court, therefore, occupies a unique position in the Constitution. He would not be able to discharge his duty without fear or favour, affection or illwill, unless he is totally independent of the executive, which he would not be if he is regarded as a Government servant. He is clearly a holder of a constitutional office and is able to function independently and impartially because he is not a Government servant and does not take orders from anyone."[546]

The bedrock of judicial independence is the presumption of judicial integrity and impartiality.[547] It is a high presumption, not easily displaced.[548] However, it cannot

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[544] *Gilham* para 40.

[545] *Union of India v Pratibha Bonnerjea* 1996 AIR SC 690.

[546] *Union of India v Pratibha Bonnerjea* 696.

[547]For an insight into the emerging issues on impartiality arising from South African constitutional enterprise, see Okpaluba "Problems and challenges of the Judicial Office: Matters arising from *Bula v Minister of Home Affairs*" 2014 *SALJ* 631; Okpaluba & Juma "The Dialogue between the bench and the bar: implications for adjudicative impartiality" 2011 *SALJ* 659; "The problems of proving actual or apparent bias: Analysis of contemporary developments in South Africa" 2011 *PER/PELJ* 14; "Pecuniary interests and the rule against adjudicative bias: The automatic disqualification or objective reasonable approach?" 2011 *JJS* 97 and "Waiver of the right to judicial impartiality: Comparative analysis of South African and Commonwealth case law" 2013 *SAPL* 1; Juma "International dimensions of the rules of impartiality and judicial independence: Exploring the structural impartiality paradigm" 2011 *SJ* 17.

[548] See e.g. *Mulaudzi* paras 47-61; *R v Poddolski* 2018 SKPC 13 (CanLII); *Christoforou v John Grant Haulage Ltd* 2017 CHRT 17 (CanLII); *Cojocaru v British Columbia Women's Hospital & Health Centre* 2013 SCC 30 (CanLII). See also Roussy "Cut-and paste justice: A case comment on *Cojocaru v British Columbia Women's Hospital & Health Centre*, 2015 52-3, 2015 CanLIIDocs 57" 2015 *Alberta LR* 761.

coexist with employment status nor co-mingling of the judiciary with other organs of the State.

It was held in *Hannah*[549] that a judge is not an employee "given the court's independence guaranteed in article 78(2) of the Constitution a Judge … cannot be said to be subject to the supervision and control of the State in the execution of his/her judicial functions."[550] At issue was unilateral withdrawal of certain benefit enjoyed by the judge who was a foreign national. The question the Namibian Labour Court was to answer was whether the applicant, a judge of a superior court of record, was an employee of the government for purposes of application of labour legislation. This was jurisdictional prerequisite for the court to hear and determine the matter under the Labour Act 35 of 1992. Ngoepe AJ held that if the presence of supervision and control is indicative, even if to a limited extent of an employer-employee relationship, then, the absence thereof must, equally, go some distance towards negating the existence of such relationship.

The decision in *Khanyile* shows that magistrates are not employees of the State because the Constitution demands the judiciary to be independent.[551] The specific issues before the SCA in *Reinecke*[552] related to a claim for damages based on repudiation of contract.[553] In labour law parlance, constructive dismissal caused by intolerable working conditions. The High Court had held that the LRA was not directly applicable to a judicial officer but a contract of employment existed between the parties and awarded damages to the magistrate for breach of contract. On appeal, the SCA sidestepped the question whether a magistrate is entitled to protection under the LRA. The court

[549] *Hannah v Government of the Republic of Namibia* 2000 4 SA 940 (NmLC).
[550] *Hannah* 943G. For helpful analysis of the case, see Okpaluba "Constitutionality of legislation relating to the exercise of judicial power: the Namibian experience in comparative perspective (part 2)" 2002 *TSAR* 436; 440-442 ("Constitutionality of legislation relating to the exercise of judicial power").
[551] *Khanyile v CCMA* 2004 *ILJ* 2348 (LC) para 30. See also Olivier "Reflections on the essence of employment status: Ministers of religion, judges and magistrates" 2008 *TSAR* 1.
[552] *President of RSA v Reinecke* 2014 35 *ILJ* 1485 (SCA): Van Eck & Diedricks "Are magistrates without remedy in terms of labour law?" 2014 35 *ILJ* 2700.
[553] The breakthrough case is *Woods v WM Car Services (Peterborough) Ltd* 1982 ICR 693, 698 in which Lord Denning formulated the duty of mutual trust and confidence specifically to ensure that employees who were "squeezed out" by their employer could claim constructive dismissal on the basis of breach of the implied term and repudiation of contract. See also *Pretoria Home for the Care of the Retarded* v *Loots* 1997 18 *ILJ* 981 (LAC).

observed that the issue of judicial independence is not a valid justification for denying magistrates labour protection. In the unanimous opinion of the SCA:

> "Nothing in the judgment affects the constitutional position of magistrates as part of the judiciary and the judicial authority of this country in terms of Chapter 8 of the Constitution. The narrow question is simply whether … magistrates were employees of the State in terms of contracts of employment… A finding that they were so employed does not impact upon their independence, which is constitutionally guaranteed."[554]

The decision in *Reinecke* seems to have generally been welcomed for the relief granted to the magistrate, but the case is not without its difficulties and indeed dangers.[555] The judgement does not, of course, answer the appropriate question whether the *Reinecke* case signalled a death knell to the *Khanyile*, namely that magistrates cannot be employees on account that the Constitution guarantees judicial independence. [556]

It is extremely difficult to envisage a judicial office holder being an employee. To do the contrary, one had to transcend the formidable constitutional hurdles of the rule of law and the cherished notion of judicial independence. The notion of judicial independence, in particular, judicial oath of office cannot countenance carrying out instructions from another like an employee. In a way, it will be a case of the executive and the legislature swallowing up their least dangerous counterpart. Stated differently, the pillars of constitutional democracy, judicial independence and separation of the judiciary from the executive and the legislature would be cast aside if judges are accorded employment status. As one commentator explains:

> "[I]f the Labour Act or any other legislation had included judges expressly or by implication in the definition of employee, that law must by definition and in the spirit of separation of powers be constitutionally invalid for attempting to bring the judicial arm within the ambit of executive control thus emasculating the independence of the judiciary." [557]

2.12 Conclusion

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[554] *Reinecke* para 7.

[555] See Nkosi "*The President of RSA v Reinecke* 2014 3 SA 205 (SCA): Constructive dismissal and the changing identity of the employer: A critique of some findings made by the Supreme Court of Appeal" 2015 *De Jure* 232; Franco & Powell "The meaning of institutional independence in *Van Rooyen v The State*" 2004 *SALJ* 562.

[556] See Diedricks "The employment status of magistrates in South Africa and the concept of judicial independence" 2017 *PER/PELJ* 1, 13-14.

[557] Okpaluba "Constitutionality of legislation relating to the exercise of judicial power (part 2)" 442. See also Wallis "Judges, servants of justice or civil servants?" 2012 *SALJ* 652.

The legal category "employee" is undoubtedly a cipher whose meaning is to be determined on the basis of the different approaches adopted by legislators and adjudicators of the appropriate class of persons who should receive the benefit of the law. The employment status has remained as the basis for coverage, but the test for determining who has status has been altered to allow for the coverage to expand (or contract) to fill the category of persons who are perceived either to need or deserve the benefit of labour law protection. The multifactorial test enshrined in the presumption of employment in the terms of section 200A of the LRA can be seen as a genuine attempt to draw the line between employment and independent contracting for purpose of determining the scope of labour protection. Adjudicators have moved away from the presence or absence of direct subordination to the consideration of an open-ended list of factors that, in principle, should be identified and weighed pursuant to a purposive analysis of the context in which the question has arisen. This strategy is encapsulated in the *SITA* three-fold test for determining the existence of employment relationship with an emphasis on the realities of the working arrangements and economic dependence.

Despite these efforts, the difficulty of using the categories "employee" and "independent contractor" persists in a world in which the actual differences between these groups are diminishing. The recurrent migraine for labour and revenue authorities on the one hand, and adjudicators, on the other, is how to distinguish between employment and self-employment, especially self-employment of the own-account variety, that is, where the self-employed person does not employ other employees. This question is particularly important given exponential growth of self-employment. This calls into question of how labour markets operate, theories of entrepreneurship, understanding about the nature of self-employment, and the adequacy of the legal tests of employment status for determining the personal scope of labour protection and social benefits. These large questions form the central theme of chapter four.

CHAPTER THREE

THE TENUOUS BOUNDARY BETWEEN DISGUISED EMPLOYMENT, GENUINE ENTREPRENEURIAL SELF-EMPLOYMENT AND DEPENDENT SELF-EMPLOYMENT

3.1 Introduction

The shaded boundary between employment and self-employment raises the focal question: to what extent has the structure of South African labour law outgrown the traditional "binary" divide between employees working under a contract of service and thus entitled to the full range of employee protective norms, and independent contractors, self-employed under contracts for services beyond the scope of employment law? From chapter one, we have learned that the organisation of work has changed considerably over the last two decades, with new forms of work having gained in importance. Traditional, long-term and full-time employment relationships are incrementally displaced, while part-time employment, temporary work, triangular employment and dependent self-employment are increasingly common.[558]

Another crucial question is whether it remains appropriate to limit the scope of application of labour law to the employment relationship in a strict sense - contract between an "employer" and an "employee". This issue has represented the topic of widespread discussion for quite some time.[559] The nub of the issue concerns the legal uncertainty of dependent self-employment. A dependent self-employed worker is formally independent, yet he or she is economically dependent on the employer. This problematic area is precisely the grey zone inhabited by these workers: "those who are both economically in employment and personally dependent on the employee status,

[558] European Parliament *Social Protection Rights of Economically dependent self-employed works* Study (2013) available IP/A/EMP/ST/2012-02 ("*Social Protection Rights of Economically dependent self-employed works*"); Theron *et la Keywords for a 21st Century Workplace*; Le Roux *The World of Work*.

[559] See generally, Hepple "Restructuring employment rights" 1986 15 *ILJ (UK)* 69 and "New approaches to international labour regulation" 1997 26 *ILJ (UK)* 353; Finkin "Introduction" 1999 *Comp. Lab. L. & Pol'y J* 1; Langille & Davidov "Beyond employees and independent contractors: a view from Canada" 1999 *Comp. Lab. L & Pol'y J.* 7; Davies & Freedland "Labour markets, welfare and the personal scope of employment law" 1999 *Comp. Lab. L & Pol'y J.* 231; Brodie "Legal coherence and the employment revolution" 2001 *LQR* 604 and "'Book Review of "*The Personal Contract of Employment*' by Freedland' 2004 33 *ILJ (UK)* 87; Stewart "Redefining employment? Meeting the challenge of contract and agency labour" 2002 *AJLL* 235; Gahan "Editorial: Work, status and contract: Another challenge for labour" 2003 *AJLL* 249.

while those who are only to some degree economically dependent are closer to the borderline of independent self-employment".[560] Self-employment varies from disguised employment and franchisees through skilled crafts people and independent professionals to the owners of incorporated businesses.

In addressing the complexities of dependent self-employment, it has become evident that the dichotomist view of employees versus self-employed independent workers is based on a "false unity" of the two concepts, leading to a "false duality". Stated differently, the indirect assumption of this binary rationale is that labour law is based on the need to protect employees, perceived as the weak party within asymmetrical employment relationship. On the other hand, self-employed persons are considered as equal to the parties they contract with, and are thus subject to the market forces. Equally, new forms of work organisation prove that both concepts (i.e. employment versus self-employment) in reality are fuzzy, including a variety of work activities. A significant number of self-employed resemble employees in that many of them work on their client's premises or premises supplied by client and are dependent on former employers as clients.[561] In short, legal scientists have argued that the traditionally personal scope of labour law and parts of social security no longer reflect the organisation of work in today's society.[562]

There is no simple answer to the multi-layered troika of difficult questions: How to unmask a true employee in modern work environment? What is dependent self-employment and where does it occur? How can dimensions of legal regulation establish typologies of work relations that measure up against the social reality of work relations?

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[560] See Muckenberger "Towards a new definition of the employment relationship" 1996 *ILR* 683; Muehlberger *Dependent Self-employment: Workers on the Border between Employment and Self-employment* (2007) and "Hierarchical forms of outsourcing and the creation of dependency" 2007 *Organisation Studies* 707; Muehlberger & Bertolini "The organisational governance of work relationships between employment and self-employment" 2008 *Socio-Economic Review* 449; Muehlberger & Pasqua "Workers on the border between employment and self-employment" 2009 *RSE* 201; Hunter "The regulation of independent contractors: A feminist perspective" 1992 *Corporate & Business Law Journal* 165.

[561] See e.g. *Phaka*; *Chet v Capita Translation and Interpreting Ltd* 2015 UKEAT/0086/15/DM; *Halawi v WDF (t-a World Duty Free)* 2013 UKEAT/0166/13/GE; *Hollis v Vabu Pty Ltd* 2001 207 CLR 21 ("*Vabu*"); *Sagaz Industries*.

[562] See generally, Supiot 2001 "The transformation of work and the future of labour law in Europe" 1999 *ILR* 31; Vettori *Alternative Means to Regulate the Employment Relationship in the Changing World of Work* (Unpublished LLD Thesis UP 2005); Le Roux *The Regulation of Work: Whither the Contract of Employment? An Analysis of the Sustainability of the Contract of Employment to Regulate the Different Forms of Labour Market Participation by Individual Workers* (Unpublished PhD Thesis, UCT 2008).

The rise of self-employment is to a large extent buttressed by a large number of national policies and programmes.[563] In this context, South African policy makers, like their counterparts elsewhere, face the difficulty of promoting "genuine" entrepreneurial self-employment whilst simultaneously containing precarious self-employment. As already noted in chapter one, the toughest challenge facing labour law concerns the transformation of work marked by decline of standard employment and the proliferation of atypical employment. To cite one of the gloomiest diagnoses, "Employment: A dodo, or simply living dangerously".[564]

3.2 Defining an enigma: Self-employment

By opening the black box self-employment, one is confronted with "somewhat of an enigma".[565] Despite its long usage of the term there is no generally accepted definition.[566] Broadly speaking self-employment is simply contrasted with employment, which in turn is not defined with precision. In the 2011 European Labour Force Survey (ELFS), self-employed persons are defined as follows:

> "Self-employed persons work in their own business, farm or professional practice. A self-employed person is considered to be working during the reference week if she/he meets one of the following criteria: works for the purpose of earning profit; spends time on the operation of business; or is currently establishing a business. A self-employed person is the sole or joint owner of the unincorporated enterprise (one that has not been incorporated, i.e. formed into a legal corporation) in which he/she works, unless they are also in paid employment which is their main activity (in that case, they are considered to be employees)." [567]

[563] See generally, Warikandwa & Osode "Regulating against business 'fronting' to advance black economic empowerment in Zimbabwe: Lessons from South Africa" 2017 *PER/PELJ* 20; Sibanda "Weighing the cost of 'BEE fronting' on best practice of corporate governance in South Africa" 2015 *SJ* 23; Kalula & M'Papadzi "Black economic empowerment: Can there be trickle-down benefits for workers? 2008 *SJ* 108; Marais & Coetzee "The determination of black ownership in companies for purposes of black economic empowerment (part 1)" 2006 *Obiter* 111 and (part 2) 2006 *Obiter* 502.

[564] Le Roux "Employment: A dodo, or simply living dangerously" 2014 35 *ILJ* 30.

[565] Aronson *Self-Employment: A Labour Market Perspective* (1991) xi. See Linder Review of "Self-Employment: A labour market perspective" by Robert L Aronson 1992 *Am. J of Sociology* 1498; Delsen "Atypical employment relations and government policy in Europe" 1991 *Labour* 123; Fenwick "Shooting for trouble? Contracts labour hire in the Victorian building industry" 1992 *AJLL* 237; Buchanan & Allan "Growth of contractors in the construction industry: Implications for taxation revenue" 2001 *Econ. & Lab. Re. Rev.* 46; Crawley "Labour hire and the employment relationship" 2000 *AJLL* 291.

[566] Leighton "The European Commission Guidelines, entrepreneurship and the continuing problem of defining the genuinely self-employed" in Collins *et al* (eds) *Legal Regulation of the Employment Relationship* (2000) 287.

[567] European Labour Force Survey (ELFS) available at of http://ec.europa.eu/eurostat/web/lfs/data/database (accessed 16-06-2018).

Historically, self-employment has been associated with independence and contrasted with the dependent status of employees. Two key elements defining self-employed are their ownership of the means of their own production and self-direction or autonomy in the worker.[568] Both Marx and Weber regarded the ownership of means of production as crucial for understanding the nature of power and authority relationships between labour and capital.[569] As an ideal type, self-employment is linked to ownership, autonomy, and control over production, clearly distinguishing craft-people, independent professionals, and small business proprietors from waged workers. However, this ideal is becoming increasingly distant from reality of self-employment. Therefore, Freedland has written:

> "[T]he idea that a healthy labour economy can be constructed on the basis of an extensive and growing sector of individual self-employment is, in the end, something of a chimera, partly a nostalgic fantasy for a largely disappeared world of independent liberal professionals and artisan craftsmen, and a world which was in any case usually a cruel and precarious one for most of the workers concerned. Even apart from the legal precarity and disadvantage experienced by "self-employed" workers, consisting in the attenuation or denial of labour rights and social security rights, the whole construct of self-employment is, at least in the present economic and organisational conditions of the labour market, a self-contradictory and inherently fragile one. Not only has this always been true in a literal sense for the terminology of self-employment – employment consists in a relation with another, so one cannot strictly speaking "employ oneself" – but it is also the case that it is exceedingly difficult for a worker to create and maintain the kind of truly individual entrepreneurial organisation which is postulated by the theory of "self-employment"'.[570]

For many of the recruits into the ranks of the self-employed including consultants, freelancers, franchisees as well as owner-driver operators the link between self-employment and entrepreneurship is no longer obvious.

Sociological research on the self-employed suggest that the conception of self-employment that links being self-employed inextricably with entrepreneurship,

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[568] Dale" Social class and the self-employed" 1986 *Sociology* 430 and "Self-employment and entrepreneurship: notes on two problematic concepts" in Burrows (ed) *Deciphering Self-Employ*ment (1991) 35; Rubenstein "Employees, Employers, and quasi-employers: An analysis in the borderland between an employer-and-employee relationship" 2012 *U. Pa. J. Bus. L* 605, 620-622 ("Employees, Employers, and quasi-employers"); Zatz "Beyond misclassification: Tackling the independent contractor problem without redefining employment" 2011 *ABA J. Lab & Emp. L.* 279, 282-283.

[569] Curran & Burrows "The sociology of petit capitalism: A trend report" 1986 *Sociology* 265. For extended analysis, see Tomassetti *The Legal Construction of Employment and the Re-Institutionalization of US Class Relations in the Post-Industrial Economy* (Unpublished PhD Thesis, UCLA 2014)1, 241.

[570] Freedland *The Contract of Employment and the Paradoxes of Precarity* Legal Research Paper Series Paper NO 37/2016 June 2015 1, 13 available at file://locallhost/<http/::www.srn.com:link:oxford-legal-studies.html>.

ownership, and autonomy has more to do with ideology than reality.[571] Self-employment is diverse and much of it is likely to be precarious in terms of pay, benefits, and security.[572] Regardless of this social reality, the ideal of self-employment continues to influence the legal norm of employment and thus is still used to justify excluding self-employed workers from labour protection.

3.3 What is dependent self-employment?

The meaning of dependent self-employment, its scope and reach in terms of work in the grey zone between employment and self-employment is contested. Suffice it to say, that the phrase "economically dependent self-employment" largely refers to the economic dependence of the agent on the principal. The synonymously used expression "precarious self-employment" additionally refers to self-employed workers whose status closely resembles those of subordinate employees. An all-encompassing definition of the term "dependent self-employment" is to describe "work relationships where the worker is formally self-employed yet the conditions are similar to those of employees. Despite working exclusively (or mainly) for a specific firm (i.e. the outsourcing firm, in the following: 'the employer'), workers are neither clearly separated nor integrated with the firm they contract with."[573] These service arrangements are not based on employment contracts, but rather on commercial contracts between a self-employer service provider and a specific firm.

A good example is the case of a truck driver who owns his (only) truck and operates a trucking company, but works only for one forwarding company. The latter determines the work schedule and the appearance of the truck, uniform etc. The truck owner-operator bears the cost and risk of the functioning of the truck, and only earns when she or he works.[574] Variants of this arrangement can be seen in the owner-driver

[571] Fudge *et al Marginalizing Workers* 5-16.
[572] Bernhardt "Comparative advantages in self-employment and paid work" 1994 *Can JL E* 273
[573] *Social Protection Rights of Economically dependent self-employed works* 25.
[574] For detailed exposition, see *Straddling the World of Traditional and Precarious Employment – A Case Study of the Courier Industry in Winnipeg*, A Study Conducted by the Courier Research Project (2005).

case of *Phaka*,[575] bicycle courier cases of *Vabu*, *Belcher*[576] and *Citysprint*,[577] and more graphically in the Uber/Lyft cases. If we re-examine the Italian cousin of *Vabu*, *Belcher* and *CitySprint*, despite the label the courier service used to designate its workers in their contracts, the Labour Court[578] held that the worker was actually an employee on the basis of socio-economic dependence. The court reasoned that the delivery driver was part of the economic and business organisation of the principal.[579]Subsequently, an appellate court deemed the worker to be an independent contractor.[580] To same effect, the highest judicial authority, *Corte di Cassazione*, agreed that the worker was an independent contractor.[581] Hence much of self-employment could be classified as disguised wage labour. Likewise, Linder argued that the self-employed should be conceived as a class separate from employers and employees, but rather should be conceptualized as a hybrid class more closely resembling wage workers than entrepreneurs.[582]

3.4 False Self-employment and Sham Arrangements

Compounding the issue of unmasking a true employee and the unpredictability of determination in any given case is the problem of false documentation. The concept of a "sham arrangement" has been explained to encompass

[575] *Phaka*.
[576] *Autoclenz Ltd v Belcher* 2011 UKSC 41
[577] *Dewhurst v Citysprint UK Ltd* (2202512/2016).
[578] *Pret. Milano*, 20 giuno 1986, Foro it. V 1987, 110, 7/8, 2264 (It.). For a helpful analysis of the Italian authorities, see Cherry & Aloisi "'Dependent contractors' in the gig economy: A comparative approach" 2017 *Am. LR* 635, 659-660 ("'Dependent contractors").
[579] *Pret. Milano* 2264:

> "The work, performed by the biker assigned to pick up and deliver and by using the own vehicle, has to be considered 'subordinate,' in spite of the length, the possibility of refusing to execute the request for the performance and even if the presence if of monitoring activity (in radio contact."

[580] *Trib. Milano* 10 ottobre 1987, in Riv, it. Dir. Lav., 1987, II, 688 stated:

> 'The work, performed by the biker assigned to pick up and delivery and by using the own vehicle, has not to be considered 'subordinate,' in the absence of the critical requirement of continuity. Those workers are not required to appear everyday at the workplace and can refuse to execute the request for the performance."

[581] Cass. 14 Aprile 1989 n.5671 (mass).
[582] Linder "Towards universal coverage under the National Labour Relations Act: Making room for uncontrolled employees, dependent contractors, and employee-like persons" 1986 *U Det LR* 555 and "Dependent and independent contractors in recent U.S. labour law: an ambiguous dichotomy rooted in simulated purposelessness" 2001 *Comp. Lab. L. & Pol'y J.* 187 (Simulated purposelessness").

"an arrangement through which an employer seeks to cloak a work relationship to falsely appear as an independent contracting arrangement in order to avoid responsibility for legal entitlements due to employees".[583] Also important to bear in mind, is that courts have held that the parties "cannot create something which has every feature of a rooster, but it is a duck and insists that everybody else recognise it as a duck".[584] Perhaps, more importantly, it is said that "employees in disguised employment relationships should have appropriate remedies available to them".[585]

One common theme that runs through the case law is the attempt to create particular relationships and edifices that defy simple classification. The prevalence of artificial arrangements for the acquisition of labour reveals that employment law has become subject to cross-currents from fiscal and other initiatives that attempt to deter false self-employment.[586]

There has been a growing tendency for those who hire labour to exploit ways in which work relationships are categorised by the law, through carefully designed contractual arrangements. The economic equation for many enterprises is likely to be finely balanced between, on the one hand, retaining a sizeable and integrated operation, and on the other, "vertical disintegration" into a series of smaller entities linked by contractual arrangements.[587] But if labour law mechanisms function in such a way as to impose much higher costs in respect of employees as opposed to contractors, then the balance is tipped in favour of particular form of disintegration in which employees are substituted by contractor labour. This is especially so if the change can be effected without altering the substance of the economic relationship.[588]

[583] The *Explanatory Memorandum* for the Bill for the Independent Contractor Act 2006 (Cth) 9. See also "Sham arrangements" ss 900 and 901.
[584] *Re Porter* 1989 34 IR 179, 184. Similar sentiment were expressed a decade earlier by Lord Denning in *Massey v Crown Life Insurance Co* 1978 IRLR 31: "The law, as I see it is this: if the true relationship of the parties is that of master and servant under a contract of service, the parties cannot alter the truth of that relationship by putting a different label on it." See also *Denel* para 36.
[585] Australia House of Representative, Independent Contractors Bill 2006, *Explanatory Memorandum* 10.
[586] See e.g. VandenHeuvel & Wooden *Non-PAYE employment and the growth of 'independent contractors in Australia: A review of evidence and Research 1994* (National Institute of Labour Studies, Flanders University, Adelaide).
[587] Collins "Vertical disintegration".
[588] Textbook examples include: *Madlanya*; *Shezi; Mac-Rites*. For instance, in *Mac-Rites* the High Court held that a contract purporting to reclassify employees as independent contractors did not transform them into independent contractors. The commissioner in *Shezi* found the sentiments expressed in that judgement to be particularly apposite, and found the contracts to be a "cruel hoax", to be seen a cynical

Depending on the circumstances, the savings to employers may be substantial. They will be relieved of the obligations amongst others to observe collective agreements, pay minimum wages, make pension and UIF contributions or observe standards of procedural and substantive fairness in relation to termination. In effect, the working arrangements revert to the classic common law position characterised by the employer's prerogative to terminate services at any time without any reason, explanation, or warning. Succumbing to the temptation of these undeniable advantages, employers have sought to transform employees into independent contractors by the magic of contractual language. It has been pointed out that "while many employees have willingly or reluctantly assisted in this exhibition of the black art, they have not always done so."[589] Were that to happen, then labour law fails in its essential purpose if it permits workers to be arbitrarily denied access to protective mechanisms and employment benefits by the technicality of a carefully drafted contract. Put another way, "semantic fanning"[590] in which an employee is hoodwinked into believing that as a self-employed entrepreneur, he is earning more than he did as an employee.[591]

A clearer example of a "cruel hoax" designed to strip employees of their rights can be found in *Melmos Cabinets CC*. In that case the court held that "humble" employees had been induced by their employer to enter into contracts that purported to convert them into "independent contractors". Landman J's observation are insightful:

> "[The employee] believes he is self-employed entrepreneur, earning more than he did as an employee. He is blissfully ignorant of his newly acquired obligations and the loss of rights and privileges which Melmons persuaded him to forego. He has no job security, he has no claim for unfair termination of his services, he is prohibited from relying on the benefits of a collectivity such as a trade union. It is fanciful to believe that he would be welcome in an employer's organisation. He has no protection against accident or illness at work. He has no safety net in the event that he cannot find work to do. He has no minimum terms and conditions…. The relationship is a sham and it remains a sham even though Mr Mawa has consented to it. In truth Mr Mawa is an employee and Melmons is his employer." [592]

attempt to evade the obligations of the law and to strip ordinary employees of their protection under the LRA 1995. These cases were the *leit motif* behind the introduction of s 200A and s 83A.

[589] *United Steel Workers of America v HG Francis & Sons Ltd* 1981 CanLII (ON LRB) para 18 ("*HG Francis & Sons Lt* ").

[590] See e.g. *Aslam* paras 37; 87 footnote 37 and para 90 footnote 45.

[591] *Melmons Cabinet CC* paras 20-21; *Dyokhwe* para 57.

[592] *Melmons Cabinet CC* paras 21-22.

Much of the same can be said about *Dyokhwe*.[593] In that case, the applicant was employed by Mondi, on a series of fixed-term contracts, and then permanently employed as from January 2003. In June 2003 Mondi engaged Adeco, a TES, to transfer some of its employees, including the applicant. The applicant was illiterate, he put his name to a *pro forma* document headed "Contract of employment defined by time". The terms of the Adeco contract were neither read nor explained. He continued to render services to Mondi, but now received a pay slip from Adecco and his hourly rate was slightly reduced. He was dismissed 5 ½ years later, in January 2009. The applicant referred an unfair dismissal dispute to the CCMA in 2009 and obtained an arbitration award against Mondi, which was subsequently set aside on review. He then again referred the dispute for arbitration citing both Mondi and Adecco as respondents. The question that arose before the Labour Court centred around who was the applicant's true employer at the time of his dismissal?

The court set aside the commissioner's ruling and declared Mondi to be the applicant's true employer at the time of his dismissal. The court not only endorsed the approach espoused in *Melmons Cabinet CC*, but crucially, interpreted section 198 of the LRA, in compliance with section 23 and section 39(2) of the Constitution, and applied public international law as well as the relevant ILO conventions and recommendations on the issue of "disguised employment relationships".[594] Steenkamp J found that:

> "…while it was common cause that the employee was being paid by Adecco, it had to approach the true nature of the relationship where the workplace and the employee's work had remained the same for almost nine years, conscious of the obligation to combat disguised employment relationships and to examine the substance rather than the form of the relationship."[595]

This approach has much to commend it. In considering who is an employee, our courts have consistently transcended such artful dodging or "scams"[596] by having regard to the true nature of the employment relationship.

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[593] For a helpful analysis of *Dyokhwe*, see Cohen "Debunking the legal fiction". See also Bogg "Sham employment in the Supreme Court" 2012 41 *ILJ (UK)* 328.

[594] ILO Convention Concerning Private Employment Agencies C181 of 1997 (Adopted 1997, came into force 10 May 2000); ILO Recommendation 198 para 9. See also Benjamin "To regulate or to ban? Controversies over temporary employment agencies in South Africa and Namibia" in Malherbe & Sloth-Nielsen (eds) *Labour Law into the Future: Essays in Honour of D'Arcy du Toit* (2012) 189-209.

[595] *Dyokhwe* para 37. See also Cohen "Identifying the true parties to an employment relationship"; Bosch "Contract as a barrier to dismissal".

[596] Linder "Simulated purposelessness".

The overall tenor of *Melmons Cabinet CC* and *Dyokhwe* can be contrasted with the stringent Australian stance illustrated in *Fair Work Ombudsman*.[597] *Fair Work Ombudsman* is of real importance to the understanding of robust judicial and legislative strategy to expose corrupt or exploitative contractual practices. The question that fell to be considered by the full bench of the High Court of Australia was whether section 357(1) of the Fair Work Act 2009 (Cth)[598] prohibits an employer from misrepresenting to an employee that the employee performs work as an independent contractor under a contract for service with a third party.

If not twins, *Dykhowe* and *Fair Work Ombudsman* are certainly siblings. The factual matrix and issues in *Fair Work Ombudsman* bear the hallmarks of *Dykhowe*. In this case, Quest operated a business of providing serviced apartments, in the course of which Quest had for some years employed Ms Best and Ms Roden as housekeepers. Contracting Solutions Pty Ltd ("Contracting Solutions") operated a labour hire business. Quest and Contracting Solutions purported to enter into a "triangular contracting" arrangement. The arrangement had two components. First, Contracting Solutions purported to engage Ms Best and Ms Roden as independent contractors under contracts for services between them and Contracting Solutions. Next, Contracting Solutions purported to provide the services of Ms Best and Ms Roden as housekeepers to Quest under a labour hire agreement between Contracting Solutions and Quest.

Quest, by its conduct, then represented to Ms Best and Ms Roden that they were performing work for Quest as independent contractors of Contracting Solutions. In reality, like their South African counterpart, Dyokhwe, Ms Best and Ms Roden continued to perform precisely the same work for Quest in precisely the same manner as they had

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[597] *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* 2015 HCA 45.

[598] Section 357 provides:

"(1) A person (the *employer*) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contract for services under which the individual performs, or would perform, work as an independent contractor.

(2) Subsection (1) does not apply if the employer proves that, when the representation was made, the employer:
(a) did not know; and
(b) was not reckless as to whether; the contract was a contract of employment rather than a contract for services."

always done. In law, they never became independent contractors. This was another cruel hoax. At the time Quest represented that they were performing work for Quest as independent contractors of Contracting Solutions, they remained employees of Quest under implied contracts of employment.

The Fair Work Ombudsman had brought proceedings in the Federal Court claiming, amongst others, pecuniary penalty orders against Quest Perth Holdings Pty Ltd ("Quest") for contravention of section 357(1) of the Act. McKerracher J held at first instance that the proceeding was to be dismissed so far as it related to that claim,[599] and an appeal from that order was dismissed by the Full Court of the Federal Court.[600]

The full bench of the High Court reversed the findings of the court below, and pointed out that the purpose of the legislative prohibition in section 357(1) "is to protect an individual who is in truth an employee from being misled by his or her employment status. It is the status of an employee which attracts the existence of workplace right."[601] To confine the prohibition to a representation that the contract under which the employee performs or would perform as the Full Court of the Federal Court had held, would be to give the provisions a capricious operation. French CJ went on to note that:

> "An employer would be liable to pecuniary penalty if the employer said to an employee 'you are employed by me as an independent contractor'. The same employer would act with impunity if the employer said to the same employee 'you are employed by X as an independent contractor'. That would be so even if X were entirely fictitious. Either way, the employee would be misled by the employer to think that the employee was an independent contractor, and the extent of the practical denial of workplace rights would be the same." [602]

Melmons Cabinet CC, Dyokhwe and *Fair Work Ombudsman* exemplify abuse of bargaining power leading to involuntary acceptance of the work pattern and imposition of apparent self-employed status. However, the decision of the British Court of Appeal in *Kalwak*[603] is clearly a judicial low point in so far as tackling sham arrangements. Kalwak, a migrant worker in food processing had been required to sign a document denying employee status and despite her working regular hours being tightly controlled. The Court of Appeal, nonetheless, found her not be an employee. If asked, like Ms Best and Ms

[599] *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd (No 2)* 2013 FCA 582.
[600] *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd (No 2)* 2015 FCR 346.
[601] *Fair Work Ombudsman* para 16.
[602] *Fair Work Ombudsman* para 17.
[603] *Kalwak v Consistent Group* 2008 EWCA Civ 430.

Roden, she would have been unlikely to describe herself as self-employed, let alone an entrepreneur.

3.5 The Problems and Perils of Making Your Bed as an Independent Contractor But Refusing to Lie on it …

In 1978, Lord Denning MR in his own rhetorical (in both senses of the word) answer said the following: "Having made his bed as 'self-employed', he must lie on. He is not under contract of service."[604] Within strict limits of course, this statement is entirely correct: the decision in *Massey* has been interpreted as meaning that there was some species of estoppel which barred a person having so to speak, opted to be "self-

[604] *Massey v Crown Life Insurance Inc.* 1978 1 WLR 676 para 21. Unadulterated narration of facts by Lord Denning MR in *Massey* paras 7-10 warrants repetition in full:

> "He was the manager of the Ilford branch of the insurance company. For a couple of years, from 1971 to 1973, the company treated him as though he were a servant. They gave him a memorandum under the Contract of Employment Act. They paid him wages: and, before paying him, they deducted the tax, they deducted the stamp, and they deducted graduated pension contributions from the amount they paid him. Further, they had a pension scheme of their own and he had to make contributions towards his pension. Being regarded as a servant, he was taxed for his income tax payments under Schedule E.
>
> But then in 1973 Mr. Massey went to his accountant who advised him to change his relationship with his employers. The accountant said: "I think you would be much better off if you so arranged your affairs so as to be self-employed instead of being a servant. Then you will come under Schedule D instead of Schedule E". That is what was proposed. Instead of wages subject to deductions, the company would pay him the full amount each week but they would not deduct tax or national insurance contributions or anything like that. He would get the full amount. It would be for him to account for tax to the Inland Revenue under Schedule D.
>
> He went to his employers, the Crown Life Insurance Co., and told them: "I have been advised by my accountants to change over to Schedule D. Will you agree?" They said: "Oh, yes; we are agreeable". So it was put through. They did it in this way: Instead of calling him "Mr. John L. Massey", he was called "John L. Massey & Associates". It was really just the same man under another name. He registered that new name with the Register of Business Names. With that new name he entered into a new agreement with the Crown Life. So far as his duties were concerned, it was in almost identical terms as the previous agreement. As a result of that new agreement, he said he was no longer a servant, he was an independent contractor. He was therefore liable to be taxed under Schedule D. The position was placed before the Inland Revenue, and the Inland Revenue seem to have thought it was all right."

In a dissenting judgment in *MJ Ferguson v John Dawson & Partners* 1976 IRLR 346 (CA) 350, Lord Lawton said that there was no doubt in that case what the parties intended. He said that they intended that Mr Ferguson "should not be a servant of the defendants". He went on to say: "Maybe the law should try to save the workmen from their own folly; but it should not encourage them to change status which they have freely chosen when it suits them to do so."

employed" or "on the lump" from afterwards asserting that he was only an employee. Put simply, Massey got the benefit of it by avoiding tax deductions and getting his pension contributions returned.[605] Conversely, the "self-employed" cannot thereafter be heard saying: "I want to claim for unfair dismissal". In common parlance, it would be wrong for a person who had forgone his status as an employee to have the proverbial penny and the bun.

The factual and jurisprudential footprints of *Massey* and its progeny such as *Young & Woods*,[606] *Catamaran*[607] *and O'Murphy*[608] are replicated in modern labour[609] and tax cases[610] indicating that the central policy dilemma has changed a little since the battle over false employment and tax avoidance was fought. The only difference is that the drafters of contractual documentation have become more adept in disguising true employment. A paradigmatic example is the convoluted contractual arrangements where a contractor works through an umbrella company rather than between a personal service company.[611] However, case law also illustrate that fiscal considerations are often overriding determinants in skilled individuals choosing to work in flexible and quasi-entrepreneurial way, seeking variety and opportunity and rejecting traditional

[605] See also Russell "The lump and safety" 1977 *MLR* 479.

[606] *Young Woods v West* 1980 IRLR 174 (CA). In that case, the court held that where there was an agreement in terms of which a party would render services to another on the basis of being self-employed, the court was entitled (if not obliged) to determine the reality of the relationship from all of the relevant facts, and to disregard whatever label the parties had chosen to attach to their agreement.

[607] *Catamaran Cruisers Ltd v Williams* 1994 IRLR 368. Williams has previously been employed by the company and had formed the personal services company on the advice of his accountant. The EAT concluded that the true relationship was that of employee and employer, and the importation of a limited company into the relationship did not prevent the continuation of a contract of employment.

[608] *Hewlett Packard Ltd v O'Murphy* 2002 IRLR 4 (EAT).

[609] See e.g. *Hunt*, *Briggs* and *Bezer*.

[610] In *Dragonfly Consultancy Ltd v The Commissioners for Her Majesty's Revenue & Customs* 2008 EWHC 2013 (Ch), a personal service company which supplied the services of a skilled IT systems tester to a client on a series fixed-term contracts appealed against a Special Commissioner's determination of liability to PAYE income tax and NICs over a period of three years. The worker was sole director and a 50% shareholder in the service company. Dragonfly did not supply the consultant's services directly to the client but through an agency that had agreed to supply services and staff to the client. The relationship between the two intermediaries was governed by a series of fixed-term contracts. Under the IR35 legislation, tax and NI liability depended on a determination of the employee status of the IT consultant, using the standard common law tests to examine a hypothetical contract made directly between the client and the worker. The High Court upheld the Commissioner's finding that the IT consultant "fell on the employment side of the line". *Dragonfly* para 59.

[611] These are amongst cases that have vexed English judicial and revenue authorities, indicating a tension between employment protection and tax avoidance, see *Dragonfly Consultancy*; *Tilson v Alstom* 2010 EWCA Civ 1308; *Evans v Parasol* 2009 UKEAT 0536/08/2307; *Muscat v Cable & Wireless plc.* 2006 EWCA 220; *Professional Contractors' Group v Commissioners of Inland Revenue* 2001 EWCA Civ 1945.

employment.[612] Two different forms of gain-seeking can be distinguished: collusion and exploitation.[613] In the first case, a deception can be perpetrated by two willing parties who collude in constructing a false relationship. In the second case, a false relationship is imposed on unwilling individuals. In both cases, there may be revenue implications.[614] *Yssel* merits consideration albeit the issues concerned the lines of accountability in trilateral relationship.[615] The facts in *Yssel* speak directly to fiscal considerations as extremely powerful factor in driving skilled professionals to waive employee status and elect to render services as independent contractors under umbrella companies and a labour broker. From a wider perspective, the case is a paradigmatic example of a global trend whereby IT consultants are supplied through intermediaries.[616]

When it commenced operations in 2000 Volvo, the appellant was looking for a manager for its information technology division. A personnel placement agent introduced it to Yssel, the respondent and Volvo decided to appoint him to the position. Yssel did not want to enter into direct employment with Volvo. He preferred instead to be employed by a labour broker with which he was then associated – Highveld Personnel (Pty) Ltd – which would assign him to provide his services to Volvo. Volvo reluctantly accepted that arrangement and for the next five years or so Yssel worked for Volvo on that basis.

[612] See for example, freelancers: *Mvoko I* and *Mvoko II; Minter-Brown*; *Padayachi*; *Burke*; *Kambule; McKenzie*.

[613] Leighton & Wynn "Classifying employment relationships" 23-24.

[614] The underlying rationale for doing so is captured in an explanatory note prepared HM Treasury on the Finance Bill 2000:

> "Prior to 6 April 2000, it was possible for workers to work through intermediaries such as personal service companies to provide services to clients in circumstances where, if it were not for the service company, the worker would be an employee of the client. The use of intermediaries in this way allowed the client to make payments to the personal service company rather than the individual, without deducting PAYE or NICs [national insurance contributions]. The worker would then take the money out of the service company in the form of dividends instead of salary. Dividends are not liable to NICs so that the worker paid less in NICs than either a conventional employee or self-employed person. There were also tax advantages in these arrangements."

See also Loutzenhiser "Tax avoidance, private companies and the family" 2013 *CLJ* 35 Rider "Tax and the regulatory conception of labour law" Arup *et al* (eds) *Labour Law and Labour Market Regulation* (2006) 365.

[615] For analysis of the fiduciary duties aspects of *Yssel*, see Idensohn "*Volvo (Southern Africa) (Pty) ltd v Yssel* 2009 4 All SA 497 (SCA)" 2010 *Speculum Juris* 142.

[616] See Leighton & Wynn "Classifying employment relationships" 14.

Around 2004 Yssel approached the Human Resources Manager of Volvo and told her that some of the personnel were unhappy with their labour brokers and that he could arrange for all the personnel to transfer to Highveld at no extra cost to Volvo. Yssel suggested the same to all the personnel concerned, pointing out that their remuneration could be more favourably structured if they were to transfer to Highveld. Volvo and the personnel were agreeable, and Yssel attended to making the necessary arrangements. Lured by increased earnings on the horizon, the six IT consultants swallowed Yssel's plan "hook, line and sinker".

A written master agreement (called a 'temporary service agreement') was concluded between Volvo and Highveld to regulate the new arrangement. It provided that Highveld would supply the services of personnel to Volvo in return for a monthly fee that was to be stipulated in each case. At various times between August 2004 and April 2005, Yssel accompanied each of the personnel to the offices of Highveld where they were introduced to Ms Pieterse (Manager: Marketing and Support) and each signed a 'confirmation of assignment'. They were under the impression that from the moneys received from Volvo in respect of their services Highveld would retain a fixed charge of about R425 per month and an administration fee of 3% of their earnings. None was apparently pertinently aware of the rate at which their services were being charged to Volvo.

Volvo again had no direct contact with Highveld in making these arrangements and dealt at all times through Yssel who acted as what he called a 'facilitator' or 'intermediary' between Volvo and Highveld.[617] Once the new arrangements were in place Highveld would send invoices to Yssel each month for the services of the various personnel and Yssel would submit them for payment to the relevant department of Volvo.

Unbeknown to Volvo, and to the personnel concerned, a large part of each monthly payment that was being made by Volvo was ending up in the pocket of Yssel.[618] What Yssel had not disclosed to Volvo, nor to the personnel concerned, was that he had agreed with Pieterse that he would be paid what he called a "commission" if he arranged

[617] *Yssel* para 6.
[618] *Yssel* para 7.

for the personnel to transfer to Highveld. He had also agreed with her that the matter of the commission should not be discussed with the personnel or with Volvo.

The amounts that were received by Yssel were substantial. In January 2006, for example, Volvo paid R27 400 to Highveld for the services of Van Rensburg, from which Van Rensburg was paid R12 000 and the balance of R15 400 went to Yssel. In other cases his portion was somewhat lower but overall he was receiving about 40 per cent of the moneys that were being paid to Highveld.

All this came to light at the end of 2005 when Steyn came across a document reflecting the discrepancy between the amount that was being paid by Volvo for his services and the amount of his remuneration. Not satisfied with the explanation for the discrepancy that he received from Yssel he investigated further and discovered other documents to similar effect, whereupon he reported the matter to senior personnel of Volvo.

The matter came to the attention of Van Eeden in January 2006 and she arranged a meeting with Pieterse. This was the first time that Van Eeden had direct dealings with anyone from Highveld. Before then all dealings between Volvo and Highveld had taken place through the "facilitation" of Yssel. When Pieterse was confronted with the discrepancies she at first denied knowledge of payments having been made to Yssel but later acknowledged that such payments had been made. After the meeting, as they left the building, they encountered Yssel, who asked Pieterse why she was at Volvo's premises. Pieterse told him that she could not speak to him then but would do so at another time. Later that day Van Eeden and another senior employee of Volvo were in the process of preparing a letter suspending Yssel when he delivered a letter of resignation. The six personnel subsequently terminated their arrangements with Highveld and entered the direct employment of Volvo.

Investigations by an internal auditor of Volvo revealed that from August 2004 to January 2006 Volvo paid R1 967 900 to Highveld for the services of the personnel (excluding Yssel) of which they received R1 087 650. From the balance of R889 250

Highveld had deducted its own commissions of R114 143 and the balance of R775 107 had been paid to Yssel.[619]

Volvo sued Yssel in the High Court for payment of that amount, alleging that it had been earned in breach of a fiduciary duty that he owed to Volvo to act in its interests and not in his own. The High Court dismissed the claim. On appeal, the SCA found that Yssel occupied a senior position in Volvo's IT division and was in a position of trust when he engaged himself in the matter and was not entitled to allow his own interests to prevail over those of Volvo.[620] He was obliged in those circumstances to disgorge his secret commissions.

Yssel is a good illustration of both the benefits and pitfalls of complicated service arrangements between skilled professionals and TES. Once again, this litigation shows not only some consternation on the part of the IT personnel who received a raw deal through the conduit of a TES. The fact that these IT consultant cum entrepreneurial service providers who were left "high and dry" by Yssel grabbed the first opportunity to come on board as employees of Volvo attests to legal entitlements attached to employee status.

Amongst the central authorities which must be considered in examining the attempt to disguise employment by means of documentation or by means of interposition of additional entities between an "employee" and labour users are *Denel* and *Vermooten*.[621] Any critical examination of the issues raised by *Denel* and *Vermooten* must be conducted against the backdrop of a quartet of cases: *Callanan, Briggs*, *Hunt* and *Bezer*. Bulbulia DP in *Callanan* had to draw a line where an employee had established a CC in order to secure a tax advantage and then sought to prosecute a claim for unfair dismissal as an employee. The court there held that the applicant was not an employee but an independent contractor, observing that an applicant "cannot have his proverbial cake and eat it", by saying that he was not an employee for purposes of taxation or to avoid membership of a pension scheme, but simultaneously be regarded as an employee for the purposes of the LRA. This argument carries echoes of those which found favour

[619] *Yssel* para 11.
[620] *Yssel* para 20.
[621] For nuanced discussion of the case, see Van Niekerk "Personal service companies and the definition of 'employee'" 2005 26 *ILJ* 1904 ("Personal service companies").

with Lord Denning MR and Lord Lawton in *Massey*, and by Lord Lawton in *Ferguson*. It has been argued by Van Niekerk that "the public interest served by this approach is clear – provided that an agreement is lawful, the parties should be held to the terms that they have agreed."[622]

Briggs concerned a respondent who had set up a CC (MCS) with the express purpose of reducing her tax burden. A "consultancy agreement" had been entered between the appellant company (CMS) and MCS in terms of which the CC undertook to provide services of the respondent at an agreed hourly rate. Invoices were submitted on a monthly basis in the name of the CC. The respondent held out to the receiver that she was a "freelancer" and that her remuneration were "fees". Had she informed the receiver that she was an employee, her tax liability would have been higher. When the company terminated the consultancy contract, the respondent claimed that she had been unfairly dismissed.

In the Industrial Court she prevailed, with it having been held that the consultancy agreement was a "farce" and "sham" and that the true intention of the parties had been to conduct an employment relationship. The Labour Appeal Court reversed that decision, holding that the respondent had made an intelligent and deliberate election to enjoy the advantages of a contractual arrangement through a CC and to forfeit the advantages of an employee.[623]

To the same effect, in *Bezer* the applicant (Ms Jaunch) consultant who rendered service under the umbrella of a personal service company sought to claim relief qua employee in the context of retrenchment following a restructuring exercise. The position of the applicant had some differentiating features from *Briggs*. For instance, she set up CC at the suggestion of the respondent; this was done whilst she was a full-time employee and the working arrangements and benefit remained largely unchanged. The agency agreement provided that she would have no other clients; she was subject thereafter to controls typical of an employment relationship; unlike Ms Briggs squarely contended that she was at all times an employee.

[622] Van Niekerk "Personal service companies" 1907.
[623] *Briggs* 277A-H.

The questions that arises is whether such differentials are sufficient to bring about a different result. Tip AJ had no hesitation in holding that the evidence as a whole yields a clear answer to that question:

> "Ms Jaunch was fully aware of the tax benefits that she anticipated would flow from the introduction of the CC. Those advantages were attractive enough for her to conclude an agency agreement in substitution of the existent employment agreement. She had ample opportunity to consider and obtain advice on the relative advantages. In those circumstances, the election made by her was one of consequence. She cannot now seek returns on both sides of the cut. As in *Briggs*, the current agreement is between the respondent and a distinct entity, the CC. That agreement explicitly brought to an end all previous contracts, including the employment agreement that had previously been in place between the applicant personally and the respondent." [624]

Whereas in *Callan*, *Briggs* and *Bezer* the arrangements were entered in order to circumvent tax legislation, the facts in *Hunt* clearly demonstrates a collusive and patently false scheme for the presentation of invoices for "financial services", coupled with the compilation of entirely fictitious expenses. Dissatisfied with what she was earning as employee, Ms Hunt sought a solution to her predicament. She was advised by the respondent that the only way she could earn more was to find a company willing to provide them with a tax invoice. She obtained a CC willing to go along with the scheme. When Ms Hunt became pregnant, the respondent terminated her services. Ms Hunt then sought relief from the Labour Court. The respondent resisted her unfair dismissal claim on the ground that she was an independent contractor.

Landman J concluded on the facts that there was indeed a scam and the case of *Briggs* was therefore indistinguishable. The dominant impression was that ICC employed Ms Hunt as an employee. The invoice scheme intended to create the impression that she was an independent contractor was fraudulent. In order to send a message to employees and putative independent contractors inclined to avoid the law when it suits them and then revert to the status of an employee when it is advantageous, the court invoked the solution proposed in *Young and Woods*[625] and informed the Revenue to conduct investigation and a reassessment of Ms Hunt tax liability.

The sole question the Labour Appeal Court was mandated to answer in *Denel* was whether the respondent, Ms Gerber had been an employee at the time of her alleged

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[624] *Bezer* para 57.

[625] As put by Smith & Wood *Industrial Law* 6th ed (1996) 15 "knowledge that this possibility could be a considerable disincentive to the person who is thinking of trying to alter his status at this late stage.

dismissal. The appellant company countered that the respondent was not its employee but was an employee of a company called Multicare Holdings (Pty) Ltd (Multicare). Multicare was the respondent company with which Denel had an agreement to provide certain HR services in the form of a designated consultant. Ms Gerber was the designated consultant. For several years, she provided the required services to Denel who, in turn, paid Multicare a monthly fee against an invoice issued by that company. When Denel terminated the contract with Multicare, it strangely invoked employment related retrenchment obligations to Gerber in her personal capacity, to the extent of offering her a severance package in the absence of alternative employment. Gerber rejected the offer and claimed that she had been unfairly retrenched. In an about turn, Denel countered that Gerber has never been its employee. It was stressed that if Gerber had been employed by anyone, her employer was Multicare. In these circumstances the court had no jurisdiction to hear an unfair dismissal claim against Denel.

The Labour Appeal Court revisited the various tests which had been developed by both the South African[626] and English[627] authorities to determine the existence of an employment relationship in those cases where the parties purported by way of contract to exclude such a relationship. The court found that it must determine the true relationship between the parties, and that this was an objective matter. It could therefore not be bound by the labels that the parties chose to give themselves. The court accordingly distanced itself from that line of cases which placed emphasis on the express intention of the parties when deciding whether or not a person fell within the definition of an "employee" for the purpose of labour legislation.[628] Such an approach would give licence to those who wished to exclude the operation of the LRA.

Zondo JP (as he then was) found that, on the facts of the case, even though the employee party had purported to sell her services to the employer through an intermediary or other corporate entity by which she was employed, she was nevertheless in reality employed by the employer. Gerber had clearly been well integrated into the organisation, and had been described in internal company

[626] *Denel* paras 82-98.
[627] *Denel* paras 28-81.
[628] *Denel* paras 94-99.

memoranda as an executive of the company.[629] She rendered services to no one else, and the BCEA had been expressly incorporated as the basis of her engagement. Consequently, Gerber was entitled to claim for her alleged unfair dismissal.

Vermooten[630] raised the issue of parties in a relatively equal bargaining position who choose to enter into a consultancy agreement and not a contract of employment and the consultancy agreement is not a sham. In *Vermooten* the motive for entering into a consultancy agreement was to avoid the limitations of the remuneration prescribed for the post. After some years, the DPE decided against renewing the contract. Vermooten then sought to reassert his status as employee along the lines of Gerber in *Denel* by lodging an unfair dismissal dispute. At the outset of the arbitration, the DPE raised a point *in limine* that the appellant was not an employee of the DPE; rather he was an independent contractor and therefore the Bargaining Council did not have jurisdiction to arbitrate the dispute. The Labour Appeal Court conducted an exhaustive examination of the contractual arrangement between the appellant and the DPE, the factual circumstances in which the former rendered his services to the latter. Vermooten and the Department consciously and deliberately elected to structure their relationship as one other than an employment relationship.[631] The LAC found that the person in question was not an employee. In a tone reminiscent of Lord Denning and Lord Lawton in *Massey*, Landman JA held:

> "The consultancy agreement was not a sham. Therefore, in the absence of any overriding policy considerations, neither a tribunal nor a court may ignore its terms. Where the parties are in a relatively equal bargaining position and consciously elect one contract or relationship over another, the legal effect should be given to their choice. To allow one of these parties to change or contend that the legal relationship between them is something else holds important implications for the integrity of the legal framework of departments of State. The appellant seeks to be defined as an employee and so, it seems to me, to achieve what could not be achieved when negotiations began i.e. to be the Director: Aviation at a remuneration level exceeding double the prescribed remuneration and with the inclusion of all the benefits which were previously excluded by reason of the consultancy agreement. In other words, he wishes to become part of an organisation which could not and still cannot, accommodate him at his desired remuneration level." [632]

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[629] *Denel* para 132.
[630] For a helpful analysis, see Calitz "Contracting out of the Labour Relations Act: *Vermooten v Department of Public Enterprises & others*" 2017 *SA Merc LJ* 543.
[631] *Vermooten* para 25.
[632] *Vermooten* para 26.

More important for present purposes is the reassertion in the *Vermooten* case of the need for adjudicators to respect the contractual arrangements freely constructed by parties who are equipollent.[633] In these situations belated effort to "reclaim" to employee status is more a case of opportunism, rather a sincere attempt to establish the true nature of a relationship where that is uncertain.

3.5.1 The Freelancer Opportunism

That the freelancer in the watershed case of *McKenzie* did not fare better in an attempt to reassert his status as an employee has not served as a cautionary tale in the broadcasting industry. In a sequel to *Mckenzie*, the ambiguities surrounding service arrangements of presenters are shown in the recent cases of *Kambule*, *Padayachi*, *Burke* and *Minter-Brown*, to which may be added *Mvoko I*[634] and *Mvoko II*[635] which though raised a related but different question of the same freelancer migraine. It is worth recalling that prior to concluding a freelance contract, McKenzie had been an employee of the SABC. He was aware that the national broadcaster drew a clear distinction between its employees and freelancers. At the time he agreed to produce and present the predecessor to the Talkabout programme he made an informed and conscious decision to do so as a freelancer. The advantages to him outweigh the disadvantages.[636] He opted to contract with the SABC on the terms contained in the freelance contract. If anyone had asked McKenzie in September 1988 whether he was an employee of the SABC, his answer would have been an emphatic "no".[637]

Generally, presenters with ambiguous working relationships have been classified as independent contractors rather than employees. Take the case of *Kambule*

[633] See for e.g. *Gbenga-Oluwatoye* para 24.
[634] *Mvoko v SABC Soc Ltd* 2016 ZAGPHC 269.
[635] *Mvoko v SABC Soc Ltd* 2018 2 SA 291 (SCA).
[636] In testifying about his "preferred option" of being a freelancer, McKenzie spoke for many in the industry:

> "One had to weigh up what you perceived as benefits of being one form of employee or the other form of employee. In one case you received benefits in the form of additional car loans, housing loans at senior-levels of seniority, leave, medical aid and various other staff benefits. On the other hand that cost you awful lot of your freedom. You had to apply for all sorts of things. You couldn't do anything without a letter of authority, you had to discuss everything, so one had to make up one's mind which was more beneficial, which was more suitable for one's own requirement." *SABC v McKenzie* para 14.

[637] *McKenzie* para 31.

where the court found that the radio personality did not pursue other remunerative opportunities with any enthusiasm and relied on his income from the contract with the station, but he never claimed he was prevented from doing so. Stripped of its bare knuckles, the applicant's argument was that he was economically dependent on the station, a marker that may tilt the scale on the side of being an employee as articulated by Benjamin.[638] If that was the case, he would be entitled to pursue an unfair dismissal claim against the station. While not disputing the point made by Benjamin, Lagrange J saw the matter differently:

> "Kambule maintained a business profile as an entrepreneur in his own right in terms of his contract only gave up his ability to work in competition with the station. What he brought to the station was his services as a radio personality, not all his creative and commercial activity, which he remained free to use in other non-competitive pursuits outside of the broadcasting hours. The more efficiently he used his own time for preparing the program or the more he paid others to do so the more time he could dedicate to other economic pursuits." [639]

Curiously, the applicant maintained that he was solely reliant on the remuneration received from the station, but on the other hand portrayed to SARS that it did not exceed 80% of the income of his CC.[640] Kambule utilised an umbrella company and a personal service company. He was the CEO of Phat Joe Holdings (Pty) Ltd and sole member of Njabula Communitech CC and invoices were issued by the CC for the programme services provided him. The CC also employed three other persons, which the station claimed did not work for it. There was no question that Kambule was an independent contractor.

At issue in *Burke* was whether video editors engaged by SABC were employees or independent contractors. The video editors had concluded standard contracts which

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[638] Benjamin "Accident of history" 803 made useful point in relation to the determination whether a person is another's employee or not:

> "As starting point is to distinguish personal dependence from economic dependence. *A genuinely self-employed person is not economically dependent on their employer because he or she retains the capacity to contract with others. Economic dependence therefore relates to the entrepreneurial position in the marketplace.* An indicator that a person is not dependent economically is that he or she is entitled to offer skills or services to persons other than his or her employer. The fact that a person is required to only provide services for a single 'client' is a very strong indication of economic dependence. *Likewise, depending upon an employer for the supply of work is a significant indicator of economic dependence*. {Emphasis added]. See also *Denel* para 19; *SITA* paras 10-12.

Further readings see Merritt "Control v economic reality" 1982 *ABLR* 105; Razzolini "The need to go beyond the contract: 'Economic' and 'bureaucratic' dependence in personal work relations" 2010 *Comp. Lab. L & Pol'y J*. 267; Cassale (ed) *The Employment: A Comparative Overview* (2001).

[639] *Kambule* para 36.

[640] *Kambule* para 36.

specifically described them as independent contractors. At the end of every month, and based on the number of shifts that they worked, as reflected on the roster signed off by the supervisor, the individual respondent would produce an invoice and submit it to SABC for payment.[641] The dispute arose when video editors referred an unfair labour practice dispute to the CCMA. Behind that unfair labour practice dispute, was the contention that the respondents were employees of the broadcaster, and thus entitled to the same benefits as all other employees of the applicant. This squared against the public broadcaster's overall argument that the CCMA lacked jurisdiction to arbitrate an unfair labour practice dispute because respondents were not its employees, but independent contractors. The respondents were successful, but both parties were not satisfied with the award and challenged the same on review.

On review, the Labour Court bemoaned the "haste to apply available tests in establishing the existence of an employment relationship, adjudicators often lose sight of the contract itself, how it came about, and the services provided in terms thereof."[642] There is no good normative reason for adjudicators to interfere with arrangements made by the parties with necessary circumspection and on the basis of informed decision as embodied in the contract, after the fact. Moreover, *pacta sunt servanda* in principle applies with equal force to employment law. This prompted Van Niekerk to ponder:

> "[W]hy should parties not be entitled, for whatever perceived advantage there may be, to make their own explicit designation of their status and in so doing, exclude an employment relationship? Why should two commercially astute and consenting adults not be entitled to structure their arrangements in the way they think best, and provided that their agreement is lawful, why should they not be held to their bargain when their consciously constructed and carefully crafted commercial arrangements go sour?" [643]

In situations where section 200A does not apply, and the parties have entered into a written agreement setting out clearly the nature of their relationship, it is this agreement that must be the default position in establishing the nature of the relationship. Conversely, the burden of proving that the reality of the working arrangements is not one of an independent service provider, but of subordinate employment relationship, falls squarely on the shoulders of the party seeking to

[641] *Burke* para 15.
[642] *Burke* para 34.
[643] Van Niekerk "Personal service companies" 1908.

contradict this agreement to show that the agreement does not reflect the true relationship between the parties. In this instance the onus will be on the employee party whereas in the case of presumption of employment, the burden is on the employer to prove that the working relationship is akin to self-employment. It is essential to determine the intention of the parties and consider what is enshrined in the contract.

On the facts the court found that the contract revealed that the video editors voluntarily waived conventional working relationship, and instead chose to operate in a flexible and quasi-entrepreneurial ways. For instance, they could perform whatever external work they want, and decide for themselves whether they want to work a shift or not. Upon an analysis of the overall arrangements, the court felt impelled to the conclusion that the relationship between the parties is not one of employment, but that of independent service providers.[644] Snyman J added:

> "The LRA was never intended to banish genuine independent service agreement concluded with individual service providers to the scrap heap of history, in favour of a default employment relationship. What the LRA was intended to do was to provide protection to unsophisticated and disenfranchised persons, in an environment where jobs are scarce and unemployment is rife, which person would do and sign anything just to get a job. Further, the LRA was intended to protect employees against unscrupulous employers seeking to abuse the common law of contract to escape employment law obligations. In these kind of circumstances, it can hardly be contradicted that the CCMA and Labour Court would be entitled to intervene and classify the relationship between the parties for what it really was – an employment relationship."[645]

Although skilled professional video editors may suffer from insecurity, evidence shows that those in the media industry often prefer freelance working. If freelancing is genuine, the arrangements are subject to the rigours of commercial law as compared to those working under "sham" or "disguised" employment, whereby notional self-employment is used by employers to evade employment obligations.

In *Padayachi,* the third respondent, a radio presenter had for more than a decade served the broadcaster on various fixed term contracts that were renewed at the end of each contract. The standard contracts described the third respondent as the Sport Independent Contractor. She claimed rebates from South African Revenue Service (SARS) and the IRP5 form issued by the SABC also indicated that she was an independent contractor. After termination of contract between the parties, Padayachi

[644] *Burke* para 40.
[645] *Burke* para 35.

referred an unfair dismissal dispute to the CCMA. The applicant's position was that the CCMA lacked jurisdiction to be seized with such a dispute, contending that Padayachi was an independent contractor and not its employee. The court found that this was not a case in which the parties deliberately entered into the contract intending to cover up the true nature of their relationship so as to avert any applicable legal bar that prohibited the employer and employee relationship between them as in *Denel*.

The next case which falls for consideration is *Minter-Brown*. There the applicant, a videographer/editor at the respondent station, signed an independent contractor agreement with the respondent each year. Arising from various statements made by him on his Facebook page, the respondent terminated his contract. The applicant contended that he had been unfairly dismissed and referred a dispute to the CCMA. The employer challenged the CCMA's jurisdiction to hear the claim since the applicant's contract contained a private arbitration clause, and because he was not an employee but an independent contractor.

At a private arbitration, the applicant submitted that on a proper consideration of the facts, the working arrangement was roughly analogous to an employment relationship and that he was thus entitled to the benefit of the statutory unfair dismissal. The applicant frankly admitted on cross-examination that he always considered himself an independent contractor and had only understood that he was in fact an employee when he sought legal advice after his termination. The respondent submitted that when the applicant realised that being an employee would necessitate him giving up his private work, he had stated that he would prefer to remain an independent contractor. His taxes were paid as an independent contractor and the applicant was fully aware of the implications of the relationship.

After considering the case law and applicable legal principles and the pertinent facts, the arbitrator concluded that the applicant was not an independent contractor. He was not hired to produce a particular result or complete a specific result but to place his services at the disposal of the station. The fact that he supplemented his income did not alter the fact that he was economically dependent on the respondent, and the latter exercised control over his activities. Unlike the radio presenters in McKenzie, there was no identifiable end product produced by the applicant's labour which was the subject of

the contract between the parties. On the contrary, he placed himself at the respondent's disposal and was utilised in whatever capacity the respondent desired. The relationship between the parties was unambiguously that of a contract of service.

3.5.2 Empowered Entrepreneurial Owner-Drivers Running Independent Enterprises or Scavengers in Precarious Self-employment?

The binary demarcation between genuine entrepreneurial dealing and wage employment is murkier in case of owner truck drivers. Time and again much emphasis is accorded to ownership of a truck, making the essence of each of the contracts into which the owner-driver concluded the provision of a "mechanical traction".[646] This appears to be a "marker" of a resolve to go into business, involving capital investment, and coupled with entrepreneurial spirit and a pride in its independence. A scoping study captures the defining categories of self-employed in transport and logistics in the following terms:

> "The road freight industry is very familiar and comfortable with the notion that you are self-employed if you own and operate your own vehicle. In addition it is generally believed that a sham arrangement is operating if the driver is 'leasing' a truck from a company – they are not self-employed because the only 'investment' they bring to the truck business is their labour – in effect, they have nothing to 'sell on' if they decide to retire. However, this definition does not prevail in the taxi industry. Despite taxi drivers leasing the taxi from the owner-operators they are still legally and practically regarded as self-employed."[647]

This in turns raises intricate questions about the fabled entrepreneurial opportunity. Scepticism has been expressed about the "entrepreneurial independence" of an owner-driver to seek work elsewhere. Such "entrepreneurial independence", is at best illusory. Often, however, it may be no more important than the same liberty of a casual employee to seek work from other employers, or even carry on a business, when not required to work by his or her employer. In reality, most of these entrepreneurial owner-drivers are economically dependent on a sole client. Like IT consultants and

[646] *Stevens v Brodribb Scawmilling* 1986 160 CLR 16; *Re Porter*.
[647] Report *The Other Half: Self-employment in Transport & Logistics in Australia – A scoping study for TALC Employment Research Australia* - available at http://www.tcq.org.au/uploads/3/0/6/0/30604245/self-employment-in-transport-and-logistics_3.pdf, 1, 30 (accessed 15-11-2016).

freelancers, owner-drivers are held captive in precarious dependent self-employment characterised by insecure payment flows and fluctuation of income and size.

3.5.3 A Fair Deal for the Entrepreneurial Owner-drivers?

Phaka is a tip of an empowerment iceberg that went awry. The scheme and the elements of it have been recognised in the Code of Good Practice on Broad Based Black Economic Empowerment for the Transport Sector as a worthy initiative providing real and meaningful opportunities for the development of business ownership and the economic empowerment of individuals.[648] On many fronts, the case is an acid test of the integrity of the empowerment initiative and its acceptability as an industry practice.

Phaka concerned unfair dismissal and unfair labour practice dispute by erstwhile employees who entered into owners-drivers scheme with their employer as independent contractors. The appellants' challenge arose out of their unhappiness with the empowerment initiative.[649] They were aggrieved about the relationships of *locatio conductio operis* established under and in terms of that empowerment initiative. They contended that a contract of employment (*locatio conductio operarum*) subsisted notwithstanding the apparent existence of a relationship of independent contractor established in the explicit terms of the contract between each individual appellant and the company.

The company, UTI SA (Pty) Ltd ("UTI") operated as a courier company on a fixed route basis, with regular and recurring collection times, primarily for financial purposes, an empowerment initiative initiated by the company in which it set up a scheme of employing owner-drivers to render client services on its behalf. The initiative had a long-established track record realised over a number of years within the road freight industry, and enjoyed the unqualified approval and support of the bargaining council.[650] The owner-driver model entailed the contracting of individual drivers (mostly former employees with their own vehicles acquired with the financial and related support of the company) to perform courier services on behalf of the company.

[648] GN 1162 of 2009 in Government Gazette 32511 of 21 August 2009.
[649] *Phaka* para 28.
[650] *Phaka* para 3.

Participation in the scheme was voluntary. Those owner-drivers who were previously employed by the company were required to resign from the company, thereby terminating their employment relationships. Thereafter the owner-driver ceased to receive any benefits associated with employment. After resignation, the relationship between an owner-driver and the company would be governed by the standard written contract concluded between the company and the owner-driver or a separate juristic person, usually a close corporation, if the owner-driver chose to operate through such.[651]

Salient terms of the standard contract entered into by former employees with UTI were couched with section 200A of the statute in mind. They explicitly disavowed an intention to create an employment relationship. For example, clause 2.1 of the contract provided that the company "hereby engages the services of the Contractor who shall effect the collection and delivery of goods on behalf of (the company) according to the route structures detailed in Annexure A".[652] Clause 2.5 in turn reads as follows: "It is recorded that nothing in this agreement, whether expressed or implied, shall be construed as creating the relationship of either employer and employee or franchisor and franchisee between the parties". Likewise, the consideration amount payable under the contract is not calculated *qua* salary but is *inter alia* a reimbursement of costs and include, where applicable, the levying of VAT on the services rendered (clause 5). In sum, the parties' intent expressed in contract, augured strongly in favour of independent contractor status.

Did the owner-drivers own the means of production? That is to say, does labour-capital arrangements as it appeared in the emergent forms of work in *Phaka* constitute legitimate "independent entrepreneurialism"? The short answer then, to the question, is yes. In upholding the arbitrator's ruling on a lack of jurisdiction[653] and a similar conclusion by the court of first instance,[654] the LAC ruled that the drivers were independent contractors because the owner-drivers resigned from their employment, and thereafter grabbed a once in a lifetime "entrepreneurial opportunity" presented by the empowerment scheme. The vehicles used in the execution of their duties under the

[651] *Phaka* para 10.
[652] *Phaka* para 19.
[653] *Phaka* paras 26-28.
[654] *Phaka* paras 31-32.

contract were owned and operated by the owner-drivers, not by UTI, though they were often acquired with the assistance of the company. By refurbishing the company's control over the labour process and invoking outsourcing as a template of driver empowerment programme endorsed by the bargaining council,[655] UTI was able to conceal and distort, or mask precarious/dependent self-employment. Irrespective of whether some of the appellants operated as owner-drivers through close corporations; some were still engaged in on-going contracts, what cannot be contested is that they were economically dependent on and derived their income mainly if not exclusively from the company.

Given that the delivery owner-drivers in fact had minimal entrepreneurial opportunity, how did Murphy AJA create the illusion that they did? The company's and judge Murphy's central argument was that the owner drivers' positions afforded them entrepreneurial opportunity. The company argued that some owner-drivers have been able to acquire more than one vehicle, employ drivers to perform the services they had contracted to provide under the contract, and in some cases ceased to perform the services themselves. Nonetheless, the record revealed that the much vaunted entrepreneurial opportunity turned out to be a mirage for many empowered owner-drivers. What UTI, the arbitrator, the LC, and the LAC conceived as an independent business does not entail a unique business identity in product, supplier or financial markets; nor does it entail the opportunity to grow or expand customer base or to refine or develop new products. The owner/operators look to the courier company for the bulk of their work. As the Ontario Labour Relations Board observed in *HG Francis & Sons Ltd*:

> "How are the contractors to be viewed in the light of the statutory criteria? It is apparent that the income of all of the contractors is directly and substantially dependent upon the work which they perform for Francis and its customers. In all but one case, these provide the sole source of work and income, and the exception involved only one individual performing minor services for friends and neighbours. There is virtually no evidence of business developments, self-promotion, or entrepreneurial initiative. The evidence discloses little inclination or ability on the part of the contractors to expand their business horizons. They do not compete for customers in the market. Such new customers as they do solicit are likely to become tied to Francis as they are themselves. The fact that they derive a benefit from attracting new customers to Francis is no more determinative of independent contractor status than it would be for commission salesmen. The fact is, that the contractors have not generally provided services to independent customers of their own, and if the contract is terminated, all of

[655] *Phaka* para 24.

Francis' customers including those which the contractor may have attracted – will be beyond the reach."[656]

So, too, the *Phaka* owner-drivers did not advertise or otherwise solicit clients on their own, and were generally available during working hours of the company. They were acting more like employee truck drivers than independent contractors. By vindicating the empowerment scheme, Judge Murphy deemed "contracting out of individual drivers" for the owner-drivers is a job that involves scavenging for crumbs.

Ownership of capital assets and contractual arrangements aside, measured against the standard of a "typical" industrial employment relationship, the empowered owner-drivers look very much like employees. Each signed a standard contract. The owner-drivers received firm-specific training and learned firm specific protocols, and they were subject to supervisory control. They were subject to a system of performance appraisal, reprimand and cancellation.[657] The relationship between owner drivers and the company bore all the essential hallmarks of employment relationship. The degree of economic dependence on the courier company meant that they were not in a position to expand their business so as to extricate themselves from their dependence on UTI.

In the instant case, there is a strong argument that despite their participation in the empowerment initiative, the owner-drivers remained employees on a par with other drivers employed by the company. The contract subjected them to significant bureaucratic control and their activities were integrated into the company in such a way as to constitute an employment relationship.[658] In support of this contention the following points were put forward. Firstly, the contract required them to report for duty six days per week for specified hours and they were subject to instructions from the same persons who had been their superiors before the initiative. Secondly, the contract imposes restrictions upon the freedom of the contractor to employ employees of their choice, to wear their preferred clothing, to use their cars as they wish during working hours, to acquire vehicles from the dealership of their choice and permitted the company to deduct PAYE and other financial penalties.[659] These arrangements and restrictions,

[656] *HG Francis & Sons Ltd* para 21.
[657] *Phaka* para 13.
[658] *Phaka* para 24.
[659] *Phaka* para 24.

they argued, tipped the scale in favour their classification as employees within the purview of the presumption in terms of section 200A of the LRA. They were subject to significant direction and control by the company.

The LAC rejected the appellants' contentions noting that there was a difference between their positions before resignation as employees and their appointment as owner-drivers and their position afterwards. The unmistakable message from arbitration, LC and the LAC is that as the ex-employees made their bed as empowered owner-drivers, so, they must lie on it.

The paradigmatic form of self-employment and micro enterprises illustrated in *Phaka*, exemplified in the bicycle courier and e-hailing driver-partner cases is perfectly compatible with great deal of subordination. The reality is that "self-employed workers in these service arrangements often continued to exhibit the "social subordination and economic dependence" typical of ordinary employees and so are equally "in need of those employment protection rights from which they are often excluded by virtue of having ceased to qualify as employees".[660]

The crucial question whether empowered entrepreneurial owner-drivers are running independent enterprises or scavengers in precarious employment invites consideration of the Australian experience

3.5.4 Lessons from the Antipodes

The outcome in the Australian case[661] of first impression concerning an owner truck driver was extremely hard on the losing party. The High Court held that an owner truck driver who had been driving full-time for the same employer for several years was not an employee, because the employer could not practically control how he drove the truck. This finding was a calamity for the driver's widow as it meant that she could not receive a benefit from the worker's compensation insurance when her husband was killed in a road accident while driving his truck. Her tragedy was a signal influence in the development of a special legislation permitting industrial tribunal to supervise

[660] Collins "vertical disintegration" 354.
[661] *Humberstone v Northern Timber Mills* 1949 79 CLR 389.

remuneration rates and other conditions of work for owner-drivers in some Australian states.[662]

It is illuminating, then, to reflect on the progressive regulatory framework for self-employed transport workers in both New South Wales and Victoria.[663] Self-employed transport workers are able to seek the intervention of specialist tribunals to deal with disputes over the terms of their work contracts. For instance, the Industrial Relations Act 1996 (NSW) Chapter 6, regulates transport industry workers whose engagements fall within the definition of a "contract of carriage" as defined in section 309 of the statute. In this respect drivers are able to make applications to the Industrial Relations Commission of NSW for a review of the remuneration or other terms in their contracts with principal contractors. The powers of the Commission extends to making determinations concerning minimum rates of pay and allowances, and to order reinstatement of terminated contracts.[664] According to Riley, "through this jurisdiction, transport workers in NSW have had the benefit of similar protections to those enjoyed by employees: support for decent wages and conditions of work, and a degree of protection from capricious termination of their work contracts."[665] The principal advantage of specialist litigation is the elimination of perennial bickering about whether the driver was an employee or a contractor before allowing the driver these protections.

Of particular interest to South Africa given the scourge of road fatalities is the Road Safety Remuneration Act 2001. This legislation was enacted in response to tragic road accidents involving long haul drivers who had fallen asleep behind the wheel after long hours without rest because of the imperative of meeting the onerous terms of their contracts. The primary focus of the statute is on the interests at stake "safe rates" to enable workers to earn a livelihood without putting themselves and other road users at risk – and not on the legal classification of the contract between the parties.[666] Section

[662] Riley "Regulatory responses to the blurring boundary between employment and self-employment: A view from the Antipodes" in Kiss (eds) *Recent Developments in Labour Law* (2013) 131, 134-136 ("A view from the Antipodes").
[663] For a more extensive account of owner driver regulation in Australia, see Johnson "Developing legislative protection for owner drivers in Australia: The long road to regulatory best practice" Fudge et al (eds) *Challenging the Legal Boundaries of Work Regulation* (2012) 121.
[664] See Industrial Relations Act 1996 (NSW) ss 313-314.
[665] Riley "A view from the Antipodes" 134.
[666] Riley "A view from the Antipodes" 136.

19(3) of the Act empowers the Road Safety Remuneration Tribunal to make "road safety remuneration orders", either on the Tribunal's own initiative, or upon an application by a road transport driver, employer, registered employee association, or a client or supplier participating in transport contracts. In short, the Tribunal is empowered to intervene where it perceives a risk of unsafe contracting practices, irrespective of whether the drivers are employees of small business, sub-contractors, or owner/operator drivers.

3.6 Franchising

Although the typical business format franchising exhibits the same inequalities in power as are customarily ascribed to the employment, it has elided labour regulation.[667] A typical franchising occurs where a business (called the franchisor) enters into an agreement with another person, in terms of which that person (called the franchisee) is licensed to operate a cloned business under the franchisor's trademark or brand.[668] The franchisee, in turn, agrees to pay the franchisor a fee.

Despite their apparently independent business status, however, the typical franchisee is susceptible to the same risks as the typical employee. Arbitrary and capricious termination of a franchise agreement will have just the same devastating ingredients as an unfair dismissal. The adverse ramifications are perhaps more amplified as the typical franchisee would have invested substantial amount of capital into the franchise, and this investment will often be lost with the franchise contract.[669]

[667] Riley has put her mind on the issue labour regulation of franchising. She suggested that commercial franchise relationships should be considered to be within the purview of labour market regulation. See generally, Riley "A view from the Antipodes" 131; "A blurred boundary between entrepreneurship and servitude: Regulating business format franchising in Australia" in Fudge *et al* (eds) Challenging the Legal Boundaries of Work Regulation (2012) 101 and "Regulating unequal work relationships for fairness and efficiency: A study of business format franchising" in *Arup et al Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (2006) 561 ("A study of business format franchising"). See also Collins "Vertical disintegration" and "Regulating the employment relation for competitiveness" 2001 30 *ILJ (UK)* 17.

[668] Theron *et al Keywords for a 21st Century Workplace* 30.

[669] See e.g. *Simelane v Pretoria Franchise Support Services (Pty) Ltd t/a Fastway Couriers (Pretoria)* 2013 ZANCT 43; *P Christodolou & Sons Textiles CC v Woolworths (Pty)* Ltd 2013 ZAWCHC 96; *Howell v Half Point Properties* 2011 ZAECGHC 32. See further Steinberg & Lescarte "Beguiling heresy: Regulating the franchise relationship" 2004 *Penn State LR* 105.

The award in *Assist-U-Drive*[670] represents a missed opportunity of exploring the outer limits of the LRA. In this case, the commissioner considered whether the termination of a franchising agreement constituted a dismissal. The franchisor operated a driving school and the franchisee obtained a franchising licence to operate under its name. While the arbitrator was mindful that substance should trump form as expounded in *Denel*, however, he was not satisfied that the control exercised by the franchisor and the economic dependence of the franchisee were of such a nature that the relationship constituted one employment. It was held that the franchisee was in fact an independent contractor.

Franchising is an attractive option for externalisation of the labour force. Take an example of a hotel chain that obtained a franchise and, with a manager-owner in place, outsourced the rest of its operation, creating a business with no labour force.[671] If we are prepared to think outside the box, it becomes apparent that many franchising relationships involve the same kind of relationships as are inherent in the subordinate employment relationships. It is hard to explain this apparent regulators incoherence. It may be that "laws regulating labour relationships have been caught out in uneasy transition from one area of labour market regulation dominated by the paradigm of the subordinated employment relationship, to a new era emblematised by the entrepreneurial incorporated worker."[672] There can be no doubt that this area cries for sustained engagement by labour law scholars.

3.7 Worker Co-operative: A Serpent in the Garment Industry?

Globally the textile, clothing, footwear and associated industries ('TCF") industry is accustomed to the increased use of the corporate veil in tandem with supply chains entailing elaborate contractual arrangement and legal forms designed to evade/

[670] *Rodgers and Assist-U-Drive* 2006 27 *ILJ* 847 (CCMA).
[671] Theron *et al Protecting Workers on the Periphery* 21.
[672] Riley "A study of business format franchising" 578. The Freedland would not consider franchising relationship to should be included within any of the overlapping circles mapping the range of "personal work relations" warranting the imposition of any protective labour standards. Freedland "Application of labour and employment law beyond the contract of employment" 2007 *ILR* 3.

minimise statutory entitlements.[673] In recent times, however, the trajectory of local TCF has witnessed co-operatives not only become important vehicles for empowerment, but also emerged as an alternative form of worker organisation.[674] As will appear presently, employers in the TCF industry have latched upon co-operatives in order to insulate themselves from the reach of labour legislation. A co-operative is an association that operates as business or enterprise in accordance with Co-operatives Act 14 of 2005 ("COA"). A distinctive feature of a co-operative is that it must operate democratically.[675] Each cooperative member has one vote whereas in a company the biggest shareholder generally calls the shot. Another distinguishing aspect of a company and a co-operative pertains to capital contribution and accumulation. Each member contributes to the capital of the co-operative. Another way of making contribution by members is by their labour.

Two kinds of co-operative enterprises can be identified. Historically, the predominant one is the farmers' co-operative. This enabled members to work co-operatively to market their produce so as to eliminate the middlemen. Co-operatives providing marketing services are amongst the most successful form of co-operatives.[676] A crown jewel is KWV.[677] On the other hand, a workers' co-operative arises where members decide to work together, providing services to businesses, in competition with other service providers in the market. The distorting feature of the worker co-operative is that the status of its members is akin to the English experiment with "employee shareholder".[678] The Employee Shareholder Status was enacted as section 31 of the

[673] See generally, Kates "The supply chain gang: Enforcing the employment rights of subcontracted labour in Ontario" 2006 *CLELJ* 449; Rawling "A generic model of regulating supply chain outsourcing" in Arup *et al* (eds) *Labour Law and Labour Market Regulation* (2006) 520; Lung "Exploring the joint employer doctrine: Providing a break from for sweatshop garment workers" 2003 *Loy. U. Chi. LJ* 291.
[674] Du Toit & Tiemeni "Do cooperatives offer a basis for worker organisation in the domestic sector? An exploratory study" 2015 36 *ILJ* 1677 and Du Toit & Ronnie "Regulating the informal economy: Unpacking the oxymoron – From worker protection to worker empowerment" 2014 35 *ILJ* 1802.
[675] *Glamour Fashions Workers Primary I* paras 25 and 27.
[676] Theron *et al Keywords for a 21st Century Workplace* (2011) 15.
[677] In *Cilliers v LA Concorde Holdings* 2018 ZAWCHC 63 a minority shareholder in the erstwhile KWV has succeeded in getting a court order for the valuation of shares in what is described as a ground-breaking judgment.
[678] For a detailed account of the English experiment, see Prassl "Employee shareholder 'status': Dismantling the contract of employment" 2013 42 *ILJ* (UK) 307 and "Members, partners, employees, workers? Partnership law and employment status revisited: *Clyde & Co LLP v Bates van Winkelhof* 2014 43 *ILJ (UK)* 495. See also Berry "When is a partner/LLP member not a partner/LLP member? The interface with employment and worker status" 2017 46 *ILJ (UK)* 309; Idensohn "The controlling

Growth and Infrastructure Act 2013, which was inserted as section 205A in the Employment Rights Act 1996. The status is acquired when an individual employee and a company agree that the former is to be "employee shareholder". As a quid pro quo, the "employee shareholder" can be denied access to key employment rights such as unfair dismissal protection and redundancy pay in return for a shareholding in their employer valued at a minimum of £2000. It is clear from the COA that the members of a co-operative are not employees. It means that the worker co-operative is divorced from employment protective norms. In this way it loses its key public-regulatory function, the distribution of risk between workers and their employing entity.

The recent Labour Appeal Court and Labour Curt decisions in *Glamour Fashions Workers Primary I* and *Glamour Fashions Workers Primary II* address more than the technical issue of blanket declaratory order stipulating that workers' co-operatives are subject to the LRA. Upon closer inspection, however, it brings to the forefront a tension underpinning the interplay between the LRA and the COA, between an inclusive approach encompassing all relationships of employment or akin thereto within the domain of labour law, and the view that primarily commercial relationships should fall outside the scope of employment regulation.

The facts, shortly stated were as follows. The applicant Bargaining Council sought a declaratory order that the provisions of section 6 of Schedule 1, Part 2 of the COA[679] do *not* prevail over the provisions of the LRA pursuant to the provisions of section 210 of the LRA,[680] and accordingly that members of worker co-operatives who

shareholder as an employee: *Secretary of State for Business, Enterprise & Regulatory Reform v Neufeld & Howe*" 2009 30 *ILJ* 1495.

[679] S 6 in Schedule 1, Special provisions relating to certain kinds of Co-Operatives, part 2 Worker Co-Operatives of the COA reads:

6. Application of the Labour Legislation

(1) A member of a worker co-operative is not an employee as denied in terms of the Labour Relations Act, 1995 (Act 66 of 1995), or the Basic Conditions of Employment Act, 1997 (Act 75 of 1997).

(2) Despite subsection (1) a worker co-operative is deemed to be the employer of its members who work for the co-operative for the purpose of the following Acts: [Skills Development Act, Skills Development Levies Act, OHSA, COEDA, UIF Act and Unemployment Insurance Contributions Act].

[680] S 210 of the LRA provides as follows:

otherwise fall within the definition of an "employee" in terms of section 213 of the LRA are employees for the purposes of the LRA, and the co-operatives and such members are accordingly bound by the provisions of the LRA.

In seeking to draw the line in such a way as to bring the worker co-operative within the embrace of a bargaining council, the applicant's complaint was that the worker co-operative was concocted to enable it evade the reach and scope of the bargaining council. The worker co-operative in its entrepreneurial venture doubly undermined the "holy cow of collective bargaining"[681] and simultaneously forestalled the extension of collective agreement non-parties[682] in the sector. Despite worker co-operatives representing a proverbial assault on collective bargaining, some commentators have suggested that they are a viable alternative form of worker organisation and empowerment.[683] Rather than being empowered entrepreneurial owners running independent enterprises, members of worker co-operative are simply

> "Application of the Act in conflict of other laws:
>
> If any conflict, relating to the matters dealt with in *this Act*, arises between this Act and the provisions of any other law save the Constitution or any Act expressly amending this Act, the provisions of *this Act* will prevail."

[681] Per Arendse AJ in *FAWU v Pet Products (Pty) Ltd* 2000 21 *ILJ* 1100 (LC) para 21.5.

[682] As explained by Ngcobo J (as the then was) in *CUSA* para 5:

> "Collective agreements concluded in a bargaining council are binding on the parties of the bargaining council. And they may, by ministerial decree, be extended to apply to all workers and employers in the sector and area in respect of which the bargaining council has been established. These agreements generally deal with minimum wages and other conditions of employment applicable to employers and workers in a particular industry. They therefore set the floor beneath which wages and other conditions of employment should not drop. Parties generally conclude the main agreement which deals comprehensively with the terms and conditions of employment. The main agreement generally remains in force for a period of one year in anticipation of the periodical re-negotiation of some of the terms, in particular those that deal with wages, which are reviewed annually. Upon the expiration of its period, the main agreement may be extended as amended by newly negotiated terms and conditions of employment."

That the extension of collective agreement to non-parties remains contentious is illustrated by *AMCU/Chamber of Mines* trilogy: *AMCU v Chamber of Mines of SA* 2017 38 *ILJ* (CC); *AMCU v Chamber of Mines of SA* 2016 37 *ILJ* 1333 (LAC); *Chamber of Mines of SA v AMCU* 2014 35 *ILJ* 3111 (LC); *NUMSA obo Members v SA Airways SOC Ltd* 2017 9 BLLR 869 (LAC).

[683] See e.g. Du Toit & Tiemeni 'Do cooperatives offer a basis for worker organisation in the domestic sector? An exploratory study' 2015 36 *ILJ* 1677 and Du Toit & Ronnie 'Regulating the informal economy: Unpacking the oxymoron – From worker protection to worker empowerment' 2014 35 *ILJ* 1802.

disempowered scavengers in the garment industry. The short point to be made is that the garment industry is a veritable site of sweatshops. Therefore, the notion that worker co-operatives can advance worker interests and serve as countervailing power is, of course, a fiction as bizarre as the notion that courts 'discover' but do not 'make' law.

The necessity for the declarator arose from a proliferation in the registration of worker co-operatives in the clothing manufacturing industry falling within its registered scope and hence jurisdiction. The proliferation arose solely in order to circumvent the application of the LRA and bargaining council's main collective agreements to employees previously engaged as such by close corporations or companies who have now converted into worker co-operatives but who operate no differently than they did before.[684]

Given that workers operating in the garment industry often toil, atomized and isolated, sham worker co-operative have emerged as an attractive alternative to direct employment. In fact, if anything, the respondent contended that former employees of the juristic entities, now framed as "members" of the primary worker co-operative, are not employees for the purposes of the LRA. It followed that the co-operatives were exempt from according such members (who are no more than employees) the rights and protections accorded employees under the LRA. While the Labour Court was sensitive to and understands concerns about sham co-operatives, it found that there was no point granting a declaratory order since the issues are essentially fact-dependent and their determination in the abstract would have little, if any, precedential value and thus no practical effect.[685] Simply put, any declaration of the LRA's precedence over the COA could only apply to those members of sham co-operatives who are in fact employees as defined in the LRA in the first place.

In coming to the conclusion that there was no conflict between the LRA and COA, and that the statutes served different purposes, Whitcher J wrote:

> "This flows from the definition of both 'employee' and 'remuneration' in section 213 of the LRA which envisages affording the protections of the Act to persons working *for* as opposed to *with* other persons. A legitimate and properly constituted co-operative is characterized by the values of collective self-help, self-reliance, self-responsibility, democracy, equality and social responsibility. At its heart is the impulse

[684] *Glamour Fashions Workers Primary I* para 7.
[685] *Glamour Fashions Workers Primary I* para 21.

> of members to voluntarily associate with each other and to apply democracy as the basis of organisational decision-making. This is reflected in provisions of the COA dealing with shareholding and the allocation of surpluses, requiring regular meetings, and instituting the general membership of the cooperative as the highest decision-making body of the organisation. Members of a workers' co-operative may be employed in a very wide sense but, in legitimate co-operatives, these members are not working *for* another person in the same way a wage-earner is. They do not place their capacity to work at the disposal of others. They are working *with* others for themselves in an enterprise they jointly own and collectively control."[686]

On Appeal, Savage AJA rejected the appellant's plea for a declaration that item 6 of Part 2 Schedule 1 of the COA does not prevail over the provisions of the LRA; that worke co-operatives and their members are bound by the provisions of the LRA; and that members of worker co-operatives are employees as defined in section 213 of the LRA. The main obstacle to granting a declaratory order was that a proper cases had not been made out for the relief sought. It should also be borne in mind that the fact COA and LRA were enacted to give effect to give effect to both the rights of members of worker co-operatives and employees, and there was no conflict between the statutes as they stand.[687] The court of first instance could not, be faulted for dismissing the application before it.

Granted that the judgements should not be taken to condone bogus co-operatives who adopt the form of a workers' co-operative to circumvent labour law, the court was of the view that "unscrupulous employers setting up sham co-operatives to circumvent labour law will, *on a proper examination of the facts on a case by case basis,* hopefully come short in the CCMA or Bargaining Council."[688] With respect, the Labour Court and Labour Appeal Court could have been more robust in its approach by granting a blanket declaratory order stipulating that all workers' co-operatives are subject to the LRA given the intensity of disguised employment and explosion of worker co-operatives in the TCF sector. If bogus worker co-operatives are a blight on the labour market and a serious abuse of worker rights, it may be said, in a perfectly intelligible sense, Whitcher J and Savage AJA have unwittingly allowed a serpent to thrive in the garden of precarious self-employment.

[686] *Glamour Fashions Workers Primary I* para 23.
[687] *Glamour Fashions Workers Primary II* para 16.
[688] *Glamour Fashions Workers Primary I* para 37.

3.8 Conclusion

This chapter has shown that the long-standing and deeply embedded distinction between employment and independent contracting (self-employment) is challenged by the reality of contemporary work environment which does not readily conform to such binary categories. In effect the definitional quandaries of who is an employee and who is an independent contractor shift, blur and obfuscate the porous parameters of disguised employment, genuine entrepreneurial self-employment and dependent self-employment. Not surprisingly, given the potential for self-employment to be a low-cost alternative to direct employment, much energy has gone to attempts to shore up and expand the reach of legal protection. Superficially the debate boils down to one side working to drag "sham contractors" back into the employment framework by better defining employees, while most resistance comes in the form of protectors of the rights of the self-employed to be "free". In reality the debate is far more nuanced and the practice of self-employment is far more heterogeneous, but the policy conversations still substantially respond to the same principal conceptual dichotomy – is the contract one of *employment* or one of *commerce*?

The inescapable inference from case law is that a significant number of self-employed are in analogous position of economic dependence as subordinate employees in that many of them work on their clients' premises or on premises supplied by clients and are dependent on former employers as clients. Somewhere in between genuinely subordinated workers and genuinely independent entrepreneurs, a third category is emerging – that of workers who are legally independent (i.e. self-employed) but economically dependent. Even though most independent contractors are under the control of, or economically dependent upon, a particular client, most lack many, if not all, of distinguishing features of entrepreneurship – ownership, autonomy, or control over production. There exists an economic spectrum - coloured at one end by the true entrepreneur and at the other end by the individual worker. At the shaded area towards the middle of the economic spectrum, critical questions about self-employment arise. The key question is not simply distinguishing between the individual worker and the true entrepreneur. Rather, the issue is how to extend protection to those workers who inhabit the grey zone between independent self-employment and precarious self-

employment. The broader challenge is how to extend protection to persons who have some of the trappings of the independent contractor, but, in reality, are in a position of economic dependence, more like that of an employee.

This chapter suggests that there is a lot of work to be done to better understand a portrait of the self-employed and self-employment, so that efforts to grapple with disguised employment and precarious self-employment[689] will not stumble at the first hurdle. This requires us to explore the outer limits of the LRA.

[689] ILO Recommendation 198 concerning the employment relationship, 2006 (adopted 15 June 2006), albeit not of the binding force of a Convention, enjoins member states to:

> "combat disguised employment relationships in the context of, for example, other relationships that may include the use of other forms of contractual arrangements that hide the true legal status, noting that a disguised employment relationship occurs when the employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee, and that situations can arise where contractual arrangements have the effect of depriving workers of the protection they are due."

In addition ILO R198 para 9 recommends that an employment relationship should be determined –

> "primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterised in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties."

CHAPTER FOUR

UNRAVELLING THE OPACITIES OF FORM: IDENTIFYING THE REAL EMPLOYER

4.1 Introduction

It is true that the inflexibility of the binary employment model has been aggravated by the shifting frontiers of work. The phenomenon of fragmentation – the rejection of the vertically integrated firm has accompanied the proliferation of the flexible firm and the corporate network, including the emergence of both dependent and independent types of fragmentation. Despite wide acknowledgement of its significance, however, the question "who is an employer" remains scantily examined,[690] except within the confines of triangular employment relationships.[691] By contrast, a substantial body of literature on contemporary labour law has lavished considerable attention on examining[692] and re-examining[693] – labour law's million dollar question: who is an employee? The preoccupation with unmasking the true employee is merited, as it brings into sharp focus the analytical and normative concerns of labour law. Ironically, the conceptual focus on the employee has tended to obstruct our view of the difficulties surrounding the concept of an "employer".[694]

[690] Rubenstein "Employees, employers, and quasi-employers: An analysis of employees and employers who operate in the borderland between an employer-and-employee relationship" 2012 *U. Pa. J. Bus. L* 605, 610 noting "a paucity of academic scholarship focusing on employer status" ("Employees, Employers, and quasi-employers").

[691] Scholarship has focused particularly on temporary employment agencies. See generally, Van Eck 2014 *IJCLLIR* 49; 2012 *IJCLLIR* 29 and 2010 *PER* 107; Cohen 2014 35 *ILJ* 2607; 2012 33 *ILJ* 2318 and 2011 *Obiter* 665; Fourie 2008 *PER* 23 Davidov "Joint employer status in triangular employment relationship" 2004 *BJR* 727; Brown "Protecting agency workers: Implied contract or legislation?" 2008 37 *ILJ (UK)* 178; Bartkiw "Baby steps? Towards the regulation of temporary help agency employment in Canada" 2009 31 *Comp Lab L & Pol'y* 61.

[692] See generally, Mureinik 1980 *SALJ* 246; Muckenberger 1996 *ILR* 683; Manamela 2002 *SAMLJ* 107; Benjamin 2004 25 *ILJ* 787; Benjamin 2004 25 *ILJ* 787; Mills 2004 25 *ILJ* 1203; Van Niekerk 2005 *CLL* 11; Bosch 2006 *ILJ* 1342; Bosch & Christie 2007 28 *ILJ* 804; Theron 2007 *LDD* 25; Le Roux 2007 *SALJ* 469 and 2009 30 *ILJ* 49.

[693] See generally, Dubal 2017 *Cal. LR* 65; Fisk 2017 *Chicago Legal Forum* 1; Pinsof" 2016 *Mich. Telecomm & Tech. LR* 341; Andrias 2016 *Yale LJ* 2; Zatz 2011 *ABA J. Lab & Emp. L.* 279.

[694] Prassl *The Concept of the Employer* (2015) 4 argues that "as long as attention remains focused on the employee category and related secondary conceptions alone, it will be very difficult to address the relevant questions at all."

The concept of an employer is a critical subject for the world of work, especially for the role of effective legal regulation of that domain. The crux of the problem is how the law identifies an "employer" as a counterparty with an "employee". Certain features of modern business organisation such as vertical disintegration of production, and their link to the rise of precarious employment underscore the extent to which the concept of employer plays a central role in defining the contours of labour protection. In the broadest sense, the structure of enterprises defines not only what form the employment takes, but also the form in which a common enterprise bears the responsibility for employing labour and the attendant employment-related obligations. In short, the organisational form that an enterprise takes has a profound impact upon equity in employment conditions.

How has South African labour law come to grips with the beguilingly simple question: who is an employer? What has been the judicial approach to penetrating the opacities of form designed to complicate the employment relationship with the effect of non-suiting the employees' unfair dismissal claims, thus impeding effective resolution of labour disputes? This chapter explores these questions in the context of unravelling the complexities of the employing entity.

4.2 Fragmentation, Vertical Disintegration and Capital Boundary Problem

The issue of defining who is an employer encompasses crucial economic issues, such as financial reliability of the firm, economic independency of businesses, boundaries of the firm,[695] entrepreneurial strategies and, national and international

[695] See Coase "The nature of the Firm" 1937 *Economica* 386, 390-91 and "The nature of the firm: Origin" 1988 *JL Econ & Org* 3, 3-4. Coase sought to explain why firms existed or why some productive activities were carried out in markets and others through centralised coordination. He rejected the popular answer that firms were aberration created by foul play, like the predatory practices of robber barons. It then became more efficient to organise economic activity within the firm. For insight into many dimensions to law or law and economics scholarship see: Calabresi "Some thoughts on risk distribution and the law of torts" 1967 *Yale LJ* 70; Williamson "The economics or organisations: The transaction cost approach" 1981 *Am. J of Sociology* 548; Easterbrook "Foreword: The court and the economic system" 1984 *Harvard LR* 98; Friedman "Two faces of law" 1984 *Wisconsin LR* 13; Landes & Posner "The influence of economics of law: A quantitative study" 1993 *JL & Econ* 385; Posner *Economic: Analysis of Law* 6thed (1977); Veljanovski *The Economic of Law* 2ed (2006) For antecedents of economic approach to law, see Holmes "The path of the law" 897 *Harvard LR* 457. For provocative insight into Holmes seminal

investments.[696] Also arising are related issues concerning the concept of separate entity,[697] "disregarding the corporate veil",[698] as well as the group concept in company law.[699] For students of labour law, the question of employer identity is interconnected with exercise of workplace discipline[700] or the so-called managerial prerogative.[701]

The process of "vertical integration", wherein firms generate goods and services internally, has drastically declined over the last several decades.[702] It is clear that the shifting frontier of work and fragmentation of the enterprise as an organisation have led to more complex employment that do not fit with the conception of employment as a bilateral and personal contract. It has been stated clearly that vertical disintegration of firms and the breakdown of internal labour markets has shown how individuals who had hitherto been treated as employees could easily be transformed into independent contractors who are outside the scope of labour protection.[703] Fragmentation takes three forms – vertical disintegration,

article: Special Issue "The path of the law after one hundred years" 1997 *Harvard LR* 989; Posner "The path away from the law" 1997 *Harvard LR* 1039; Ackerman "2006 Oliver Wendell Holmes Lectures: The living Constitution" 2007 *Harvard LR* 1737.

[696] Corazza & Razzolini *Who is an Employer* 2014 *Centre for the Study of European Labour Law Working Papers* 1, 2.

[697] The *locus classicus* is *Salomon v Salomon & Co Ltd* 1897 AC 2 (HL).

[698] See e.g. *Ex parte Gore NNO* 2013 3 SA 382 (WCC); *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 4 SA 790 (A). See also Larkin "Regarding judicial disregarding of the companies separate identity" 1989 *SA Merc LJ* 277; Cassim "Piercing the veil under section 20(9) of the Companies 71 of 2008: A new direction" 2014 *SA Merc LJ* 307; Subramanien "Unconscionable abuse - section 20(9) of the Companies Act 71 of 2008" 2014 *Obiter* 161.

[699] *Omar v Inhouse Venue Technical Management (Pty) Ltd* 2015 3 SA 146 (WCC). See generally, Botha "Recognition of the group concept in company law" 1982 *De Jure* 107; "Holding and subsidiary companies: fiduciary duties of directors" 1983 *De Jure* 234 and "Holding and subsidiary companies: fiduciary duties of directors (conclusion)" 1984 *De Jure* 167.

[700] See e.g. *Dyasi v Onderstepoort Biological Products Ltd* 2011 7 BLLR 671 (LC).

[701] For in-depth treatment: Strydom *The Employer Prerogative from A Labour Law Perspective* (Unpublished LL. D Thesis UNISA 1997).

[702] Hovenkamp "The law of vertical integration and the business firm: 1880-1960" 2010 *Iowa LR* 863, 865 – vertical integration occurs whenever a business does something for itself that it might otherwise have obtained on the market.

[703] Collins "Vertigal disintegration". See also Stone "Legal protection for atypical employees: Employment law for workers without workplaces and employees without employers" 2006 *Berkeley J. Emp Lab. L* 251, 253-254. See also Stanworth & Stanworth "The self-employed without employees – autonomous or atypical?" 1995 *IRJ* 221.

horizontal disintegration,[704] and temporal disintegration.[705] Disintegration is often classified as vertical where multiple entities are functionally integrated but are each subject to independent control and management, a factor which is particularly relevant to triangular employment relationship. Labour cost related to vertical disintegration is integrally related to labour cost saving. A consistent economic rationale for externalisation is evasion of employer responsibility. Thus, the subcontractor can violate the law more cheaply than firms higher in the production chain, and can utilise the resulting savings to tempt those firms into subcontracting relationships. By tapping into their unique ability to skirt employment mandates, intermediaries can maximise savings for the firms that engage them. This simply means so long as firms remain free in law and practice to determine their own boundaries, their superior bargaining power allows them to dictate the form of employment relationship, including the allocation of employment related obligations.[706]

The essence of "capital boundary problem"[707] is the freedom of capital organisations to define their own boundaries at the expense of workers. A succinct description of the capital boundary problem is provided by the Ontario Superior Court in *Lian*

> "In the absence of intervention by the legislation or regulation, businesses have the freedom of action to determine the type and extent of the particular business activity carried on, as seen to be their own self-interest. Division of labour and specialization in a competitive market are inherent to all businesses in a competitive market. Specialization in a competitive market serves to maximize consumer choice at the most favourable price. A given business, say a garment retailer, can properly limit its

[704] Horizontal disintegration refers to the scenario where traditional management functions are split between two or more firms, as with temporary agencies. See Zatz "Working beyond the reach or grasp of employment law" in Bernhardt *et al* (eds) *The Gloves-Off Economy: Workplace Standards at the Bottom of America's Labour Market* (2008) 31.

[705] Temporal disintegration refers to disintegration of ownership and control of a firm or its assets as they either dissolve or are transferred over time – a situation which applies to successor companies in situations of insolvency. See Zatz "Working beyond the reach or grasp of employment law" 31. See also Fudge & Zavitz "Vertical disintegration and related employers: Attributing employment-related obligations in Ontario" 2006 *CLELJ* 107, 111 "Vertical disintegration and related employers"; Fudge "Fragmenting work and fragmenting organisations: The contract of employment and the scope of labour regulation" 2006 *Osgoode Hall LJ* 609, 639 ("Fragmenting work").

[706] Kates "The supply chain gang: Enforcing the employment rights of subcontracted labour in Ontario" 2006 *CLELJ* 449, 457 "The supply chain gang"

[707] Collins "Ascription of legal responsibility to groups in common patterns of economic integration" 1990 *MLR* 731.

> business activity to retailing, knowing and intending that its product for sale will be manufactured by others. The fact that there is known chain of supply and pyramid of businesses within the overall garment industry, such that it can be said there is vertically integrated industry, is in itself of no adverse legal consequence."[708]

According to Collins, firms retain the productive capacity of their workforce while delegating the protective role of the employer to an intermediary that is frequently smaller, economically unstable, and less committed to employment rights.[709] It can be argued persuasively that this undermines the trade-off between economic dependence and social protection, an overriding factor in employment relationship. It is not surprising that the result of the reallocation of responsibility through fragmentation is a structural tendency for the under enforcement of employment standards, since it is the worker who assumes any risk of default.

The question of ascribing responsibility for employment-related costs, duties and risks in multilateral employment relationship where more than one employing entity was involved has created conditions for potential injustice. Polarisation of employment relations has two distinct forms. At the apex are knowledge workers, who are associated with the rise of "new economy" and networked organisation. Although these workers function as entrepreneurs in the enterprise, when linked with their property in knowledge, they have approximate equality of bargaining power in standard employment relationship.[710] Generally, the need for protection of these employees are not typically considered.[711] At the other end of the spectrum are

[708] *Lian* para 71.

[709] This is a common thread in TES litigation: *Enforce Security Group; Nape; Chuma*. See also Forere 2016 *SA Merc LJ* 375; Aletter &Van Eck 2016 *SA Merc LJ* 285; Bosch 2015 34 *ILJ* 1631; Feldman"Ex-ante vs. ex-post: optimizing state intervention in exploitive triangular employment relationships" 2009 *Comp. Lab. L. & Pol'y J.* 751

[710] See e.g. *Gama v Transnet SOC Ltd* 2018 ZALCJHB 348; *Molefe v Eskom Holdings SOC* 2017 ZALCJHB 281; *Gbenga-Oluwatoye* paras 24; *Vermooten* para 26. *Golding*; *Denel*.

[711] Cheadle "Regulated flexibility" 664 notes that "statutory unfair labour practice has become a charter of rights for middle and senior management while the most vulnerable workers are left without protection." See generally Cohen "Precautionary suspensions in the public sector: *Member of the Executive Council for Education, North West Provincial Government v Gradwell* 2012 33 *ILJ* 2012 (LAC)" 2013 34 *ILJ* 1706; Norton "When is suspension an unfair labour practice? A review of court decisions" 2013 34 *ILJ* 1694; Note "Precautionary suspension in the public sector" 2013 34 *ILJ* 1705; Mischke "Delaying the disciplinary hearing: Strategies and shenanigans" 2011 *CLL* 41; Moletsane "Challenges faced by a public sector employer that wants to dismiss an employee who unreasonably delays a disciplinary enquiry" 2012 33 *ILJ* 1568. See also the following reports: *Report on Management of Precautionary Suspension in the Public Service* – Public Service Commission June 2011; The Office of the Public Protector - "Pre-empted Appointment" *Report on an Investigation into Allegations of Maladministration, Abuse of*

"precarious" or vulnerable workers who are associated with the informal economy and temporary employment agencies.[712] The conception of the employment relationship retains its salience and significance, both in terms of protection that is apt to deliver, and the number of workers protected.[713] The exact relationship between flexible forms of labour and enhanced employment vulnerability is clear.

4.3 The Unitary Employer Model

The concept of the employer as a "single indivisible entity" has its lineage in the master and servant doctrine. In other words, it is rooted in the antecedent law of domestic service, of the analogy between the "master" – a male human employer – and the modern corporate "employer".[714] Oddly, we often imagine the employer and the employee through the prism of observations like those of Lord Justice Asquith's famous witticism on the subject of whether an employer owes any duty to provide work: "Provided I pay my cook her wages regularly, she cannot complain if I choose to take any or all of my meals out."[715]

From this antiquated perception of the person of the employer, labour law proceeded from the premise that employment is a personal and bilateral relationship between two parties. In fact, it treated the complex organisation that in most cases is the employer as if it were the same as human master. While this characterisation fits with situations where human employer personally directs an employee, it does not hold true to the situations where the employee is employed in a large bureaucratic organisation, subject to many sources of direction and authority.[716] In the situations just described, the

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Power and Irregular Expenditure in The Appointment of a Legal Firm as Service Provider for the Department of Finance in the North West Province - Report No 12 OF 2013/2014.

[712] See e.g. *CWU obo Madela/MTN (Pty) Ltd* 2017 4 BALR 371 (CCMA); *FAWU obo Mokgethwa/SAB Ltd* 2017 5 BALR 491 (CCMA); *Matjila /Eco Group Civils (Pty) Ltd* 2017 9 BALR 982 (CCMA).

[713] Deakin *Addressing Labour Market Segmentation: The Role of Labour Law, Government and Tripartism* Department Working Paper No 52. Geneva 2013, available at: http://www.ilo.org/wcmp5/groups/public/---ed_dialogue/publicationwcms_223702.pdf (accessed 20-06-2017).

[714] Deakin "The complexities of the employing enterprise" 274.

[715] *Collier v Sunday Referee Publishing Co Ltd* 1940 2 KB 647, 650.

[716] Fudge *Osgoode Hall LJ* 609, 622.

employee's contract is with a legal corporate person, the incorporated company instead of a human being.

The diverse multilateral relationships between people within work organisation is thus equated with simple bilateral relationship between two individuals. Despite the displacement of the master and servant perspective,[717] the binary employment model continues to exert profound influence on the identification of the employer as a single individual employing entity.[718] The need to establish a contractual nexus between an employee and employer has the effect of completely misaligning the employment relation from the organisational context in which the work is performed.[719] In contemporary work environment companies increasingly hire workers without technically employing them.[720] Likewise, the uniforms that many workers wear today do not necessarily reflect the identities of their actual employers.[721]

Scepticism regarding viewing the firm as a unitary and bounded entity, and the employment as a personal and bilateral contract, is derived from its distortion of what goes on when workers are employed. The functions that make up the idea of employing workers or being an employer, it has been said "may be exercised together by or within a single employing entity, or exercised separately by different employing entities."[722] It is generally said that there is no such a thing as "the employer"; rather, in

[717] Deakin & Wilkinson *The Law of the Labour Market: Industrialisation, Employment and Legal Evolution* (2005) chap 5.

[718] Deakin "Commentary: The changing concept the employer in labour law" 2001 *ILJ (UK)* 72.

[719] Carlson "Variations on a theme of employment: Labour law regulation of alternative worker relations" 1996 *S. Tex. LR* 661, 663 points out that "most labour and employment laws assume a paradigmatic relationship between an "employer" and "employee." The employer in this model contracts directly with an individual employee to perform an indefinite series or duration of tasks, subject to the employer's actual or potential supervision over the employee's method, manner, time and place of performance. This model describes most workers well enough, but there has always been a large pool of workers in alternative relationship with recipients of services. Some workers are "independent contractors" who contract to perform specific tasks or achieve particular results, but who retain independence and self-management over their performance."

[720] Think of a security firm that guards the end-user company's warehouse every night. The security guards do not work directly for the end- user company, but for temporary employment agency. See e.g. *Integrity Staffing Sols Inc. v Busk* 135 S. Ct. 513, 515-517, 519 (2014) – rejecting the wage claims of workers who supplied warehouse security services to Amazon through an intermediary.

[721] See e.g. *Gray v FedEx Ground Package Sys Inc* 799 F.3d 995 (8th Cir. 2015); *O'Connor*; *Vabu*; *Sagaz Industries*; *Halawi*.

[722] These functions are (1) engaging workers and terminating; (2) remunerating and providing them with other benefits; (3) managing the employment relationship and the process of work; and (4) using workers' services in the process of production or service provision. Freedland *The Personal Employment Contract* (2003) 40

most enterprises, a number of people exercise managerial functions.[723] In reality, many people in an entity have dual functions, as workers and as employers, who manage others.[724] As the case of the controlling shareholder who is also employed as chief executive illustrates, one can effectively be one's own boss and still be a "worker".[725] Equity ownership and control have never been a stumbing block to determining employment status in companies, as was made clear by the Privy Council in *Lee's Air Farming*[726] confirminag a finding that Mr Lee had been an employee of a company which he himself had incorporatedand solely managed as both director and controlling shareholder.

Conceptual focus on the "employer" as the counterparty to an "employee" does not require that all the legal obligations of the employer toward the employee can or must be attached only to a single entity or person.[727] The responsibility for any particular employer obligations towards an employee should be exercised by the party which, in reality, exercises the requisite control in relation to particular function. According to Prassl "the goal is to ensure congruent legal coverage in situations where multiple entities exercise some form of direct control in relation to a particular function."[728] This would be achieved by bringing into "the realm of potential employment relationship" any party with a "legal right to exercise an employer function, or a legal right to have a decisive role in the exercise of such function."[729]

The identification of the real employer in the public service may also give rise to difficulties, because the service is divided into various organs and institutions.[730] The cardinal issue lies not in identifying the true employer, which clearly is the State, but in identifying who exercises the State's rights as employer vis-a-vis the public sector

[723] *Golding*; *Board of Executors v McCafferty* 1997 18 *ILJ* 949 (SCA); *Fisheries Development Corporation of SA Ltd v Jorgensen* 1980 4 SA 156 (W). For extended analysis see: Strydom *The Employer Prerogative from A Labour Law Perspective* (Unpublished LL. D Thesis UNISA 1997).
[724] See e.g. *IMATU v Rustenburg TLC* 2000 21 *ILJ* 377 (LC); *Keshwar v SANCA* 1991 12 *ILJ* 816 (IC).
[725] *Clyde & Co LLP v Bates van Winkelhof* 2014 1 WLR 2047 para 39.
[726] *Lee v Lee's Air Farming* 1961 AC 12 (PC).
[727] Fenwick "Book Review Prassl *The Concept of the Employer* (2015)" 2016 *ILR* 163.
[728] Prassl *The Concept of the Employer* (2015) 165.
[729] Prassl *The Concept of the Employer* 165 and "Autonomous concepts in labour law? The complexities of the employing enterprise revisited" in Bogg *et al* (eds) *Autonomy of Labour Law* (2015) 151, 152-154.
[730] Grogan *Workplace Law* 11th ed (2017) 21. See also Wedderburn "Multi-national enterprise and national labour law" 1972 1 *ILJ (UK)* 12.

employee.[731] The LC explained the separate components of the State which constituted a unitary employer in *Jele*.[732] In that case, the applicant had applied unsuccessfully for a position in a provincial Department of Transport. He was at the time employed in the provincial Department of Health. When he referred a dispute concerning his non-appointment, he cited the MEC of Transport as the employer. The MEC contended that he was not the employer. The court held that the MEC could be cited as the employer for purposes of the case, because the power to appoint officials to the Department vested in him. On appeal, the LAC dismissed the same point on the basis that, for purposes of disputes between employees of provincial departments and their departments, the employer is in fact the State.[733] In effect, this means that, where an employee applies for a higher post in the national government, the employee may cite head of the department in the national administration. It does not mean, however, litigating public sector employees may cite State executive authorities as respondents haphazardly.

4.4 The Plural Employer Model

The shifting of risk associated with the capital boundary problem has prompted an approach which is not limited to the contract of employment but stresses multilateralism.[734] According to Davies and Freedland there is

> "a level of employment relations within the enterprise which cannot satisfactorily be characterised in terms of simple subordination and dependency. This thereby erodes, at a deep and subtle level, not just the simple bipolar antithesis between 'the employer' and 'the worker', but also, and no less momentously, the simple binary distinction

[731] See e.g. *Baloyi v Minister of Communications* 2013 34 *ILJ* 890 (LC) para 16-21; *Hlabangwane v MEC for Public Works, Road & Transport, Mpumalanga Provincial Government* 2012 33 *ILJ* 1195 (LC) para 22.
[732] *Jele v Premier of the Province of KZN* 2003 24 *ILJ* 1392 (LC).
[733] *MEC for Transport: KZN v Jele* 2004 25 *ILJ* 2179 (LAC) paras 17 and 28.
[734] Freedland "From the contract of employment to the personal work nexus" 2006 35 *ILJ (UK)* 1 had developed what he calls the "personal work nexus" as a descriptive framework that reflects the complexity of the work relationship more accurately than the contract of employment. Deakin's "functional approach" to identify the employer allocates liability for employment-related obligations not on the basis of the contract of employment but on the basis of which legal entity serves the functions ascribed to employers, namely, by assessing "coordination", "risk" and "equity." See Deakin "The employer" 79. Davidov "Joint employer status" 736-737 offers variation of the functional approach which would allocate employer-related obligations on the basis of "who controls the employee and subjects her to a somewhat non-democratic regime, and upon whom she depends, both economically and for social/psychological needs." Fudge "Fragmenting work" 646 has further developed the functional approach by incorporating it into framework that conceives of the enterprise as a coordinated and integrated activity.

between employees and independent contractors. All of this tends to de-legitimate the use of that distinction as a basis for drawing the boundaries of employment rights."[735]

The plural-employer model in the US is rooted to the joint employer doctrine and to a greater extent a response to the variety in the forms of labour organisation.[736] The joint employer doctrine allows the judges to determine that more than one employing entity must be recognised as jointly liable towards the employee by applying one of four tests to each of the entities: the common law right-of-control test, the economic reality test, the interference test and the hybrid test.[737] It is often said that whether two or more entities are joint employers depends on the purpose for which the question is asked. This is consistent with the so-called "targeted approach" to the difficulty of defining either who the employee is or who the employer is.[738]

The American jurisprudence has a concept of "single employer" as well as a concept of "joint employers." The single employer is invoked to treat as one employer different entities that are nominally independent but in reality constitute only integrated enterprise. The single employer theory is often invoked by a union in order to prevent an employer from using double-breasted operations where it shifts work from a unionised plant to a non-union facility.[739] In other words, the non-facility is essentially an "alter ego" of the unionised facility and an employer would be able to evade the requirements of its labour agreement if such practices were permitted.[740]

The joint employer is used to treat as "co-employers" separate entities that "share or co-determine those matters governing the essential terms and conditions of employment".[741] In order to be considered an employer, one must "meaningfully affect matters relating to the employment relationship such as firing, discipline, supervision, and direction." When these responsibilities are shared between two entities, labour board and courts have been willing to consider them "joint employers." For example,

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[735] Davies & Freedland "Changing Perspectives on the Employment Relationship in British Labour Law" Barnard *et al* (eds) *The Future of Labour Law: Liber Amicorum Sir Bob Hepple QC* (2004) 283

[736] Stone "Legal protections for atypical employees"; Becker "Labour law outside the employment relation" 1996 *Texas LR* 1527.

[737] Corazza & Razzolini *Who is an Employer* 9.

[738] Sciarra *The Evolution of Labour Law (1992-2003*) – European Communities General Report, 2005; 30-34.

[739] *S. Calif. Paint & Allied Trades v Rodin & Co.* 558 F.3d 1028, 1031 (9th Cir. 2009).

[740] Rubenstein "Employees, Employers, and quasi-employers" 651.

[741] *NLRB v Browning-Ferris Industries* 691 F.2d 1117, 1123 (3rd Cir. 1982)

they have found temporary work agencies and user firms to be "joint employers" for purposes of the National Labour Relations Act.[742] The joint-employment relationship has also been found to exist in the context of Fair Labour Standard Act[743] and other protective regulations.

The core of the joint-employer standard can be traced as far back as the *Greyhound*[744] case, a representation proceeding that involved a company operating a bus terminal and its cleaning contractor. There, the Board in 1965 found two statutory employers to be joint employers of certain workers because "share[d], or codetermine[d], those matters governing essential terms and conditions of employment."[745] At an earlier the Supreme Court explained the issue presented whether Greyhound "possessed sufficient control over the work of the employees to qualify as a joint employer with" the cleaning contractor was "essentially a factual issue"[746] for the Board to determine.

An essential element of any joint employer determination is sufficient evidence of immediate control over the employees.[747] In *Zheng*,[748] the Second Circuit exhaustively analysed the case law concerning the joint employment and held that in determining whether or not there is joint employment the following non-exclusive factors should be examined:

1. The equipment and premises of work.
2. Whether the corporations in question "had a business that could or did shift as a unit from one putative joint employer to another;"

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[742] See e.g. *Holyoke Visiting Nurses Association v NLRB* 11 F.3d 302 (1st Cir. 1993); *MB Sturgis Inc*. 331 NLRB No. 173 (2000).
[743] S 791(a) of the Fair Labour Standards Act of 1938.
[744] *Greyhound Corp*. 153 NLRB 1488, 1495(1965).
[745] *Greyhound Corp*. 153 NLRB 1495.
[746] *Boire v Greyhound Corp*. 376 US 473, 481 (1964).
[747] The NLRB in *Laerco Transp. &* Warehouse 269 NLRB 324, 325 (1984) describes joint employer status as follows:

> "The joint employer concept recognises that two or more business entities are in fact separate but that they share or codetermine those matters governing the essential terms and conditions of employment…. To establish joint employer status there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction."

[748] 335 F.3d 76 (2d. Cir. 2003).

3. The "extent to which the plaintiff performed a discrete line job that was integral to "process of production" of the putative joint employer;"
4. Whether responsibility under contracts could pass from one employer subcontractor to another without material change;
5. The degree of supervision by the putative joint employer;
6. Whether the plaintiffs "worked exclusively or predominantly for the putative employer".[749]

4.5 The Issue of Group Companies

Related to the multi-employer model is the situation in which several companies, although formally separated, are managed under unified direction and co-ordination of the holding as a single economic entity. In practice a multiplicity of companies thus coexist with the unity of the group.[750]

From the standpoint of labour law, in the case of outsourcing processes and vertical disintegration there is a need to re-draw the boundaries of the legal concept of employer and of employment obligations by focusing on the economic activity rather than on discrete legal entities. With respect to group of companies, the link between the employer and the firm can be maintained, but the boundaries of the firm have to be re-drawn as to represent the situation in which the firm and the employment are shared by a number of separate entitites.[751] In this instance, the separate personalities of companies do not coincide with the real boundaries of the firms as individual employer. The group supersedes the disjuncture between boundaries of the legal person as well as the boundaries of the unitary concept of employer.

The German[752] and Italian[753] corporate law proceed from the premise that a group of companies requires an "effective unified direction" to exist. Moreover, direct or indirect control of a corporation over other corporations by means of number of

[749] Zheng 335 F.3d 72.
[750] Teubner *Unitas Multiplex: Corporate Governance in Group Enterprises* (1988) 67.
[751] Corazza & Razzolini *Who is an Employer* 18.
[752] S 18 ArtG.
[753] Art. 2497 *Codice civile*.

shares as to achieve the right to a majority of votes (*de jure* control) or by means of contracts as to achieve a "dominant influence" (de facto or contractual control) is a *condictio sine qua non* for the existence of a group company.[754] Hence subsidiaries must be managed under the unified direction of the holding company. French courts usually require the existence of a condition of "economic and juridical dependence" between the companies, while Spanish courts regard the *direccion initaria* a key element of group companies.[755]

The unified direction that usually denotes the existence of a group of companies is intimately connected to the corporate law perspective, but not necessarily from a labour law standpoint. The approach endorsed by French, Italian and Spanish judges in carrying out fact finding inquiry attaches weight on the following factors:(a) the existence of unified direction; (b) the existence of common goals and strategy (c) the joint-exercise of a unified economic activity.[756] With respect to the question who is the employer for the scope of employment protections, the decisive factor from labour law perspective is the fact that the employee, despite having a formal employment contract with only one company, works under the direction or indirect control and direct control of the other subsidiaries.

In the Italy, French, German, Spanish and other Continental European legal systems co-employership is preferred. The European Court of Justice has given a nod of approval to the notion of multi-employership in a situation in which the firm, economic activity, the employment are physiolgically shared by a number of entities belonging to the same group. In the *Heineken*[757] case, an employee formally hired by one company, had been assigned on a permanent basis to another company that had then transferred its business undertaking to a third company. The crisp issue was whether the second and the third companies could be respectively regarded as "transferor" and "transferee" for the purposes of the Transfer of Undertaking Directive. The ECJ determined that "within a group of companies, there are two employers, one having contractual relations with the employees of that group and the

[754] Corazza & Razzolini *Who is an Employer* 18.
[755] Corazza & Razzolini *Who is an Employer* 18-19.
[756] Corazza & Razzolini *Who is an Employer* 19 (footnotes omitted).
[757] *Alberion Catering BV v FNV Bondgenoten, John Roest*, October 21, 2010, C-242/09.

other non-contractual relations with them".[758] From this angle, it is possible to regard as a "transferor", within the meaning of the Transfer of Undertaking Directive 2001/23, "the employer responsible for the economic activity of the entity transferred which , in that capacity, established working relations with the staff of that entity, despite the absence of contractual relations with those staff".

In essence, the ECJ's approach corresponds with the British perspective, rather than to the Continental European perspective because it emphasises the legal possibility for employee to have a contractual relation with formal employer and non-contractual relation with a substantial employer to which the employee is assigned. Leaving aside the statutory concept of "associated employer", in the UK a multi-employership is recognised to exist by combining contract with common law. This is confirmed by the fact that dual vicarious liability is a legal possibility when the right to control the working activity is shared by two legal entities.[759] *Newton-Sealey*[760] concerned a worker hired by one company belonging to the Armor Group who was seriously injured while he was working in Iraq under the control and the direction of the subsidiary. The issue before the High Court of Justice was whether despite a person having a contractual relations with only one member of a corporate group, other corporate members have acted in such a way as to be under a duty of care to him. It was held that notwithstanding the fact that employee had an employment contract with one corporation, the other parts of the Armor Group had behaved in such a way as to voluntarily enter into special "non-contractual" relation of "proximity" with the employee whereby they owe to the employee a duty of care.

4.6 The US Franchisor Jurisprudence

Franchising as an organisational form remains a neglected frontier for labour law, and to a great extent impervious to labour law despite its severe employment repercussions. Put shortly, the issue is this. The franchise model is characterised as "an

[758] *Alberion Catering BV v FNV Bondgenoten, John Roest*, October 21, 2010, C-242/09.
[759] See e.g. McPeak "Sharing tort liability in the new sharing economy" 2016 *Conne LR* 171.
[760] *Newton-Sealey v Armor Group Services* 2008 EWHC 233 (QB).

often unrecognised form of fissured employment."[761] Weil lays down the following proposition:

> "[T]he fundamental dilemma of the fissured workplace… allowing lead companies [in the case franchisors] to have it both ways: creating, monitoring, and enforcing standards central to business strategy while at the same ducking responsibility for the social consequences of those policies when it comes to the workplace. Any effort to improve labour standards compliance in franchised industries must recognise that organisational form's role in creating fissured workplaces."[762]

Franchising enables the franchisor to dodge legal accountability as an employer, including avoidance of unionisation and the collective bargaining process. That franchisors exert significant control over the day-to-day operations of their franchisees hardly be overstated. The franchisor can dictate how many employees are employed at an establishment, the hours they work, how they are trained, and how they answer the telephone. For example, "McDonald's computers keep track of data on sales, inventory, and labour costs, calculate the labour needs of the franchisees, set and police their work schedules, track franchisee wage reviews…"[763] According to the NELP report "while the brands claim that they have no influence over wages paid to workers, they control wages by controlling every other variable in the business except wages."[764] It has been fairly asserted that franchisors' are eligible as "joint employers" of their franchisees' employees since former control franchised unit employees' wages by controlling other "business variables". The attempt to deem franchisor the "joint employer" of its franchised employees is still a site of major battlefield.[765]

4.6.1 McDonald's and *Browning Ferris* Conundrum

[761] Weil *The Fissured Workplace* (2014) 9.
[762] Weil *The Fissured Workplace* (2014) 158.
[763] National Employment Law Project (NELP) report entitled *Who's The Boss: Restoring Accountability for Labour Standards in Outsourced Work* (2014) 11.
[764] NELP report entitled *Who's The Boss: Restoring Accountability for Labour Standards in Outsourced Work* (2014) 11.
[765] Kaufmann *et al* "A franchisor is not the employer of its franchisees or their employers" 2015 *Franchise LJ* 439, 448 argue that the philosophies underlying the "franchisor as employer" theory are contradicted by the established structures and norms franchising; the federal and state laws governing franchising; the Lanham Act; judicial precedent almost universally holding that franchisors and franchisees possess an independent contractor relationship. See also Killion "Franchisor vicarious liability – The proverbial assault on the citadel" 2005 *Franchise LJ* 162, 164; King, Jr. "Limiting the Vicarious liability of franchisors for the torts of their franchisees" 2005 *Wash. & Lee LR* 417"; Hanks "Franchisor liability for the torts of its franchisees: the case for substituting liability as a guarantor for the current vicarious liability" 1999 *Okla City U LR* 1.

Is McDonald the employer of franchisees or the joint employer of its franchisees' employees? The age-old question whether a franchising should be deemed the "joint employer" of its franchisees' employees has generally been answered in the negative. The judicial precedent almost universally hold that franchisors and franchisees possess an independent contractor relationship.[766] If franchisors are deemed joint employers, they will generally be held jointly and severally liable for all labour and employment violations.

The issue of extending joint employer status to franchisors became subject of judicial scrutiny following the NLRB General Counsel December 19, 2014, announcement of the issuance of complaints alleging that McDonald's is the employer of its franchisees' employees. However, the NLRB General Counsel's amicus brief in the protracted *Browning-Ferris Industries* (*BFI*)[767] litigation offers a glimpse to what is likely to be the NLRB General Counsel's rationale against McDonald. The NLRB in *BFI* invited amici to address amongst the broader question of joint-employer standards.

The underlying case involved employees of Leadpoint Business Services ("Leadpoint") who were assigned to work at BFI Newby Island Recyclery ("BFI") in Milipitas California as sorters, screen cleaners, and housekeepers. A union petitioned to represent approximately 240 of these employees, naming both Leadpoint and BFI as employers. The NLRB Regional Director issued a decision finding that Leadpoint was the sole employer of the employees. The Union filed a request for review of that decision by the Board. And for reasons explained more fully below, the Board voted to overturn the Regional Director's decision and held that BFI was a joint employer with Leadpoint.

The *BFI* amicus brief urged the NLRB "to adopt a new standard that takes into account of the totality of the circumstance…. Under this test, if one of the entities wields sufficient influence over the working conditions of the other entity's employees such that meaningful bargaining could not occur in its absence, joint employer status would

[766] See e.g. *Quijada Corp. v General Motors Corp*. 253 A.2d 538 (DC 1969); *Perry v Burger King Corp.* 924 F.Supp. (SDNY 1996); *Kaplan v Coldwell Banker Residential Affiliates Inc*. 69 Cal. Rptr. 2d 640 (Cal. App. 1997); *Alberto v McDonald's Corp*. 70 F.Supp. 2d 1183 (D. Nev. 1999); *Sensormatic Security Group v Sensormatic Electronics Corp.* 455 F.Supp.2d 399 (D. Md. 2006); *Jacobson v Comcast Corp.* 740 F. Supp. 2d 683 (D. Md. 2010); *Gray v McDonald's USA LLC* 874 F.Supp. 2d 743 (WD. Tenn. 2012).

[767] *Browning-Ferris Industries of California Inc. v Sanitary Truck Drivers Local 350, International Brotherhood of Teamsters* 41 NLRB 32-RC-109684(May 12, 2014).

be established." The "new' approach was a return to the pre-1984 "traditional" test in which the indirect control over employee wages and potential – but not exercised – control over employee work conditions supporting a finding joint employment. So the corollary of the amicus brief's preference for expansive joint employer standard suggests that NLRB is likely to determine that McDonald's is the joint employer of its franchisees' employees.

4.6.2 The *BFI* Decision

On August 27, 2015, the three-member Democratic majority of the Board adopted the General Counsel proposed standard in BFI, overturning the ARD's decision and holding BFI and Leadpoint were joint employers of the Leadpoint provided employees.[768] The key inquiry in any joint employer analysis under the Act is the extent of the putative joint employer's control over the terms and condition of employment of the employees in question. The Board no longer requires that a company have a direct and immediate control over terms and condition of employment, nor that a company actually exercise that authority.[769] Stated differently, in order to exercise significant control a putative employer need not "hover over [workers], directing each turn of their screwdrivers and each connection that they made."[770] In revisiting the joint-employer standard in *BFI*, the Board took into account the diversity of workplace arrangement in today's has significantly expanded.

The key facts that the Board relied upon in finding that BFI was a joint employer included the latter's significant control of over hiring and firing at Leadpoint and control over "the processes that shape" the day-to-day work of Leadpoint's employees. Another decisive factor concerned the significant role played by BFI in determining Leadpoint employee wages. Leadpoint was contractually barred from paying its employees more than any BFI employees performing the same work.

[768] *BFI* 362 NLRB No. 186.
[769] *BFI* 11.
[770] *Sun-Maid Growers of California* 239 NLRB 346, 351 (1978).

In an impassioned dissent, the two-member Republican minority[771] stated that the majority's change on the joint employer standard "will subject countless entities to an unprecedented joint-bargaining obligations that most do not even know they have, to potential joint liability for unfair labour practices and breaches of collective bargaining agreements, and to economic protest activity."[772] The minority's keenest objection to the majority's joint-employer test is that it allowed mere *potential*, even in the absence of any evidence of director or actual control. The minority maintained that the "the new joint-employer test fundamentally alters the law applicable to user-supplier, lessor-lessee, parent-subsidiary, contractor-subcontractor, franchisor-franchisee [and] predecessor-successor… business relationships under the Act."[773] Lastly, the minority expressed their belief that the majority overstepped the Board's authority by expanding the joint-employer definition without congressional approval and contrary to express congress direction.[774]

To the extent that unions did not pursue joint-employer claims, many of the employer predicted consequences of *BFI* decision, including increased unfair labour practice liability and forced collective bargaining did not arise.[775] The joint-employer developments post *BFI* decision, proved that the shift in NLRB joint-employer jurisprudence was short-lived. Two weeks after BFI, US Senator Lamar Alexander introduced the Protecting Local Business Opportunity Act[776] to rollback *BFI* by limiting joint-employer status to circumstances where employers have "actual, direct, and immediate" control over essential terms and conditions of employment.

The reformulated joint-employer standard by a Democratic Board majority in 2015 BFI case, was killed off in December 2017 by augmented Republic Board majority decision in *Hy-brandt*[777] Board restored the pre–*BFI* standard that governed joint-

[771] For a nuanced exposition of the legal reasoning by different partisan bloc on the National Labour Relations Board regarding employment status decisions see: Tomassetti *The Legal Construction of Employment and the Re-institutionalization of US Class Relations in the Post-Industrial Economy* (Unpublished Ph.D. Thesis University of California, 2014)
[772] *BFI* 21-49.
[773] *BFI* 23.
[774] *BFI* 48.
[775] Pasternak & Perera "The NLRB's evolving joint-employer standard: *Browning-Ferris Industries of California, In*." 2016 *ABA Lab. & Emp. L.* 295, 310.
[776] S. 2015 11th Cong. (2015).
[777] *Hy-brandt Industrial Contractors and Brandt Construction Co*. 365 NLRB No. 156 (2017).

employer liability. In all future and pending cases, two or more entities will be deemed joint employers under the National Labor Relations Act (NLRA) if there is proof that one entity has *exercised* control over essential employment terms of another entity's employees (rather than merely having reserved the right to exercise control) and has done so *directly and immediately* (rather than indirectly) in a manner that is not limited and routine. Accordingly, under the pre–*BFI* standard proof of indirect control, contractually-reserved control that has never been exercised, or control that is limited and routine will not be sufficient to establish a joint-employer relationship. The Board majority concluded that the reinstated standard adheres to the common law and is supported by the NLRA's policy of promoting stability and predictability in bargaining relationships. Applying the reinstated pre–*BFI* standard, the Board agreed with an administrative law judge's determination that Hy-Brand and Brandt Construction Co. were joint employers and therefore jointly and severally liable for the unlawful discharges of seven striking employees.

Concentrating for the moment on the franchisor-franchisee relationships, the overruling of *BFI* by *Hy-Brandt* refutes the notion that franchisor McDonald's may be deemed the "joint employer" of its franchisees' employees. What is striking about the exercise of control by franchisors is the advent of technology. Like TNCs, enormous software capability allows McDonald's to monitor its franchisees real time which is significant because it goes beyond what is necessary to protect the quality of the brand. The General Counsel's amicus brief in *BFI's* highlighted the fact that McDonald's technology may have been a key factor in the complaints.[778]

The case of *Betts*.[779] Involved alleged harassment and discrimination claims. The Betts complaint alleged that McDonald's franchisees were required to use an "in-store processor" (ISP) and a computer software programme called "Staffing Scheduling and Positioning for Operational Excellence." According the complaint:

> "McDonald's Corporate's software generates a 'Daily Activity Report' for all restaurants in the McDonald's system, including those operated by Soweva. Daily Activity Reports include information about employee hours worked on the clock, sales made, the customer count, the drive-thru window sales count, transacting per worker-

[778] Amicus Brief of the General Counsel, *BFI* No. 32 RC-109684 (NLRB June 26 2014) 15-16.
[779] Complaint *Betts v McDonald Corp*. No. 4:15-cv0002 (WD Va. Jan. 22 2015) http://www.pathlaw.com/wp-content/uploads/2015/02/Filed-Complaintpdf (accessed 11-01-2018).

hour, and the labour cost as a percentage of sales. These Daily Activity Reports are updated at least once per hour."[780]

These facts raise significant issues regarding the joint employer status. Considering the expansive and extensively control over working conditions, there is a force of argument that franchisors should be named and held responsible as joint employers. If it is determined that McDonald's is in fact a joint employer, the global franchisor is likely to appeal all the way to the US Supreme Court.

4.7 The *University of Alberta* Jurisprudence

If we are to ask Canadians how to distinguish between who is and who is not an "employer" under the country's labour and employment law, one believes that the answer would, in large measure, lie in the jurisprudential imprints of *University of Alberta* decisions.

The essential question before the Board in *AUPE*[781] was, who was the employer of trust employees at the University of Calgary? The University, or the trustholders? Another way of posing the difficult and interesting question is to ask the following: What is the status under labour legislation of a party that has the legal and institutional means to govern workers terms and conditions of employment, but chooses not to, and defers control over them to a group of its own employees. In the body of "true employer" determination cases, *AUPE* is highly unusual case.

Because most non-academic employees of the University were unionised, the question who was "true employer" cannot be gainsaid. The Alberta Union of Provincial Employees (the "Union" or "AUPE") is by section 74(2) of the Public Service Employee Relations Act ("PSERA") deemed to be certified bargaining agent for a bargaining unit described as "All employees when employed in general support services." The union argued that it was entitled to bargain with the University for the terms and conditions of employment for these employees.

To begin, it is unnecessary to provide terminological clarity and identify the parties at the heart of the dispute. The present case concerned technical and

[780] *Betts v McDonald Corp*. 16-17.
[781] *Alberta Union of Provincial Employees v The Board of Governors of the University Calgary* 2008 CanLII 51098 (AB LRB).

administrative employees that work in the broad university research establishment but are neither principally academics – scholars or students – nor ordinary non-academic employees.[782] They were paid out of ordinary university budgets, but out of "trust" moneys. "Trust" moneys in this context denotes government research grants, private research moneys, and donations, periodically parcelled out research projects on the basis of merit and administered by the scholars or groups of scholars designated by the grantor.[783] The scholars administering these moneys are, almost always, those charged with the principal responsibility of directing research, and are commonly called the "principal investigators". The scholars administering these trust moneys are called "trustholders".

It is worth noting that this was not the first time an Alberta Labour Relations Board examined the question who is the employer of trust employees. Two oscillating cases separated by a more than a decade, examined the status of trust employees at the University of Alberta and reached different conclusions. In *University of Alberta Non-Academic Staff Association I*,[784] the Public Service Employee Relations Board found the trustholders, not the University, was the employer of such employees. It reasoned that the trustholders created the relationship, directed the employees' work, and terminated the relationship, while the modest control exercised by the University tended to derive from the requirement of the granting agency funding the research. By contrast, in *University of Alberta Non-Academic Staff Association II*,[785] the Board found that the University was the employer of three trust employees in the faculties of Agriculture and Medicine and that they were included in the bargaining unit represented by the Union (the University conceded that two other trust employees in the Faculty of Law were its employees). In the wake of this decision, the University of Alberta and NASA negotiated a global resolution to the status of trust employees by which most trust employees were considered employees of the University for the union was entitled to bargain.

In analysing the *University of Alberta* decisions, the *AUPE* Board observed that the Board in earlier cases applied the three common tests of employer status. The first is

[782] *AUPE* para 3.
[783] *AUPE* para 4.
[784] 1992 1 Can. LRB 78.
[785] 1996 Alta. LRB 523.

the "control: or *Montreal Locomotive Works*[786] test. The second is the "organisation" or "*Co-operators Insurance*"[787] test. And the third is the *York Condominium*[788] test also often referred to as the "*K-Mart*", adds and elaborates upon the *Montreal Locomotive Works* analysis. *York Condominium* required the Ontario Labour Relations Board to determine the true employer of a group of employees, the owners of the building or the management company. In doing so, the Board set out seven criteria it used for making such a determination:[789]

1. The party exercising discretion and control over the employees performing the work.
2. The party bearing the burden of remuneration.
3. The party imposing discipline.
4. The party hiring the employees.
5. The party with the authority to dismiss the employees.
6. The party which is perceived to be the employer by the employees.
7. The existence of an intention to create the relationship of employer and employees.

In applying the *Montreal Locomotive Works* analysis, the Board said:

> "What best describes the position of the trust holders? Are they employers in their own right? Or, are they more like managers, who are themselves employees of the enterprise, but exercises managerial discretion and authority on behalf of the enterprise to accomplish the enterprise's goals? Who benefits from the exercise of that discretion and authority? An employer can also be a manager, but a manager need not be an employer. This is the crux of the case as we see it."[790]

In its application of the *York Condominium* analysis, the Board repeated its conclusion about the University's control over trust employees' terms and conditions of employment given in the discussion of the *Montreal Locomotive Works* test. It also placed considerable weight on two other of the *York Condominium* indicia: employees'

[786] *Montreal v Montreal Locomotive Works* 1947 1 DLR 161 (PC 1946) (Can.).
[787] *Cooperators Insurance Association v. Kearney* 1964 CanLII 21 (SCC), 1965 SCR 106, 112. See also *Mayer v T. Conrad Lavigne Ltd* 27 O.R. 129, 133 (C.A. 1979).
[788] *York Condominium Corporation No. 46 and Medhurst Hogg & Associates Ltd* 1977 OLRB Rep. 645
[789] *York Condominium* 648.
[790] *Montreal Locomotive Works* 568.

perception of who is the employer, and the existence of an intention to create an employment relationship.[791]

4.7.1 The Parties Contentions

The union contended that the Board should look beyond the common law test of control in identifying the employer of the trust employees. It should consider the statutory framework, the purpose of statute and the need for harmony among statutes. The union also pointed out that universities have evolved far beyond their origins as "communities of scholars".[792] This is because there is a sophisticated statutory scheme that legislates a collective bargaining regime. It also contended that, if the trustholders are employers, they are empowered by the Labour Relations Code; bargaining structures at the University would be fragmented and trust employees could strike where University employees could not, a disharmony between the Code and the PSERA that the Board should try to avoid.

The union also argued that the Board should look at the funded research system and focus on the question, "Whose business is this?"[793] It pointed out that trustholders are not engaging in independent business when they engage in research. They are employees of the University, a status that makes it very difficult for them to acquire the status of independent entrepreneurs. According to the union the University's position in this case postulates a split personality for trustholders: in his or her own participation in the research, he or she is an employee; but for purposes of supervising others in the very same research, he or she is an independent contractor. The builds on this propositions to contend that scholars' research "businesses" are not viable on their own; they are not "functional economic vehicles", to borrow the term from successorship cases.[794] They rely on the access to the University's infrastructure and organization that their employment gives them.

Centrally, the University argued that the Board should be careful to ask itself the correct question: who is the employer? not whether a scholar is an employee or an independent

[791] *York Condominium* 57-573.
[792] *AUPE* para 232.
[793] *AUPE* para 233.
[794] *AUPE* para 233.

contractor.[795] Neither should the Board be sidetracked from core issue by misplaced analogies to successorship law. In identifying who is the real employer, the well-recognized method of analysis focuses on day-to-day control. The bottom line is that whatever the precise test the Board uses to identify the employer, there must be at least a measure of control before one can have that status. [796]

On the decisive question of control and the realities of the University-trust employee relationship, the *AUPE* Board noted that there is a striking lack of control:

> "The almost total lack of line control over trust employees is consistent with the nature of universities generally, with the principle of academic freedom, and with the particularly entrepreneurial culture of the University of Calgary. Thus, almost all the criteria of control point toward the trustholder as employer. The criteria that do not, remuneration and ownership of equipment, point to granting agencies rather than the University. Whether or not the 1996 *University of Alberta* decision was warranted by its evidence, the facts are very different here and there is no sound basis to characterize academics as mere "managers" of the University's research enterprise."[797]

Like the University, the trustholders maintain that there is no bar to an employee also acting as an employer, and that was the result in the case at bar.[798] In turn, the union retorted that the argument that academics are independent entrepreneurs is flawed. After all, "the academic staff member here is in a clear subordinate relationship to the University, which distinguishes this case from the typical true employer case (even the cases of bogus employers like payroll companies) where both potential employers are independent from one another."[799]

At the centre of a conundrum before the Board: for the purposes of the Public Service Employee Relations Act, who is the employer of these trust employees, the University or the trustholder? Other questions — are the academic staff independent contractors, dependent contractors, or employees in their conduct of research? Is research a "functional economic vehicle" in the hands of the academic staff? Is research a principal role, a core function, of a University? — are either not relevant to that determination, or are subsidiary questions, at best serving to illuminate some aspect of the inquiry into the identity of the employer.

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[795] *AUPE* para 236.
[796] *AUPE* para 236.
[797] *AUPE* para 237.
[798] *AUPE* para 240.
[799] *AUPE* para 241.

The Board sought guidance from pivotal cases. At issue in that case was whether instructors of the Alberta Correspondence School were employees of the Crown or independent contractors. The Board found to be a great assistance in two respects. The Board in *Alberta Correspondence School*[800] undertook extensive review of the various tests that the Courts and administrative tribunals have applied to the task of determining whether an employer-employee relationship exists in a particular case.[801] The second way in which *Alberta Correspondence School* is helpful in its exposition of the importance of the statutory purpose for which the question is being answered.[802] In other words, the purpose of the statute, though not entirely capable of overriding the facts and other legal tests, is highly important; and it comes into play principally as a factor influencing the weight to assign to the other *indicia* of control, entrepreneurship, and organizational integration.[803]

Although not directly applicable on its facts, the *AUPE* Board was convinced that the employment agency case of *Pointe-Claire*[804] warranted sustained analysis. There the Supreme Court of Canada gave some instructive analysis on the phenomenon of "tripartite" employment relationships and how a labour board should go about identifying the employer for purposes of its statute. No doubt *AUPE* was not the "classic" tripartite relationship of the employment agency cases, but it involved three parties (trust employees, trustholders and University) and two potential employers (trustholders and University). The question there before the Court was whether the Quebec Labour Court had committed reviewable error in finding that the City of Pointe-Claire, not the employment agency, was the employer of temporary personnel on assignment at the City for purposes of the Quebec *Labour Code*. There was some dispute in supplementary written argument whether our case is properly characterized as involving a "tripartite" relationship.

The Supreme Court of Canada in *Pointe-Claire* reviewed the Quebec "true employer" cases involving employment agencies and observed the overriding

[800] *Alberta Union of Provincial Employees v The Crown in Right of Alberta* 1988 PSERBR 856.
[801] *Alberta Correspondence School* paras 37-41.
[802] *Alberta Correspondence School* paras 50.
[803] *AUPE* para 256.
[804] *Pointe-Claire (City) v. Quebec (Labour Court)* [1997] 1. S.C.R. 1015

importance that many of these cases placed upon the factor of "legal subordination", which in the common law provinces equates to the notion of day to day control over the employee's work. Without denying that day to day control is an important criterion, the court rejected the suggestion that it is a controlling criterion; it instead approved a more global analysis of the tripartite relationship before concluding which party was the employer.[805]

Granted that a predominant weight is accorded to legal subordination test, a more comprehensive approach has been found to be more appropriate for identifying the real employer in triangular employment relationships.[806] In terms of the more comprehensive approach, the legal subordination and integration into business should not be used as exclusive criteria for identifying the real employer.

Having examined facts, the Board was the concluded that a finding that the trustholder is the employer would thus frustrate much of the statutory purpose of the PSERA. The Board elaborates:

> "It would deny collective representation at all to some employees, and atomize the others into many small bargaining units, each with little ability to negotiate effective collective agreement terms on issues that transcend the individual project they are working at. [T]he Board should not treat the scholars individually as employers where they are not pursuing ends independent of their employment and where that would deprive many employees of meaningful access to the benefits of the statute. The public policy of the Public Service Employee Relations Act enabling collective bargaining as a meaningful and effective method of setting employees' terms and conditions of employment, favours identification of the University as the employer unless to do so is fundamentally inconsistent with the facts. It is not inconsistent with the facts to do so, and so we have little difficulty concluding that the statutory purpose of the PSERA strengthens rather than weakens our preliminary judgment that the University is the employer."[807]

In Canada the multi-employer provisions of the Ontario Employer Standards Act 200 (ESA) represent by far robust protection against the evasion of statutory obligations through fragmented business structures. There is authority to the effect that when interpreting the ESA, adjudicators should give foremost consideration to its character as a remedial and benefit-conferring statute.[808]

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[805] *Pointe-Claire* para 33.
[806] *Pointe-Claire* paras 47-48.
[807] *Pointe-Claire* para 50.
[808] *Machinger v HOJ Industries Ltd* 1992 1 SCR 986 para 31 and *Re Rizzo & Rizzo Shoes Ltd* 1988 1 SCR 27 para 36. Fudge & Zavitz "Vertical disintegration and related employers" 133 are of the view that

Section 1(1) of the ESA defines "the employer" as follows, with explicit reference to section 4:

> "employer" includes,
>
> (a) an owner, proprietor, manager, superintendent, overseer, receiver or trustee of an activity, business, work, trade, occupation, profession, project or undertaking who has control or direction of, is directly or indirectly responsible for, the employment of a person in it, and
> (b) any person treated as one employer under section 4, and includes a person who was an employer.

The pertinent portions of section 4 read as follows:

> 4(1) Subsection (2) applies if,
>
> (a) associated or related activities or business are or were carried on by or through an employer and one or more other persons; and
> (b) the intent or effect of their doing so is or has been to directly or indirectly defeat the intent and purpose of this Act.
>
> (2) The employer and the other person or persons described in subsection (1) shall be treated as one employer for the purpose of this Act.
>
> …
>
> (5) Persons who are treated as one employer under this section are jointly and severally liable for any contravention of this Act and the regulations under it and for any wages owing to an employee of any or them.

In terms of these provisions, separate entities are to be treated as one employer, and held jointly and severally liable for contraventions of employment standards, if a fourfold test is met: (i) there are two or more business entities; (ii) either the entities themselves or the activities they carry out are associated or related; (iii) the claimant was at one time an employee of either entity; and (iv) the intent or effect of the associated relationship defeats the intent and purpose of the Act.

The circumstances in *Lian* usefully illustrate the failure of ESA to hold accountable multiple employers in a subcontracted employment relationship. At issue was the predicament of workers in the garment industry as result of disintegration in the form of subcontracting of production among a number of firms. Employment vulnerability is typically pronounced because the workers who actually make the

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adjudicators apply the common employer provisions restrictively because they misconstrue it as being confiscatory and punitive.

clothes have a contractual relationship with only one of the intermidiaries at the bottom of the production pyramid. The production template unfolds as follows: a large retailer designs the clothes it wants to sell in its stores. It then contracts out the production of the apparel to manufacturing contractors, who in turn subcontract the work to meet the retailer's specifications.[809] Hidden deep in the supply chain, away from the consciousness of consumers, the emplying firm is less concerned than the retailer about its reputation or about the rights of its employees.[810]

Fan Jin Lian, the representative plaintiff in a class action was a homeworker who produced clothes at the bottom of a supply chain that led to major clothing retailers in Canada such as J. Crew, Costa Blanca, and Northern Elements. When her immediate contractual employer, an intermediary "jobber" in the production pyramid, defaulted on her statutory wage entitlements,[811] Lian sought redress from the retailer "end users" that benefited from her labour. The court had to determine whether section 12, the ESA's "joint employment" provision, encompassed subcontracted employment relationships characterised by indirect control and arm's length dealing between entities. Cumming J held that section 12 did not apply because of the absence of common control of the defendant or an attempt to defeat "intent and purpose" of the ESA.[812] By excluding liability of the principals at the top of a subcontracted employment relationship, the suit was halted on summary judgement. "In *Lian's* case", Kates has argued , "her employment rights were defeated not by a complex and evasive international arrangement but by the incapacity of Ontario's employment standards regime to enforce the rights of subcontracted labour in the province."[813]

[809] In South Africa the use of worker co-operatives in the production chain has enabled the garment industry to evade the LRA - *Glamour Fashions Worker Primary I* and *Glamour Fashions Worker Primary II*.
[810] Kates "The supply chain gang 451-452.
[811] For example a breach of ESA by not paying wages, including overtime and vacation pay. *Lian* para 7.
[812] See also *OPSEU, Local 253 v Victorian Order of Nurses Waterloo-Wellington-Dufferin* Branch 2004 OLRB Rep (July/August) 1238, 2004 CarswellOnt 6330(WL Can); *Texron Financial Canada Ltd v Beta Ltd/Beta Brands Ltd* 2007 36 CBR (5th) 94 (Ont Sup Ct J); *Novaquest Finishing Inc. v Abdoulrab* 2009 ONCA 491.
[813] Kates "The supply chain gang" 452.

Besides ESA, Ontario Human Rights Code[814] (OHRC) and Occupational Health and Safety[815] (OHSA) contain pertinent provisions concerning who is the employer. Although the OHRC does not directly define "employer", but a purposive approach has been adopted to the scope of its employment provisions. Section 5(1) of the Act stipulated that "[e]very person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability." The case of *Payne*[816] required the Ontario Board of Inquiry to pronounce who is an employer under section 5(1) in a motion to add party respondents. The complainant alleged that the defendant company refused to employ her in a booth at a trade fair because of her race. She also alleged that the additional parties she sought to add – various trade fair organizers and their employees had condoned and furthered the discriminatory act. The board of inquiry set up under OHRC rejected submissions that the absence of a contractual relationship with the complainant prevented a potential finding of liability on the part of the respondents. Before dealing with contravention ofsection 5(1), board member, Garfield pointed out that the Supreme Court has consistently stated that human rights statutes are to be given a "fair, large and liberal interpretation to advance and fulfil their purposes ...." He also endorsed the statement by the Federal Court of Appeal in *Rosin*[817] that "'courts have interpreted the words [i.e., "employ" and "employment"] broadly, finding employment relationships to exist in this context where in other contexts they might not have so found.'[818] Garfield was persuaded that "[a]n infringement of section 5(1) can occur between an employee and other persons who are not 'employer' in the traditional sense." It follows that the provision required only "some nexus or link in the chain of discrimination between the respondent and the complainant."[819]

[814] RSO 1990, cH.19
[815] RSO 190, cO.1.
[816] *Payne v Otsuka Pharmaceuticals Co* 2002 44 C.H.R.R. D/203 (Ont. Bd. Inq.). For full discussion: Kates "The supply chain gang 477-476.
[817] *Canada (Attorney General) v. Rosin* (1990), 16 C.H.R.R. D/441 para 22 (FCA).
[818] *Payne* para 35.
[819] *Payne* para 35.

The English case of *Abbey Life*[820] also highlight the nature of the problems arising where the employee is an active participant in setting up arrangements which split the function of the employer among two or more parties. These commonly involve workers in the computing and information technology field offering their services to employers through their own "personal service companies".[821] The complainant in *Abbey Life* had set up his own personal service company (Intelligents) for the supply of his services as a computer consultant.[822] Intelligents then contracted with an employment agency (MHC) to supply his services to the end user, Abbey Life.[823] The contract between Intelligents and MHC had the effect of placing the complainant "under the control of Abbey Life" as part of a team working on the impact of the "millenium bug" on Abbey Life's computer systems. Few months later into this arrangement, Abbey Life terminated its use of the complainant's services, soon after he had been diagnosed as suffering from diabetes. He brought claims against both MHC and Abbey Life for disability discrimination.

The Employment Appeal Tribunal[824] and the Court of Appeal held that Abbey Life, but not MHC, owed the complainant obligations of non-discrimination under section 12 of the Disability Discrimination Act. The section imposes the equal treatment obligation on a 'principal' to whom the labour of a "contract worker" is supplied under the terms of a contract entered into between the principal and another person. The typical case which the Act envisages is a situation in which the contract is entered between the user and the entity which supplies the worker: a "principal" is defined as "a person ("A") who makes work available for doing by individuals who are employed by another person who supplies them under a contract made with A".[825] In the present circumstances, there was a contract between Abbey Life and MHC, on the one hand, and between MHC and Intelligents, on the other; however, there was no contract between Abbey Life and Intelligents. The Court of Appeal was not

[820] *Abbey Life Assurance Co Ltd v Tansell* 2000 IRLR 387. For extended analysis Deakin "Commentary: The changing concept the employer in labour law".
[821] Leighton & Wynn "Classifying employment relationship" 23-32.
[822] This is variant of the problem in cases such as *Vermooten*; *Gerber*; *Bezer*; *Briggs*.
[823] *Abbey Life* 388.
[824] *MHC Consulting Ltd v Tansell* 1999 IRLR 677.
[825] S 12(6) of the Disability Discrimination Act 1995.

deterred, Mummery LJ held that "the statutory definition only requires the supply of the individual to be under a contract made with A'". It does not stipulate who is to be the party who contracts with A'. This interpretation, he said, was "achieved by a conventional process of judicial construction of legislation", while at the same time enabling the court to give "the wide ranging provisions of the discrimination legislation a generous interpretation."[826] Morris J in the EAT noted the argument of counsel that a contrary interpretation would "make it easy to evade the wide coverage which the Act was intended to achieve. It would, as [counsel] submitted, be all too simple to insert another contract somewhere along the line". The correct approach was to have regard to "the general principle which applies in social legislation of this kind, namely that the statute should be construed purposively, and with a bias towards conferring statutory protection than excluding it".[827]

For Deakin the outcome in *Tansell* is all the more impressive because of the clear evidence that the complainant entered into the arrangement with full awareness of its implications:

> "[t]he employment tribunal found Intelligents was not a sham company but formed under advice before the applicant embarked upon selling his computer knowledge and skills through agencies. The EAT suggested that computing consultants are 'required' to contract through personal service companies 'because of the risks they will incur if they were to make a negligent mistake in the course of carrying out their duties. The consequences of such a mistake could be enormous and sufficient to cause the individual to become bankrupt'. It is not clear whether the fiscal advantages of personal service companies were also known to the courts. Nevertheless, there is an avoidable sense in which the complainant was, in this case, able to obtain some of the advantages of employee/worker status, while avoiding some of the normal disadvantages.
>
> …
>
> From the wider perspective of the body of case law, *Tansell* seems to be the exception which proves the rule. The default position taken by the courts is one of respect for the pre-existing arrangements made by the parties, whether these relate to supply through intermediaries or the use of corporate group structure. It is only in those few instances where a specific statutory provision extends employment rights in across contractual or capital boundaries – as in the case of the statutory provision relied on in *Tansell* – that they will depart from this approach. "[828]

[826] *Abbey Life* 390.
[827] *MHC Consulting Ltd v Tansell* 679.
[828] Deakin "The changing concept the employer' 78. See also Bogg "Sham employment in the Supreme Court".

Muschett[829] is a polar opposite of *Payne.* In that case the the Court of Appeal left undisturbed the employment tribunal's finding that it lacked jurisdiction to hear agency worker's discrimination claim against an "end user" because there was no evidence of an employment contract between Muschett and HMPS. The question in this case was whether a temporary agency worker was an employee as defined by discrimination legislation and, therefore entitled to bring a claim for race, sex and religious discrimination."

In order of an individual to say that they are employed, they must satisfy section 230 of the Employment Rights Act 1996 (the "ERA"), which states that an employee is an individual who has entered into, or works under a contract of employment. By contrast, the definition of an employee is given a wider interpretation under discrimination. Section 78(1) of the Race Relations Act 1976 (the "RRA") defines employment as being any "employment under a contract of service or apprenticeship or a contract to personally executive any work or labour". Section 7 of the RRA provides protection for contract workers who are employed by an agent who supplies them to a principal. Agency workers are usually considered to be contract workers and are afforded protection from discrimination by the agency and the principal.

Muschett had signed a contract with Brook Street Agency and was supplied to HM Prison Service to work as a cleaner. Under the terms of Muschett's contract with the agency, the assignment could be terminated at any time by Brook Street, HMPS or Muschett himself, without prior notice or liability. After four months, HMPS terminated the assignment. Muschett brought a claim against HMPS for unfair dismissal, wrongful dismissal, race, sex and religious discrimination. The Employment Tribunal decided that he was not an employee under section 230 of the ERA because he could terminate the assignment at any time without giving notice, as could HMPS.

The Employment Tribunal also found that Muschett was not an employee for the purposes of discrimination legislation. The tribunal found that because the agreement could be terminated by Muschett or HMPS, at any time, he was not employed by HMPS and so could not claim for discrimination. Finally, the tribunal

[829] *Muschett v HM Prison Service* 2010 EWCA Civ 25. See also Royston "Agency workers and discrimination law" 2011 40 *ILJ (UK)* 92 ("Agency workers and discrimination law").

found that Muschett was not employed by Brook Street and so could not seek protection from discrimination under section 7 of the RRA.

This case confirms that in most situations agency workers will not, within the meaning of the ERA be employees of either their agency or their end user.[830] However, it would be wrong to conclude from *Muschett* that agency workers are beyond the scope of discrimination law.

At issue in *Szabo*[831] was whether a subcontractor could be considered "employer" under section 5(1). The complainant had worked for an agency called Casa, which assigned her to various cleaning jobs. In finding that Ms Szabo's "subcontractor" role was in fact one of employment under and that she was an employee within the meaning of the Code and section 5(1),[832] the Ontario Human Rights Tribunal applied the "purposive, functional approach"[833] articulated in *Payne*.

The question who is an employer under the OHSA is inseparable from the question who is an employee in light of the fact that section 1(1) of the statute defines "employer" with specific reference to the employment of "workers":

> "[E[mployer" means a person who employs one or more workers or contracts for the services of one or more workers and includes a contractor or subcontractor who performs work or supplies services and a contractor or subcontractor who undertakes with an owner, constructor, contractor or subcontractor to perform work or supply services.

In contradistinction to ESA, the language of the definition of "employer" under OHSA is ample and inclusive in formulation.[834] A fundamental difference between OHSA definition and that in the ESA is the clear inclusion of contractors and subcontractors. The issue whether the OHSA applied to the "employer" of an independent contractor killed in the course of his work as a window washer arose in *Wyssen*.[835] The Ontario Court of Appeal based its decision in large part on the OHSA's

[830] See e.g. Royston "Agency workers and discrimination law"; Leighton & Wynn "Classifying employment relationships".
[831] *Szabo v Poley* 2007 HRTO 37.
[832] *Szabo* para 16.
[833] *Szabo* para 16.
[834] See e.g. *Universal Workers Union, Labourers International Union of North America, Local 183 v H & R Developments* 2011 CanLII 26357 (ON LRB); *Brenda Bastien v 817775 Ontario Limited (Pro-Hairlines)* 2014 CanLII 65582 (ON LRB); *Brown v William Osler Health Centre* 2012 CanLII 38163 (ON LRB).
[835] *R v Wyssen* 1992 10 OR 3d 193.

expansive definition of "employer" but its interpretation was influenced by a consideration of the intent and purpose of the statute. This was evident from "the intention of the legislature to make 'employers' responsible for ensuring safety in the workplace.[836] This led the court to conclude that "[t]he employer's duty under the Act and Regulations cannot be evaded by contracting out performance of wok to independent contractors."

Expansive approach can also be seen in *Grant Forest Products*[837] where the defendant employer argued that the all-encompassing definition of "employer in the OHSA was so broad as to infringe on the employer's right to "liberty" under section 7 of the Canadian Charter of Rights and Freedoms. In giving a short shift to this argument, Belanger J stated:

> "Unavailability of an option to contract out of employee responsibilities … appears to me to reinforce the legislative objective to make workplace owners and employees conscious of their responsibilities to take prudent and effective measures to ensure the existence of a safe workplace environment.
>
> …
>
> If the intention of the legislation was to make an employer a virtual insurer of employee safety in the workplace, it does not appear to me that the legislation restricted liberty more than was necessary to accomplish that goal."[838]

Although the capital boundary problem does not manifest itself directly under either the OHRC or the OHSA, the jurisprudence shows that courts and tribunals are willing to adopt a progressive approach to the scope of employment and to employment related liability.

4.8 The South African Approach to the Complexities of the Employing Entities

What has role South African law played in tackling the problem of identifying real employer in contemporary labour market with diverse service arrangements between workers and employing entities? But more importantly, the question is who must take responsibility for the plight of the employees when employment relationship severs? The crux of the problem implicates the emergence and

[836] *Wyssen* 1999.
[837] *R v Grant Forest Products* 2003 CarswellOnt 6071 (WL Can) (Ont Sup Ct).
[838] *Grant Forest Products* paras 54 & 87,

consequences of non-standard forms of employment,[839] and the possibility that relatively few of the world's workers are engaged in standard, ongoing employment relationships.[840]

The point at which employment relation terminates is the time when the employee is most vulnerable and hence, most in need of protection. Identifying the real employer party to a dismissal dispute thereby ensuring its participation in the conciliation proceedings, and if they fail, subsequent arbitration and adjudication can hardly be overstated. The delicate issue of determining the real employer is most amplified where a large group of employees employed by different but associated companies with shared HR services and overlapping directors and shareholders are dismissed and the corporate group conveys their dismissal. The task of correctly identifying and citing the employer party for each individual employee is similar to unravelling an omelette.

4.8.1 *Golding* Litigation

Although the central issue in *Golding* concerned an abortive attempt to halt the disciplinary hearing and declare suspension unlawful, it also touched upon the problem of identifying the real employer in complex multilateral work settings such as corporate groups.

The facts giving rise to the litigation can be briefly spelt out as follows. The applicant held senior positions within the Hosken Consolidated Investments (Pty) Ltd (HCI) group of companies. He was the executive chairman of HCI the first respondent and also the chief executive officer (CEO) of Sabido Investments (Pty) Ltd and etv, the second and third respondents respectively. At HCI Managerial Services (Pty) Ltd, the entity that paid his salary he was the director. Following allegations of misconduct relating to undeclared and unauthorised purchase of shares, the applicant was

[839] See ILO *Non-Standard Forms of Employment: Report for Discussion at the Meeting of Experts on Non-Standard Forms of Employment (Geneva, 16-19 February 2015),* Geneva, 2015, available http://www.ilo.ch/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/meetingdocument/wcms_336934 (accessed 15-04-2017).

[840] See ILO *World Employment Outlook: The Changing Nature of Jobs* Geneva, 2015, available at http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_368626 (accessed 30-03-2017).

suspended and later notified to attend a disciplinary enquiry. On the eve of the scheduled hearing, the applicant brought an urgent application to interdict and restrain the first respondent from proceeding with the disciplinary enquiry pending the determination of an unfair labour practice dispute. He also sought to set aside his suspension.

Among the arguments raised by Golding in contesting the lawfulness of the institution of disciplinary proceedings was that HCI was not the employer.[841] To be precise, the applicant submitted that he was employed by Sabido and etv, not HCI. Both Sabido and etv were subsidiaries of the holding company HCI. The Companies Act 71 of 2008 defines a "group of companies" as a holding company and all its subsidiaries. A "holding company", in relation to a subsidiary, means a juristic person that controls that subsidiary. Since the parties did not place sufficient evidence showing how HCI controlled Sabido and etv as its subsidiaries as envisaged in sections 2(2)(a) and (3) of the Companies Act, applying the rule in *Plascon-Evans*,[842] the court was satisfied that the two entities were subsidiaries of the holding company.

In deciding the issue of who is the employer, the court noted that Golding as a CEO was clearly an employee of Sabido and etv. However, that did not necessarily imply that he was not an employee of HCI.[843] In this regard the court sought guidance from eminent authority. The Labour Appeal Court and the Supreme Court of Appeal in *McCafferty*[844] authoritatively considered the problem of identifying the true employer. *McCafferty* established that a highly placed employee in a group situation who performed services on behalf of a number of entities usually has more than one employer. Similarly, the court found that Golding had more than one employer.

After examining section 213 of the LRA dealing with the definition of an employee, the court posed the question: from whom does Golding receive his substantial remuneration? Evidence revealed that the employee's salary was paid by HCI

[841] Generally Cassim "Contesting the removal of a director by the board of directors under the Companies Act" 2016 *SALJ* 133; Stoop "The company director as employee"2011 32 *ILJ* 2367; Olivier "The dismissal of executive employees" 1988 9 *ILJ* 519; Larkin "Distinction and differences: A company lawyer looks at executive dismissal" 1986 7 *ILJ* 248.

[842] *Plascon-Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd* 1984 3 SA 623 (A) 634H-I.

[843] *Golding* para 31.

[844] *Board of Executors v McCafferty* 1997 18 *ILJ* 949 (SCA).

Managerial Services. However, he did not earn any remuneration from Sabido or etv. A salient feature pointing to Golding also being an employee of HCI was his acceptance of an offer to partake in the HCI employee share scheme available only to"selected full-time employees of HCI Ltd and its subsidiaries."[845] Furthermore, the court noted that the applicant was the executive chairman of HCI. In effect, this implies that he was also an employee of HCI.[846] Steenkamp J adopted the view articulated in *Jorgensen*,[847] where the point was made that "a difference between the so-called full-time or executive director, who participates in the day-to-day running of the company's affairs or of a portion thereof, and the non-executive director who has not undertaken any special obligation". This leads to a conclusion that the decision to discipline the applicant was not unlawful.

4.8.2 *NUMSA v Intervalve* Trilogy

The nature of the dilemma which confronts a union in identifying the real employer for each individual employee for referral of unfair dismissal disputes for conciliation manifests itself where companies deal with employees and their union as a single, composite employer in the course of the ensuing dispute and issued a single dismissal notice to employees. Naturally, matters are straightforward but for the fact that the union is unable to pinpoint exactly which employee works for which employer and the group employer is not disposed to providing a list indicating employing entities for respective employees. It begs the question whether the group employer in such a situation waived the right to insist on separate service of the referral or otherwise estopped from relying on its absence? Can the union be faulted for acting reciprocally by serving only the group employer pursuant to section 191(3) of the LRA because it is unable to pin down the real employer for each individual dispute? Does referral to conciliation of only the group employer embrace associated employing entities? Granted that non-compliance with conciliation formalities is a jurisdictional bar to the Labour Court hearing an unfair dismissal claim, does the fact

[845] *Golding* para 33.
[846] *Golding* para 34.
[847] *Fisheries Development Corporation of SA Ltd v Jorgensen* 1980 4 SA 156 (W) 156H. See also *Mpofu v SABC* 2008 ZAGPHC 413 para 23.

that dismissed employees likely to lose their unfair dismissal claims against different employing entities be countenanced? These focal questions were pointedly faced by the Labour Court,[848] Labour Appeal Court[849] and the Constitutional Court[850] in a trilogy of judgements, each with a different outcome.

The difficult and interesting problems of jurisdiction of the Labour Court giving rise to *NUMSA v Intervalve* trilogy are not ordinary issues of statutory construction but they involve a more complicated and perspicacious process than conveyed by the question "is the referral of a dismissal dispute a precondition to the Labour Court's jurisdiction?" In pith and substance, they involve what Cameron J with his customary clarity characterised as "what the law can do to penetrate the opacities of form"[851]

4.8.2.1 Background to *NUMSA v Intervalve* Trilogy

NUMSA v Intervalve trilogy is a salient example of complexities of the employing enterprise. The multilateral work setting concerned three employing entities, namely Steinmuller, Intervalve and BHR. The three companies were collectively referred to as the "Steinmuller group of companies." The three companies constituted a single economic entity, with overlapping shareholders and directors. They "shared services" including HR services and payroll administration. Another distinctive feature of the Steinmuller group of companies is that in flagrant disregard of the provisions of section 197 of the LRA "during their employment certain employees were transferred from one of the three entities to another, at different times, without termination of one employment contract and the conclusion of a new contract, nor cession and assignment of obligations."[852] From this perspective, the group of companies can be regarded in itself as an "internal labour market" capable

[848] *NUMSA v Steinmuller*.
[849] *Intervalve v NUMSA*.
[850] *NUMSA v Intervalve*.
[851] Per Cameron J in *NUMSA v Intervalve* para 1.
[852] *NUMSA v Steinmuller* para 15.7. From a point of view of law and economic perspective, the multi-employer model testifies to the need to fit legal techniques the changing use of relational contracts among firms. Whilst the single employer model reflects a notion of employment relationship relying on ownership of the firms, the plural employer model makes it possible to conceive as a network of relational contracts. Baker *et al* "Relational contracts and the theory of the firm" 2001 *QJE* 39. Generally Freedland 2006 35 *ILJ (UK)* 1; Deakin "The employer" 79. Davidov "Joint employer status" 736-737.

of supplying flexible labour, on the one hand, and disregarding the employees' expectations about stability in income and employment, on the other.[853]

The dismissal of the employees was consequent upon a strike action at the shared premises. The strike was handled from the employer side by shared HR services which communicated with the employees using a document on a letterhead bearing the names of all three entities, namely, Steinmuller, BHR and Intervalve. The employing entities acted with a single voice and face throughout the events that culminated in the dismissal of the individual employees, in particular the shared HR services issued identical letters of dismissal.

NUMSA, in referring unfair dismissal dispute for conciliation before the bargaining council cited only Steinmuller as the employer party. At the conciliation meeting, Steinmuller pointed out to NUMSA that many of the dismissed employees in the referral were not its employees. In the second referral to the bargaining council which was well beyond the LRA's 30-days cut-off, NUMSA cited the employer party to the dispute as Steinmuller, alternatively Intervalve, alternatively BHR and alternatively KOG.[854] NUMSA's condonation application for lateness[855] was refused by the bargaining council. NUMSA did not take the bargaining council decision on review but rather filed a statement of claim in the Labour Court in respect of the first referral involving Steinmuller alone. The relief sought was solely against Steinmuller.[856]

After a lapse of seven months, NUMSA launched an application in the Labour Court to join Intervalve and BHR as respondents to the unfair dismissal claim against Steinmuller. It is this dispute that found its way to the court of last resort.

4.8.2.2 The Labour Court Judgment: *NUMSA v Steinmuller*

At the court of first instance, NUMSA application for joinder of Intervalve and BHR as respondent employer parties was successful. The court found that Intervalve

[853] This reinforces the precarious employment as opposed flexicurity. For works advocating the new concept of the employer in a flexicurity perspective: Corazza & Razzolini *Who is an Employer* 9.
[854] *NUMSA v Intervalve* para 9.
[855] Section 191(2) provides that if the employee shows good cause at any time, the bargaining council may permit the employee to refer the dispute after the relevant time limit in subsection (1) has expired.
[856] *NUMSA v Intervalve* para 10.

and BHR had substantial interest in the subject matter of the proceedings. Put simply, they were employing entities of employees in proceedings in which the dismissal is challenged "quite obviously constitutes a sufficient legal interest in the proceedings" to join them.[857] Taking a cue from *Driveline* minority judgment,[858] Steenkamp J concluded that the fact that conciliation had already occurred with Steinmuller only was not a jurisdictional bar to joinder of other entities. In support of this proposition, the judge noted that there is ample authority to the effect that Labour Court had power to join additional employer parties to an unfair dismissal dispute even after concilition.[859] Joinder was more or less permissble since the legal representatives for Intervalve and BHR were the very representatives who appeared for Steinmuller at the conciliation proceedings. It follows that they had already taken part in a conciliation process. To deny joinder would be overly formalistic. It could also herald a slide into crippling formalism[860] This means that the rule permitting joinder would serve no purpose if NUMSA had to refer separate conciliation disputes against each individual employer only to apply for consolidation later.[861]

4.8.2.3 The Labour Appeal Court Judgment: *Intervalve v NUMSA*

In the Labour Appeal Court, Intervalve and BHR prevailed in overturning the grant of joinder. The Labour Appeal Court held that the Labour Court has no jurisdiction to entertain an unfair dismissal claim against Intervalve or BHR because the LRA requires that the matter be conciliated against them.[862] In this regard the Labour Appeal Court relied on its earlier decision in *Driveline*.[863] The *Driveline* majority

[857] *NUMSA v Steinmuller* para 21.
[858] *NUMSA v Driveline Technologies (Pty) Ltd* 2000 4 SA 645 (LAC) para 8. The *Driveline* minority judgment by Conradie JA considered that the dispute could be broadened at the litigation stage because the Labour Court has jurisdiction over the dispute regardless of how it was categorised or conciliated at the conciliation stage. Non-compliance with conciliation formalities, including referral for conciliation, was not a jurisdictional bar to the Labour Court hearing the unfair dismissal claim.
[859] *NUMSA v Steinmuller* paras 28-30 and 33, citing *Mokoena v Motor Component Industry (Pty)* Ltd 2005 26 *ILJ* 277 (LC) and *Selala v Rand Water* 2000 21 *ILJ* 2102 (LC) and distinguishing *SACCAWU v Entertainment Logistics Service* 2011 32 *ILJ* 410 (LC).
[860] The *Driveline* para 8 minority worried that making conciliation a jurisdictional precondition would foster formalism and encourage technicalities. This would "lead to a resurgence of the kind of point" that turned the former Industrial Court into "a forensic minefield".
[861] *NUMSA v Intervalve* para 12.
[862] *Intervalve v NUMSA* para 24.
[863] 2000 4 SA 645 (LAC).

had held that "the wording of section 191(5) imposes the referral of a dismissal dispute to conciliation as a precondition before such dispute can either be arbitrated or referred to the Labour Court for adjudication".[864] *De Beer*[865] also echoed the principle that it is only after the bargaining council or the CCMA Commissioner must have certified that the dispute remained unresolved, or a period of 30 days had elapsed since the referral and the dispute remained unresolved, that: (a) the council or the CCMA must arbitrate the dispute in terms of section 191(5)*(a)*; or (b) the employee may refer the dispute to the Labour Court for adjudication - section 191(5)*(b)*. Section 191(5) thus makes it clear that the referral of a dismissal dispute to conciliation is not just the first stage in the process but also "a precondition before such a dispute can be arbitrated, or referred to the Labour Court for adjudication. In the absence of a referral to conciliation, or if it was referred, but there is no certificate issued as contemplated in section 191(5) and the 30 days period has not expired, the Labour Court has no jurisdiction to adjudicate the dismissal dispute."

If NUMSA was uncertain about which employees worked for which entities, the preferable route was to refer the unfair dismissal claim simultaneously against all possible employers. "There was no requirement to set out exactly which member worked for which employer at that stage, or it could be explained that the members worked for one alternatively for the other."[866] Further the Labour Appeal Court ruled that the discretion to join parties to proceedings cannot override the expressed jurisdictional requirements of the LRA. The application for joinder was misplaced since the Intervalve and BHR did not have a direct and substantial interest in the dispute between NUMSA and Steinmuller. Although BHR and Intervalve were materially connected to the underlying dispute, the judgement sought by NUMSA against Steinmuller could not affect them.

4.2.2.4 *NUMSA v Intervalve* in the Constitutional Court

[864] *Driveline* para 73.
[865] *De Beer v Minister of Safety & Security* 2013 34 *ILJ* 3038 (LAC) para 23.
[866] *Intervalve v NUMSA* para 21.

The problem arising from *NUMSA v Intervalve* trilogy may be postulated in the form of propositions. Did NUMSA comply with section 191 of the LRA? Did Intervalve and BHR waive their entitlement to separate notice of the conciliation process? Can employees lose their claim against their employers because of a merely technical omission owing to complex working arrangements created by the latter? These questions turn upon the proper interpretation and application of section 19, in the light of the spirit, purport and object of the Bill of Rights, and in particular, the right to fair labour practices in section 23 and access to courts in section 34 of the Constitution.[867] The answer to these questions elicited a sharp division in the Constitutional Court.

The gist of the argument advanced by the union was that the companies had made an election to deal with the workers and the union as a single, composite, group employer and hence it elected to be dealt with reciprocally in that way.[868] Put differently, because the companies conducted themselves so throughout the strike, and issued a single dismissal notice to the striking employees, Intervalve and BHR waived the right to insist on a separate service of the referral. In this context, any other approach would be asymmetrical and unfair.

In addition, it was contended that the companies made a series of representations that they were acting collectively for the purpose of the strike and the ensuing dismissal dispute. To their detriment, the employees and their union relied on these representations. Logically, Intervalve and BHR are to be estopped from denying that they received adequate notice. On the opposite, Intervalve and BHR argued that there was no express or tacit waiver of service referral under section 191(3). They concede that the joint dismissal notice did more than show that the employer entities acted in concert, and that they were prepared to receive

[867] See e.g. *Legal Aid SA v Magidiwana* 2015 6 SA 494 (CC) paras 13-16; *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 5 SA 89 (CC) paras 1, 30; *Twee Jonge Gezellen (Pty) Ltd v Land & Agricultural Bank of SA* 2011 3 SA 1 (CC) paras 35-36; *Lesapo v NW Agricultural Bank* 2000 1 SA 409 (CC) paras 73-76. See also Okpaluba "Constitutionality of legislation relating to exercise of judicial: the Namibian experience in comparative perspective (part2) 2002 *TSAR* 436, 459-460; Okpaluba & Mhango "Between separation of powers and justiciability: Rationalising the Constitutional Court's in the Gauteng e-tolling litigation in South Africa" 2017 *LLD* 1; Okpaluba "Justiciability and standing to challenge legislation in the Commonwealth: a tale of the traditionalist and judicial activist approaches" 2003 *CILSA* 25.

[868] *NUMSA v Intervalve* para 21.

representation collectively. They deny that it implied that, if legal steps followed notification to only one company would suffice. In sum if the dismissal notice did not amount to a waiver, it also could not constitute a representation to estop the companies from the absence of separate service under section 191(3).

Centrally, Intervalve and BHR contended, that section 191(3) made actual service on every employer a prerequisite for the Labour Court jurisdiction. It was pointed out that NUMSA did not seek a joinder of convenience under rule 22(1), where the Labour Court may grant joinder "if the right to relief depends on the determination of substantially the same question of law or fact", but a joinder of necessity under rule 22(2)(*a*), where "the party to be joined has a substantial interest in the subject matter of the proceedings".[869] Building on these propositions, Intervalve and BHR contended that NUMSA did not bring a constitutional challenge to the 30-day referral requirement; hence the interpretive injunction in section 39(2) cannot assist them.

4.8.2.4.1 The Main Judgment

Cameron J addressed the issue of the preconditions to the Labour Court's jurisdiction, and the questions of form and substance and equitable jurisdiction in the determination of the matter.

4.8.2.4.2 Referral for Conciliation as a Precondition to the Labour Court Jurisdiction

The well-known and settled principle of labour law is that labour disputes should be referred to a conciliation process before they can be subject to arbitration or adjudication.[870] As previously noted, the Labour Appeal Court relied on the *Driveline*

[869] *NUMSA v Intervalve* para 17.

[870] Section 191(5) reads:

> "If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days have expired since the council or the Commission received the referral and the dispute remains unresolved –
> (a) the council or the Commission must arbitrate the dispute at the request of the employee if –
> (i) the employee has alleged that the reason for dismissal is related to the employee's conduct or capacity, unless paragraph (b)(iii) applies.

decision in overturning the Labour Court judgment. It held that in the absence of conciliation of the dispute which was belatedly referred, NUMSA was not entitled to refer its dispute against Intervalve and BHR to the Labour Court for adjudication.

The salient facts of *Driveline* bear mentioning. The case concerned an application for an amendment of the applicants' statement of claim. In their referral notice, the individual appellants claimed that their dismissal for operational requirements was unfair. The amendment, that the Labour Court rejected, sought to attack the fairness of the dismissal on the basis that the dismissal were automatically unfair. The employer contended that the conciliation of the dispute concerning automatically unfair dismissal was a jurisdictional precondition to a consideration of the matter by the Labour Court. It contended that the amendment sought to introduce a new dispute which had not been referred to conciliation and that the Labour Court had no jurisdiction to adjudicate. The *Driveline* majority (Zondo AJP, with Mogoeng AJA concurring) stated that it was "as clear as daylight that the wording of section 191(5) imposes the referral of a dismissal dispute to conciliation before such dispute can either be arbitrated or referred to the Labour Court for adjudication".[871]

Cameron J who read the majority opinion endorsed the reasoning of the *Driveline* majority, and the separate concurring judgment as convincing. Section 191(5) specifies one of two requirements before the dispute can be referred to the Labour Court for adjudication: there must be certificate of non-resolution, or 30 days must have passed. Where neither condition is fulfilled, the LRA provides no avenue

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(ii) the employee has alleged that the reason for dismissal is that the employer made continued employment intolerable or the employer provided the employee with substantially less favourable conditions or circumstances of work after a transfer in terms of section 197 or 197A, unless the employee alleges that the contract of employment was terminated for a reason contemplated in section 187;
(iii) the employee does not know the reason for dismissal; or
(iv) the dispute concerns an unfair labour practice; or

(b) the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is –
(i) automatically unfair;
(ii) based on the employer's operational requirements;
(iii) the employee's participation in a strike that does not comply with the provisions of Chapter IV; or
(iv) because the employee refused to join, was refused membership of or was expelled from a trade union party to a closed shop agreement."

[871] *Driveline* para 73.

through which the employee may bring the dispute to the Labour Court for adjudication.[872] Furthermore, section 157(4)(a) underscores the importance the LRA places upon the attempts to be made to try to resolve a dispute through conciliation before resorting to other methods of resolution.[873]

The lead judgment put to one side the question of formalism. It pointed out that the LRA makes it easy to refer disputes for conciliation. NUMSA muddied the procedural waters as the initial referral cited Steinmuller alone, the referral could have mentioned any entity NUMSA suspected may have been an employer. "Indeed, the second, abortive referral two months later did precisely this."[874] What is uncontested, Cameron J observed "why NUMSA failed to adopt this expedient from the start we do not know".[875]

In concurrence Zondo J expressed his conclusion on the stratagem of using the process joinder in the following terms:

> "The answer is that the union realised that the referral did not include any dismissal dispute between Intervalve and its former employees or between BHR and its former employees and this meant that the Labour Court would not have jurisdiction to adjudicate those dismissal disputes. It was after the bargaining council had refused condonation that the union thought of using the joinder strategy to try and bring the dismissal disputes involving Intervalve and its former employees and BHR and its former employees through the back door into the trial proceedings relating to the dismissal dispute between Steinmuller and its former employees. This was a ploy by the union to circumvent the decision of the bargaining council refusing it condonation in respect of the dismissal disputes involving Intervalve and BHR."[876]

4.8.2.4.3 Was the Dispute with Intervalve and BHR Referred For Conciliation?

Given that the those dealing with the dismissal on behalf of all three entities had notice of the referral against Steinmuller, can it be concluded from these facts that the Steinmuller conciliation referral encompassed also Intervalve and BHR? That depends on whether the prescipts of section 191 were met. *Maharaj*[877] establishes that in measuring of a statute's requirements, the enquiry is not whether there has been

[872] *NUMSA v Intervalve* para 32.
[873] *NUMSA v Intervalve* para 34.
[874] *NUMSA v Intervalve* para 38.
[875] *NUMSA v Intervalve* para 38.
[876] *NUMSA v Intervalve* para 137. See also *NUMSA v Intervalve* para 108.
[877] *Maharaj v Rampersad* 1964 4 SA 638 (A), applied in *ACDP v Electoral Commission* 2006 3 SA 305 (CC) para 24 and *All Pay Consolidated Investment Holdings (Pty) Ltd v CEO, SASSA* para 30.

"exact" or "substantial" compliance. *Maharaj* test countenances deviation from statutory prescriptions provided the purposes has been met.

The crucial question is: was there compliance? In order to ensure compliance with section 191, NUMSA had to refer the dispute between the employees and Intervalve and BHR for conciliation. Referral for conciliation is a prerequisite to the Labour Court's jurisdiction over dismissal disputes.[878] Whether the referral embraced Intervalve and BHR depends on the purpose of theprovision. The content and ambit of section 191 is clear: to ensure that, before parties to a dismissal or unfair labour practice resort to legal action, a prompt attempt is made to bring them together to resolve issues between them. It serves to enable the employer to participate in the conciliation proceedings, and, if they fail, to gird itself for the conflict that may ensue.[879] Another purpose is to inform broadly the human agents involved in a dispute that a referral to conciliation has occurred. Section 191(3) offers a significant signpost. Service must be on "the employer". Steinmuller was not the sole employer but one of the employers – the employing entity of some of the employees, but not all of them.

Although non-compliance with statutory service requirements often results in harsh outcome, the lead judgment relied upon venerable precedents[880] which have held that notifying the wrong party, even because of a mistake, is no notification at all and cannot constitute substantial compliance. The facts in *Malokoane* are illustrative of the fatal consequences of non-compliance. There the injured claimant, through an error on her or her attorney's part about the exact date of her accident, submitted a

[878] The Labour Appeal Court *Intervalve v NUMSA* distinguished the factual circumstances in *Mokoena* and *Selala*. It disavowed of the erroneous view, expressed in both those judgements, that the LC has a discretion to condone non-compliance with the conciliation requirement. The Labour Appeal Court noted that the party joined in Mokoena was a transferee who had taken oven the going concern of another business. Judgement against the old business was therefore effective against the transferee, who would be jointly and severally liable for any claim. The transferee therefore had an interest in the outcome of the dispute. The joined party in Selala also had an interest in the outcome of the case, as he was a co-employee currently employed in a position the applicant claimed should have been his. By contrast, *SACCAWU* at para 14 right held that an applicant in the Labour Court "cannot rely on a joinder in terms of rule 22 to avoid its obligations to comply with section 191 of the LRA".

[879] *NUMSA v Intervalve* para 47.

[880] *Malokoane v Multilateral Motor Vehicle Accidents Fund* 1999 1 SA 344 (SCA); *Blaauwberg Meat Wholesalers CC v Anglo-Dutch Meats (Exports) Ltd* 2004 3 SA 160 (SCA); *Associated Paint & Chemical Industries Ltd t/a Albestra Paint & Lacquers v Smit* 2000 2 SA 789 (SCA).

claim form to the wrong agent of the Multilateral Motor Vehicle Accident Fund (MMF). She contended that the timely submission of the form to an agent of the MMF, even the wrong agent, constituted substantial compliance with the statute's notice requirement, because the MMF was the true defendant and both agents acted for it.[881] Both the High Court and the Supreme Court of Appeal rejected this argument. The Supreme Court of Appeal found that, even though the purpose of the statute was to "provide the widest possible protection to injured persons", and the claimant had made a genuine mistake, she nevertheless did not comply.[882]

The Supreme Court of Appeal held that service of the form on an agent with no authority to deal with the claim was without effect.[883] It was immaterial that the claimant notified an agent of the MMF within the prescribed period because it was the wrong agent. As to the fact that the MMF or some of its agents had actual knowledge of the claim, the court held that it was not relevant. The claimant had in fact informed no legal authority to receive or handle her claim. In the circumstances, there was no compliance.

In *Blaauwberg*, the Supreme Court of Appeal found that the complete lack of service on the debtor could not possibly have put it on notice that it was subject to the proceedings.[884] In that decision an amendment of a summons was refused where the wrong party issued the summons itself, even though it was a company closely associated with the correct party. This was even though the declaration attached to the summons mentioned the correct party as plaintiff. The court held that the summons issued by the incorrect creditor, even if later corrected, was not sufficient to interrupt prescription. This was even though the process was issued in the name of the actual creditor's parent company, and the companies shared the same address.[885] Therefore, there was no compliance with the statutory requirement.

It is important to pause and scrutinise the purpose of service requirement in section 191(3). Beyond simply letting the employer know that a dispute that affects it,

[881] *Malokoane* 549E.
[882] *Malokoane* 549G-550A.
[883] *Malokoane* 550A-D.
[884] *Blaauwberg Meat* para 16-18.
[885] *Blaauwberg Meat* para 14.

is being conciliated, notice must be directly targeted. In other words "it must be to put each employer party individually on notice that it may be liable to legal consequences if the dispute involving it is not effectively conciliated."[886] The adverse consequence for the employer are readily apparent. These may include: trial proceedings, reinstatement orders, back pay and costs orders.

Undoubtedly, the beneficiary of service requirement is the employer.[887] Once one appreciates that the purpose of the statutory provision is "to tell those on the line that impending legal process might make them liable to adverse consequences was not fulfilled".[888] A referral that arrived at the companies' shared HR services identified Steinmuller as the sole target in the intended litigation. That the three entities shared HR services and the entities' legal representative knew about the referral against Steinmuller did not mean that they should have concluded that the dispute against Intervalve and BHR had also been referred for conciliation. On the contrary, the exclusion of Intervalve and BHR signalled that the ensuing legal process did not encompass them. They were off the hook.

At the core of NUMSA's challenge is that throughout the events leading to the dismissal of the individual employees, in particular, in effecting dismissal, the three companies acted with a single voice. It will be remembered that the Labour Court deplored as "cynically opportunistic"[889] the companies' stance in the litigation. Behind this complaint lies the suggestion that the separate identity of the three companies is a sham. This raises the question of "piercing the corporate veil" [890] so as

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[886] *NUMSA v Intervalve* para 52.

[887] "This makes clear that a referral citing one employer does not embrace another, uncited, employer. The fact that the uncited employer has informal notice of the referral cannot make a difference. The objectives of service are both substantial and formal. Formal service puts the recipient on notice that it is liable to the consequences of enmeshment in the ensuing legal process. This demands the directness of an arrow. One cannot receive a notice of liability to legal process through oblique or informal acquaintance with it." per Cameron J in *NUMSA v Intervalve* para 53.

[888] *NUMSA v Intervalve* para 58.

[889] *Intervalve v NUMSA* para 41.

[890] Courts will in appropriate circumstances disregard a company's separate personality if it is used by another person to achieve irregular objectives: *Airlink Pilots Association of SA v SA Airlines* 2001 6 BLLR 587 (LC); *NUMSA v Lee Electronics (Pty) Ltd* 2013 2 BLLR 155 (LAC); *Group 6 Security (Pty) Ltd v Moletsane* 2005 6 BLLR 1072 (LC); *Veres v Granard CC t/a G2 Clothing* 2004 3 BLLR 283 (LC). It is therefore hard to disagree with the sentiments articulated by Lord Sumption in *Lowick Rose LLP (in Liquidation) v Swynson Ltd* 2017 WLR 1161 para 1:

> "The distinct legal personality of companies has been a fundamental feature of English commercial law for a century and a half, but that has never stopped businessmen from treating

to prevent the shirking of employer responsibilities in an intricate working relationship where it is almost impossible to determine the true employer for each employee.[891] To this, the majority judgment noted that the fact that the companies shared premises and constituted a single economic unit, does not justify treating them as a single entity for purposes of citation in a legal process."[892] The fault for the sad, perplexing twists in litigation lies on both parties.

In upholding the right of the two companies to rely on the exclusion from the conciliation process, Cameron J indicated:

> "The separate legal personality of the three companies – Steinmuller, Intervalve and BHR – cannot be willed away because there was some overlap in their corproate operations. They had overlapping boards of directors and interconnected shareholdings, and a joint holding company. But this does not help NUMSA. NUMSA's argument depends on the proposition that knowledge held by an officer or employee of one corproation may be imputed to the other corporation with which she is associated. That approach has long been alien to our law.[893] Our law has also rightly rejected the suggestion that serving on several corporate boards makes knowledge pertaining to one company against the other."[894]

4.8.2.4.4 Waiver and Estoppel

As already pointed out, the three entities shared HR services. They dealt jointly with the dismissed employees and they issued a joint dismissal letter. It is from here that NUMSA's alternative argument premised on waiver and estoppel springs. This

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their companies as indistinguishable from themselves. Mr Michael Hunt is not the first businessman to make that mistake, and doubtless he will not be the last."

[891] See e.g. *Footwear Trading CC v Mdlalose* 2005 5 BLLR 542 (LAC).

[892] *Intervalve v NUMSA* para 55.

[893] See Williams "Companies" in *LAWSA* 2 ed (2005) paras 64 and 69.

[894] In *Lipschitz v Landmark Consolidated (Pty) Ltd* 1972 2 SA 482 (W) 487C-488B, endorsed in *Southern Witwatersrand Exploration Co Ltd v Bisichi Mining* 1998 4 SA 767 (W) 881-782; the court rejected the proposition that knowledge held by a director of one company became automatically admissible against another company on whose board the director also served. It further held:

> "[E]ven if [director] was the sole shareholder and governing director of the defendant it does not follow that he is to be identified with the defendant. He falls to be regarded as no more than an agent of the defendant and cannot be regarded as being the defendant itself which in law is a distinct and separate legal entity. [The director]'s statement and actions are not *ipso facto* and *per se* to be regarded as being those of the defendant. Even in the case of a one man company and its shareholder and/or director are distinct and separate entities."

For Froneman J, the reasoning of the majority is not unassailable because "finding for NUMSA here will not threaten any fundamental principles of our law, be they those relating to the recognition of separate legal personality or to orderly dispute resolution. All it does is to discourage relying on formal technicalities in order to avoid dealing with the true merits of underlying labour disputes." *NUMSA v Intervalve* para 197.

brings to fore the question whether Intervalve and BHR waived their entitlement to separate notice of the conciliation process.

The concept of "waiver" connotes not insisting on some right, or giving up some advantage which one is otherwise entitled to rely.[895] It involves both knowledge and intention to forgo the exercise of such a right. The onus to prove waiver rests with the party asserting it. That party is required to establish that the right-holder, with full knowledge of the right, decided to abandon it.[896] The test to determine the intention to waive is said to be determined objectively rather than subjectively.[897] If the right holder's conduct appears to manifest an intention to waive yet falls short of manifesting an unequivocal intention, waiver will not be readily inferred. So waiver depends on the intention of the right holder. That can be proved either through outward manifestations or by conduct plainly inconsistent with an intention to enforce the right. This leaves no doubt that the "knowledge and appreciation of the party alleged to have waived is ... an axiomatic aspect of waiver".[898] In short, as Innes CJ observed it is "always difficult"[899] to establish waiver.

On the face of the facts, the court was satisfied that the conduct of Intervalve and BHR did not square up with waiver of the right to separate notice under section 191(3). To hold otherwise would require the courts "to infer from the companies's joint conduct an intention to waive their right to separate when the legal screws tightened. That requires a leap that is impossible to make."[900] Therefore, waiver has not been established.

The question of estoppel by representation, takes us to NUMSA's keenest objection – intentional obfuscation, namely that the various companies were one legal

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[895] According to *SA Eagle Insurance Co Ltd v Bavuma* 1985 3 SA 42 (A) 49G-H:

> "a provision enacted for the special benefit of any individual or body may be waived by that individual or body, provided that no public interests are involved. It makes no difference that the provision is couched in peremptory terms."

[896] Innes CJ in *Laws v Rutherfurd* 1924 AD 261, 263. See also the minority judgement of Kroon AJ *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* 2009 4 SA 529 (CC) para 80.

[897] See e.g. *RAF v Mothupi* 2000 4 SA 38 (SCA) para 16; *Palmer v Poulter* 1983 4 SA 11 (T) 20; *Multilateral Motor Vehicle Accident Fund v Meyerowitz* 1995 1 SA 23 (C) 27; *Bekazaku Properties (Pty) Ltd v Pam Golding Properties (Pty) Ltd* 1996 2 SA 537 (C) 543. For extended discussion see: Hutchison & Du Bois "Contracts in general" in Du Bois (ed) *Wille's Principles of South African Law* 9ed (2007) 881.

[898] *RAF v Mothupi* para 17.

[899] *Laws v Rutherfurd* 263.

[900] *Intervalve v NUMSA* para 62.

entity not just for the purposes of managing the strike, but for the purposes of subsequently being sued. This squares up with NUMSA's overall argument in the court of first instance concerning the joinder application. It pertinently complained that "Steinmuller and its sister companies had created confusion among the workforce as to who the true employer is", and that the corporate structure and the close working relationship between the three companies has "led to justifiable confusion on the part of individual applicants as to their true employer".[901]

Estoppel is a legal doctrine that precludes a person from denying the truth of a representation made to another if that other, believing in its truth, acted detrimentally in reliance on it.[902] The party invoking estoppel must prove that he acted reasonably in relying on the representation. It is often said that a person who knows the correct position cannot say that he was induced to act to his prejudice in the face of the representation.[903] If the defence of estoppel succeeds, it has the effect that the incorrect impression is maintained as if it were correct.[904] Reliance on estoppel is thwarted by the rule that estoppel cannot operate in such a way as to bring about a result not permitted by law.[905]

On the question of estoppel by representation, the majority held against NUMSA. NUMSA's submission was flawed because it relied on crucial representation "that the various companies were one legal entity not just for the purposes of managing the strike, but for the purposes of subsequently being sued. That representation cannot be inferred from the companies' joint conduct during the

[901] *Intervalve v NUMSA* para 68.
[902] See Rabie "Estoppel" in *LAWSA* 2 ed (2005) vol 9 para 652; Christie & Bradfield *Christie's The Law of Contract in South Africa* 6th ed (2011) 28-29. See also *West v De Villiers* 1938 CPD 103-105; *Aris Enterprises (Finance) (Pty) Ltd v Protea Assurance Co Ltd* 1981 2 SA 274 (A) 291D-E; *Maluti Transport Corporation Ltd v MRTAWU* 1999 20 *ILJ* 2531 (LAC) para 35; *Captick-Dale v Fibre Solutions (Pty) Ltd* 2013 34 *ILJ* 129 (LC) para 17; *Makate v Vodacom (Pty) Ltd* 2016 4 SA 121 (CC) paras 49-50.
[903] See e.g. *Bird v Summervile* 1961 3 SA 194 (A) 204E; *Abrahamse v Connock's Pension Fund* 1963 2 SA 76 (W) 79G; *Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou* 1978 2 SA 835 (A) 849G.
[904] See Van der Merwe *et al Contract: General Principles* 4th ed (2012) 29.
[905] See e.g. *Saldanha Bay Municipality v SAMWU obo Wilschut* 2015 36 *ILJ* 1003 (LC) para 25; *HNR Properties CC v Standard Bank of SA Ltd* 2004 4 SA 471 (SCA) 480A; S*trydom v Die Land en Landboubank van Suid-Afrika* 1972 1 SA 801 (A) 815B-816B; *Mgoqi v City of Cape Town* 2000 (4) SA 355 (C) 396D; *Eastern Cape Provincial Government v Contractprops 25 (Pty) Ltd* 2001 4 142 (SCA) 148E-H. See also Rabie & Sonnekus *The Law of Estoppel in South Africa* 2 ed (2000) 171.

strike and in dismissing the employees."[906] That Steinmuller indicated during conciliation that it was not sole employer of the listed employees renders NUMSA's reliance on the alleged representation contained in the dismissal letters flawed. It further raises doubt whether the union or the employees suffered prejudice that can be ascribed to any representation by the employers.[907] It is also important to mention that estoppel was not raised during the proceedings. To recapitulate: the bone of contention between the parties, since NUMSA lodged the joinder application, has been whether it is entitled to join Intervalve and BHR to the proceedings against Steinmuller. Against this background, NUMSA's reliance on estoppel rang hollow.

At the core of the minority judgment's dissent is that the approach espoused in the lead jugment is overly restrictive and formalistic and will hinder the effective resolution of labour dispute.[908] According to Cameron J this charge seems undue because:

> "A clear requirement that a union must include every employer in conciliation proceedings is likely to lead to less, not more, litigation. The dissent rightly notes in a complex working relationship it may be difficult to determine the true employer of each employee. But the LRA offers condonation if this complexity results in missed deadlines. Indeed, condonation for the late referral involving Intervalve and BHR was available here, and it is not clear why NUMSA did not seek to review the Bargaining Council's decision in August 2010 to deny it condonation. NUMSA may indeed still seek to review that decision on the basis that, until the decision of this Court, it believed that it was entitled to have the companies joined." [909]

At first sight, the main judgment represents a death knell for the union and the employees. However, upon close reading Cameron J identified a third way for legal redress concerning the employees of Intervalve and BHR at risk of losing their unfair dismissal claims as a result of NUMSA's failure to act promptly at various

[906] *Intervalve v NUMSA* para 66.
[907] For a plea of estoppel to be successfully the party invoking it must prove that, by acting on the representation made to him, he acted to his detriment is usefully illustrated by the decision in *Saldanha Bay Municipality*. In that case employee who had pleaded guilty to dishonesty during the course of a disciplinary hearing invoked estoppel to validate a settlement agreement entered into by him and an outgoing municipal manager ostensibly to circumvent the disciplinary process. The LC found reliance on estoppel was defeated by the fact that the employee had not suffered in any apparent detriment, on the contrary he was shielded from the labour law's version of capital punishment. For full discussion Maloka "The Turquand rule, irregular appointments and bypassing the disciplinary process" 2017 *SA Merc LJ* 527.
[908] Per Nkabinde J paras 176-180.
[909] *Intervalve v NUMSA* para 71.

points during the litigation.[910] They may seek recompense from the union on the based on negligent mismanagement of their claim.[911] Paradoxically, this reveals the comparatively narrow outlook and historical failure of South African labour law to develop trade union law into a niche area. By way of counterpoint,[912] the paltriness of jurisprudence in this crucial area of labour law - trade union governance remains a puzzling feature of our labour law landscape.[913]

4.8.2.4.5 The Dissenting Judgements

Nkabinde J delivered the principal dissent. She noted that the primary question was whether NUMSA complied with section 191 of the statute. She agreed with the characterisation of the issues by the majority as squarely raising questions about "what the law can do to penetrate the opacities of form." Her disagreement with the main judgment flows from the fact that majority's overly restrictive construction of the section 191 has the effect of non-suiting the employees unfair dismissal claim. Overall, it makes the resolution of labour disputes ineffective and impractical through the mechanism created by the LRA.

The interpretive approach adopted by the minority to section 191 leads to the same destination but yields different conclusions reached by the Labour Appeal Court, the main judgment and the concurring judgment. Unlike the main judgement which focused solely on the scope and breadth of section 191, the thrust of the dissenting opinion is on the proper interpretation and application of the relevant provision, in the light of the spirit, purport and objects of the Bill of Rights, and, in

[910] *Intervalve v NUMSA* para 71.

[911] See *FAWU v Ngcobo NO* 2014 1 SA 32 (CC) countenancing a delictual claim by dismissed employees against their union for its negligent failure to prosecute their unfair dismissal claim. See also *SAMWU v Jada* 2003 6 SA 294 (W). See Le Roux "The Rights and Obligations of Trade Unions: Recent Decisions Clarify Some Limits to Both" 2012 *CLL* 31.

[912] For a pick into high craftsmanship that characterises British labour law see: Rideout *The Right Membership of a Trade Union* (1963); Grunfeld *Modern Trade Union Law* (1966); Citrine *Trade Union Law* (1967); Perrins *Trade Union Law* (1985); Kay *The Settlement of Membership Disputes in Trade Unions* (1976); Kidner *Trade Union Law* 2ed (1984); Elias & Ewing *Trade Union Democracy: Members' Rights and the Law* (1987). See generally, Chafee "The internal affairs of associations not for profit" 1930 *Harvard LR* 993; Cox "The role of law in preserving union democracy" 1959 *Harvard LR* 72.

[913] Lately, nascent trade union scholarship is emerging to fill the neglected chapter in the South African labour law corpus see: Cohen *et al Trade Unions and the Law in South Africa* (2009); Mlungisi *The liability of trade unions for conduct of their members during industrial action* (Unpublished LL.D Thesis, UNISA 2016).

particular the right to fair labour practices in section 23 and access to courts in section 34 of the Constitution.

It is in this context, and in the light of the primary objects of the LRA that the provisions of section 191 must be understood and construed. In a sense, section 191 should not be construed in isolation, but in the context of other provisions in the LRA and the Constitution.[914] The critical point is the interpretive process envisaged in section 39(2) of the Constitution.[915] It is generally said that when legislative provisions limit or intrude upon fundamental rights, they should be interpreted in a manner least restrictive of the right if the text is reasonably capable of bearing that meaning.[916] It is perhaps worth repeating what Ngcobo J said in *Chirwa*:

> "The objects of the LRA are not just textual aids to be employed where the language is ambiguous. This is apparent from the interpretive injunction in section 3 of the LRA which requires anyone applying the LRA to give effect to its primary objects and the Constitution. The primary objects of the LRA must be read in the light of its objects. Thus where a provision is capable of more than one plausible interpretation, one which advances the objects of the LRA and the other which does not, a court must prefer the one which will effectuate the primary objects of the LRA."[917]

Having regard to the constitutional rights at issue, namely the rights to fair labour practices and access to courts, a narrowly textual and legalistic approach to determining whether there has been substantial compliance with the prescripts of section 191 is to be avoided.

Had the Labour Appeal Court and the majority interpreted the LRA in a purposive manner and paid due consideration to the facts and the fundamental rights at play, they would have concluded that there was substantial compliance with the relevant provisions of the Act. One can do no better than repeat Nkabinde J's conclusion:

> "The interpretation contended for by the three companies non-suits the individual claimants. The construction may have a chilling effect on the stated objects of the LRA which include the promotion of the effective resolution of labour disputes and the right of access to courts in section 34 of the Constitution. The restrictive and formalistic approach and the construction contended for by the three companies undermines this

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[914] *SA Police Service v POPCRU* 2011 6 SA 1 (CC) para 30.
[915] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2000 1 SA 545 (CC) para 21-26.
[916] See e.g. *S v Zuma* 1995 2 SA 642 (CC) para 15; *SATAWU v Moloto NNO* 2012 6 SA 249 (CC) para 44; *Hyundai* paras 22-23; *Wary Holdings (Pty) Ltd v Stalwo (Pty)* Ltd 2009 1 SA 337 (CC) paras 46-47, *NEHAWU v UCT* para 39.
[917] *Chirwa* para 110.

> context. If the approach and construction are accepted, it would mean that there must, of necessity or inevitably, be another referral of the same dispute which had already been conciliated. This construction would, to borrow the words used by the majority in *Driveline*, 'render the dispute mechanism of the Act ineffective, unworkable and nugatory'. *It would also allow for a situation whereby employees, in a complex working relationship created by the employers, are saddled with an undue burden of having to establish who their true employer is. Such a situation, in effect, rewards an employer who complicates the working relationship. It also has the effect of creating unfairness in labour relations and limiting access to courts. This is untenable and it is manifestly unfair*."[918]

To the extent that real dispute between the parties has been conciliated, it stands to reason that section 191 was substantially complied with. That Intervalve and BHR were not served does not detract from the fact that they participated in the conciliation process through the shared HR services and their legal representative. Accordingly, "proper reading of *Driveline* supports a construction that favours a conclusion that there was substantial compliance, particularly because 'the dispute' was conciliated."[919]

The concluding remarks of concurring minority judgement exposes the weakness if not the fallacy of "narrowing of purpose" articulated in the lead judgement.[920] Putting the matter more forcefully, Froneman J writes:

> "It seems to me to tilt the scale too far towards compliance with form rather than substance. I cannot accept that a mistaken reference to a party in a referral notice must necessarily spell non-compliance. The concerns relating to the mistake can adequately be met by the fourth requirement in determining substantial compliance, namely whether there was 'any practical prejudice because of non-compliance'.
> Here, there was notice of referral to the other employers, albeit informally and, perhaps, in the mistaken belief that they fell under Steinmuller as the real employer. There was no obstacle to attaining the purpose of attempting conciliation, except for a deliberate decision to stay away as far as possible from conciliation by relying on, yes, a formal technicality. There was no 'practical prejudice', only intentional obfuscation."[921]

If we bear in mind that the intentional obfuscation of the employment relationship by the corporate group created a justifiable confusion on the part of individual employees as to their real employer, the minority opinion is to be preferred. The reasoning of the minority accords with the facts, constitutional and statutory scheme. At the same time, it gives proper consideration to the fundamental rights at

[918] *NUMSA v Intervalve* para 180 [emphasis added].
[919] *NUMSA v Intervalve* para 182.
[920] *NUMSA v Intervalve* paras 45-48 and 53.
[921] *NUMSA v Intervalve* paras195-196.

stake. In short, the inescapable conclusion is that there was substantial compliance with section 191 of the statute.

NUMSA v Intervalve trilogy encapsulates the problems resulting from a unitary analysis of the employer, where the employing entity is defined as a single counterparty to the contract of employment or service. To a large extent, the approach of the minority dovetails with the views of scholars who have attempted to fashion a comprehensive rethink of the unitary concept of employer.[922] Put concisely, Prassl contends that in order to restore congruence to the application of employment law norms, the very definition of the employer must carefully be re-conceptualised as a more openly functional one.[923] In the light of the outcome in *NUMSA v Intervalve* it is hard to disagree.

While the lead judgement can be commended for correctly diagnosing the problems of fragmenting work and enterprises as a matter of penetrating the opacities of form, in failing to account for the asymmetries between the employees and employing entities in complex multilateral settings such as a corporate group, it demonstrated its inflexibility in the face of facts. The conclusion reached by majority inevitably means that the employees' unfair dismissal claims are defeated not only by complex and evasive multilateral working arrangements but also by a mere technicality. Rather than sanctioning the employing entities for contriving the opacities of form, the majority unwittingly rewards an employer who complicates the employment relationship. In this context the central postulate of *Driveline* stranglehold perpetuates precarity, allowing employing entities to rely on technicalities to evade their employment-related obligations and shift risk onto employees.[924] Without doubt, this is manifestly unfair.

[922] See generally, Deakin 2001 *ILJ (UK)* 72 and 2003 *ILJ (UK)* 57; Davies and Freedland "The Complexities of the Employing Enterprise" 274; Prassl "The Notion of the Employer" 2013 *LQR* 380.

[923] Prassl *The Concept of the Employer* (2015) 24–25 and "Towards a Functional Concept of the Employer" A Thematic Working Paper for The Annual Conference of the European Centre of Expertise (ECE) in the field of labour law, employment and labour market policies: *The Personal Scope of Labour Law in Times of Atypical Employment and Digitalisation* (April 2017).

[924] Maloka "Penetrating the opacities of form: Unmasking the real employer remains labour law's perennial problem" 2018 *Speculum Juris* 105

4.9 Conclusion

The preceding discussion has shown that the legal nature of the employer is emerging as a focal issue in its own right. Apart from the triangular employment relationship, the problems of identifying the employer in multilateral employment setting such as the corporate group structures necessitate reappraisal of the concept of an employer. It is now increasingly clear that the legal meaning of the employer is not coterminous with the sociological or economic idea of the "enterprise" or "organisation", nor with the workplace, that is, the physical place on which work is carried out. The tendency towards fragmentation implies that the identification of the employer may be decided partly by considerations of organisational and workplace boundaries.

CHAPTER 4

BETWEEN AN UBER ROCK AND AN UBER HARD PLACE: WORKERS WITHOUT A WORKPLACE AND EMPLOYEES WITHOUT EMPLOYERS

5.1 Introduction

The onset of the 'on-demand/platform economy' also benignly described as "gig economy", "uberised economy" or "sharing economy" presents a global puzzle as regards the development of appropriate forms of work regulation. The platform economy is structured around app-enabled enterprises that profit from connecting consumers with service providers through smart communications technology. However, on-demand economy is a double-edged sword. An oft-touted feature of the platform economy is the worker's increased control over her work schedule. Platform economy service providers determine for themselves when they will work through the platform and for how long.

The downside of this flexibility that enables a worker to control her work schedule is a more tenuous relationship between the firm and worker, and a lack of certain significant employment related benefits. The problem for the new "uberised" workforce is that the benefits secured by their ancestors' industrial efforts, such as minimum rates of pay, and minimum shifts times, and a measure of employment security, are entitlement reserved to direct employees, working under a "contract of service".[925] Virtual platforms and apps can pave the way to a severe commodification of work. This reveals that the sharing economy is not a separate silo of the economy and that is part of the broader trends such as casualisation and informalisation of work and the proliferation of non-standard forms of employment. In short, uncertainty and precariousness are the inseparable henchmen of the uberised economy.

The most notable and perhaps most controversial example of the platform economy is ridesharing services, such as Uber, Lyft, Sidecar and Taxify. Because of robust array of legal issues they raise, ridesharing companies are the main focus of the discussion.

[925] Riley "Regulating work in the 'gig economy'" 2, available at http://ssrn.com/abstract=294631 (accessed 13-11-2017).

The challenges to the legal regulation of work as applied to platform economy are extremely vast and can be explored from three dimensions. In the first place, there are different sets of problems concerning labour law's perennial headache: unmasking the true employee and the genuinely independent contractor. The recurring question concerns the categorisation of e-hailing drivers as "partners" or "independent contractors." Uber the renowned ridesharing company, for instance, argues that it does not provide transportation. Certainly, Uber owns no vehicles and maintains unashamedly that it does not employ any drivers. Paradoxically, Uber as platform operator dictates working conditions – from setting non-negotiable wages rates, to implementing behaviour codes, to 'deactivating' (i.e. firing) individuals who perform poorly reflects bipartisan employment relationship. What is clear, however, is that an app is vested with unfettered power to hire and dismiss at will. The critical question that arises is: are the partner-drivers employees in view of the criteria that reveal disguised employment?

Secondly, the work practices in the app-based economy show the potential of resettling the boundaries of the enterprise and challenging the current paradigm of the firm. Or, to put it another way, many platforms and apps lack a physical workplace and the performance is accomplished at the user's or service provider's place. The question of identity comes up: workers without a workplace or employees without employers. Online platform and apps are nothing but "traditional" intermediaries by other means. Arguably, platforms and apps perform activities that temporary employment agencies execute without being subject to regulation. In equal measure, platform economy service providers like workers in triangular employment relationship face the problem of identifying who is their employer for purposes of unfair dismissal and collective bargaining. Also arising from the problem of workers without a workplace and employees without employers, are strategies for sincere "digital organising". Granted that Uber would not be a viable business entity without its drivers, are there prospects of new sources of worker organisations (from virtual spaces like blogs and forums, to app-based drivers' association, or worker-owned co-ops)? In a nutshell, a modern trade union for the modern economy.

5.2 Typological Differentiation and Terminological Confusion

What has been described as "sharing economy,"[926] "participatory economy," "peer-to-peer economy," and "collaborative economy," although generally identified as "on-demand economy",[927] "gig-economy,"[928] "uberised economy"?[929] Each of these terms represents an aspect of the digital revolution, but none completely encapsulate the entire scope of the transition from widgets to digits. What is evident is "uberisation of everything".[930]

The "on-demand economy" comprises of app-enabled enterprise that profit from connecting consumers with service providers through smart communications technology. The notion that the new businesses operating in this way are based on "sharing"[931] depends upon a character of their business model as one involving unlocking the unused value in assets owned by one person, so that they can 'share' the costs and benefits of those assets with others. In this characterisation, participants in the business are collaborators gaining a mutual benefit from 'sharing' an asset. A more accurate characterisation of the business model is that it involves intermediation between customers seeking services, and the workers providing those services, by

[926] Sharing economy, understood as the business model based primarily on the letting of goods by their owner whose provision of services is incidental or residual, does not seem to need labour protection. In fact, in the case of rental of housing, the protective rules, historically, have been designed to protect the tenant. It is understood that the owner of the property to be rented is in a position of power that does not require safeguards. Therefore, a first observation consists in distinguishing between when we are faced with a true sharing business, where goods are the main element of the transaction, and when an exchange resolves around service delivery. In the first case, labour laws would not apply, nor does it seem necessary for them to do so, since there is no imbalance of position. See Infranca "Intermediary institutions and the sharing economy" 2016 *Tulane LR Online* 1.

[927] Todoli-Signes "The end of the subordinate worker? Collaborative economy, on demand economy, gig economy, and the crowdworkers' need for protection" 2017 *IJCLLIR* 241.

[928] The term 'gig' refers to the practice, common in the music and entertainment industries, of performance one-off shows, without any expectation of continuing engagement. See Fisk "Hollywood and the gig economy" 2017 *U Chicago LF* 1; Andrias "The new labour law" 2016 *Yale LJ* 2.

[929] Uber's business model is a sort of telling paradigm in the on-demand/gig economy. Eschewing the on-going debate on terminology, the author would indifferently use an umbrella term "uberised economy" or "uberised employment", disregarding the nuances of their particular meaning of expressions like "sharing economy," "on-demand economy," gig-economy," "participatory economy," "peer economy," "collaborative economy," "reputation economy," and "1099 economy." Besides, coming up with a solid definition of the sharing economy that reflects common usage is nearly infeasible. There is bewildering diversity of array activities.

[930] Freeman "Uberization of Everything is Happening, but Not Every 'Uber'" Huffington Post Can. (Apr. 1, 2015), http://www.huffingtonpost.ca/2015/04/01/uberization-uber-of-everything_n_6971752.html (accessed 30-11-2017).

[931] See generally, Brescia "Regulating the sharing economy: New and old insights into an oversight regime for the peer-to-peer economy" 2016 *Nebraska LR* 88.

means of an "app-based" communication system. At the core this business model is an innovator who creates the computer application (the "app") that is used to connect the worker and the customer, and to facilitate reliable electronic payment for work.

5.3 The Context of Crowdwork

The labour dimensions of the "sharing economy" understood as including both crowdwork and "work-on-demand via apps". Crowd work and work-on-demand via app are not monolithic or homogenous concepts in themselves. The enabling role of technology and the common business model is what links "crowd-work" and "work-on-demand via app". The difference between "crowd work" and "work-on-demand via apps" primarily consist in the way of accomplishing the performance. Crowd work encompasses jobs completed on virtual platforms by workers, in response to on-line calls and potentially involving people across the globe.[932] Work-on-demand refers to types of work performed in the real world and therefore locally.[933] Crowd work takes place by the project, with small gigs or micro labour on the Internet, workers are only hired for particular task, even if that takes only seconds or minutes. The notion of breaking down tasks to their lowest common denominator is traceable to Taylorism.[934]

In terms of business arrangements, the role of platforms is to facilitate pulling down transaction costs (for instance, coming into contact with consumers) serving as a global and virtual "notice board."[935] Thus crowd workers are in a boundary-less labour market, competing with their "colleagues" in developing countries. Accordingly, vendors can recruit a contingent worker from another location for a quick or instant job task. For instance, bigger and more meaningful works can be crowd sourced such as the creation of a logo, the development of a site or the initial project of a marketing campaign.[936]

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[932] For e.g. HourlyNerd, CrowdSpring, Fiverr, CoContest.
[933] For e.g. WoNoLo, JustPark, PostMates, Deliveroo.
[934] For detailed discussion see: Stone "The new psychological contract" 529-535.
[935] Howe "The rise of crowdsourcing" *Wired Magazine*, Issue 14.06, June 2006, available at http://www.wired.com/2006/06/crowds (accessed 10-10-2016).
[936] Leimeister & Durward "New forms of employment and IT – Crowdsourcing", paper presented at the *IV Regulating for Decent Work Conference*, ILO, Geneva, 8-10 July 2015, available at http://www.rdw2015.org/download (accessed 11-10-2017).

A distinctive feature of crowd work infrastructure is the predominance of code in mediating work relations. This process is described as automatic management or "algocracy".[937] The trends suggest that algorithms are absorbing many organisational functions that managers traditionally fulfil. Closer analysis reveals that the ubiquitous role of computer code may execute an array of supervisory tasks from the routine to the sophisticated. For instance, allocating tasks to workers, speeding up work processes, determining the timing and length of breaks, monitoring quality including ranking employee. In this way, the omnipresent code makes decisive on-the-spot decisions about individualised employees and what they need to be doing in real time.[938] Of particular significance also is that labour practices that used to be run through human resources are becoming embedded into the computer programmes.[939] Workers are directed by imperative programmed into algorithms, which displaces the traditional external schemes performed by managers.

Automatic management has redrawn the classic picture of workplace practices. As an illustration built into Amazon's Mechanical Turk code are simple filtering criteria for selection of workers, performance assessment of their work, and the provision of incentives, whether positive or negative. This situation is further complicated when communication and dispute resolution systems are entirely absent from automatic management systems. What is apparent is that communication and dispute resolution systems are neither time nor cost efficient for the employer. It has been candidly observed by one task assigner, "the time spent looking at the email costs more than what you paid them [the workers]".[940]

Unsurprisingly, Uber and Lyft also embrace "Big Brother" management systems. As opposed to conducting background checks, having a dispatch system, or

[937] Aneesh "Global labour: Algocratic modes of organisation" 2009 *Sociological Theory* 347.
[938] An analogy to "Big Brother" a fictional character and symbol in George Orwell's dystopian novel *Nineteen Eighty Four* (1949) is fitting.
[939] Cherry "Beyond misclassification: The digital transformation of work"2016 *Comp. Lab. L & Pol'y J.* 577 ("Beyond misclassification").
[940] Irani & Silberman "Turkopticon: Interrupting worker invisibility in Amazon Mechanical Turk, paper presented at the SIGCHI Conference on Human Factors in Computing Systems, Paris, 27 April-2 May 2013, available: https://ww.uwaterloo.ca/faculty/elaw/cs889/reading/turkopticon.pdf (accessed 5-11-2017).

sport check by supervisor, Uber outsourced its quality control to its passengers.[941] Upon completion of a ride, passengers are asked to rate their driver on a scale of one to five, with five stars as the best score. Thereafter the ratings are averaged in order to provide a composite score. If a driver has below par ratings, they can longer log in. They are deactivated, a euphuism for being booted off Uber app. The threshold for being cut off is high, roughly 4.7 out of five stars. In fact, automatic deactivation or "firing by algorithm" is at the core of the drivers' keenest objection. In terms of *Cotter v Lyft*[942] settlement, the drivers received the right to an arbitration hearing before their dismissal. No longer can Lyft dismiss drivers by booting them from an app.[943]

5.3.1 Amazon Mechanical Turk

Amazon Mechanical Turk ("AMT") started in 2005 and is by far the largest crowdsourcing platform on the web.[944] It is considered the first stop for many individuals and firms seeking cheap, on-demand crowd labour. Workers in the AMT perform HITs (Human Intelligence Tasks) that computers are still unable to accomplish.[945] Cognitive tasks remained human province.[946] These "microtasks" extremely parcelled activities, often menial and monotonous, include copying or

[941] See Sachs "Uber and Lyft: Customer reviews and the right –to-control" Onlabour blog, available at https://onlabour/2015/05/20/uber-and-lyft-customer-reviews-and-the-right-to-control/ (accessed 17-11-2017)

[942] *Cotter*.

[943] Cherry notes that establishing industrial due process undercut the idea that Lyft driver are independent contractors, and regardless of what the settlement says, another governmental or regulatory agency could decide that these workers are employees, notwithstanding.

[944] Felstiner "Working the crowd: Employment and labour law in the crowdsourcing industry" 2011 *Berkeley J. Emp. & Lab. L.* 143.

[945] Silberman & Irani "Operating an employer reputation system: Lessons from turkopticon, 2008-2015" 2016 *Comp. Lab. L & Pol'y J.* 472.

[946] This is precisely the idea that lies behind the name of the platform. Mechanical Turk is the name of an eighteenth century wooden "robot" with humanoid form, adorned with a turban, which was able to play chess. They said it was the first "robot" in history. However, it was discovered that inside the wooden humanoid was a person suffering dwarfism, who in actual fact ran the "robot". This analogy may seem a curiosity, but responds to a far more worrying philosophy: workers who carry out functions that are completely dehumanised on the other side of the wiring of a computer. They perform totally repetitive, monotonous tasks that are far from the final product, without, in many cases, any knowledge of what they are really working on.

translating texts, identifying spelling error, processing raw data, participating in an online behavioural study and sorting data spread-sheet.[947]

Upon registration, each user must indicate whether he/she intends to participate as a "Requester" or as a "Provider". Requesters post HITs to be fulfilled and determine compensation (defines as "reward"). Requesters determine hiring conditions and also refuse to accept performance result, while still retaining the work done (in this case, Tuckers do not get paid).[948] To be precise, MTurk provides for a satisfaction clause: the Requester could reject jobs already completed, and consequently avoid payment, for any reason or no reason.[949] Oddly, this type of clause does not provide enforcement should the Requester arbitrarily decline to pay the worker whilst still retaining the work already accomplished.

Amazon maintains that its role merely consists in building a marketplace and allowing Requesters get in touch with Turkers. Amazon Participation Agreement classifies a Turker as an independent contractor. Although the "label" is not dispositive,[950] it places Turker beyond the scope of labour legislation. In the AMT, workers are required to waive and bear all risk.[951] It has been noted that parties are prevented from contracting freely outside the platform, thus shrinking their contractual

[947] Irani "Difference and dependence among digital workers: The case of Amazon Mechanical Turk" 2015 *SAQ* 225.

[948] If a Requester is not reasonably satisfied with the services, the Requester may reject the services" Amazon Mechanical Turk Participation Agreement, 3 *Amazon Mechanical Turk* https//www.mturk.com/mturk/conditionsofuse (last updated Dec. 2, 2014)

[949] This echoes classic common law approach: Okpaluba 1999 *AJICL*392, 392-393; Feinman "The development of the employment at will rule" 1976 *Am. J. Legal Hist*. 118; McGinley "Rethinking Civil Rights and employment at will: Toward a coherent national discharge policy" 1996 *Ohio St. LJ* 1443.

[950] In *Rutherford Corp. v McComb* 331 US 722 (1947) the US Supreme Court stated that "[w]here the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor" label does not take the worker from the protection of the Act." See generally, Carlson "Why the law still can't tell an employee when it sees one and how it ought to stop trying" 2001 *Berkeley J. Emp. & Lab. L.* 295; Stone "Legal protections for atypical employees".

[951] Clause 3(b) of the Amazon Participation Agreement reads:

> "(vii) you will not be entitled to any of the benefits that a Requester or Amazon Mechanical Turk may be available to its employees, such as vacation pay, sick leave, insurance, programmes, including group health insurance or retirement benefits; (viii) you are not eligible to recover workers' compensation benefits in the event of injury."

freedom.[952] This appears to be inconsistent with the declared independent contractor status of "Turkers".[953]

5.3.2 "Work on Demand via App" and the "Uberisation of work"

In "work on-demand via apps", jobs related to traditional working activities such as transport, cleaning and running errands, but also forms of clerical work, are offered and assigned through mobile apps. The businesses running these apps usually intervene in setting minimum quality standards of service and in the selection and management of the workforce.

A useful description of what "uberising" actually means is provided by Aloisi.[954] It means set of innovative procedures – geo-location, online payments, workforce management, and distribution – into an "app-accessible service" or a "sweatshop," with lower entry barriers because people monetize resources they already own.

At the time of registration ("sign up"), the user becomes part of a contract that, in fact, ends up by reducing or excluding the likelihood of litigation, because of binding pre-dispute arbitration clauses in contracts. The platform is designated as an "arbiter of compliance of the contract" via "click-warp agreements" (or "click-through agreements").[955] They are invoked to disclaim warranties, restrict liability, indicate applicable law and forum for dispute resolution. The user can only click "I accept" before entering the website. These inescapable procedure could represent a race to the bottom because of the asymmetries between parties.

Likewise, the process of selection is geared towards the internal ranking, entailing ethical hazard, determining provider's prospects of being recruited in the future. Unlike workers in standard employment, the internal ranking systems put

[952] Davidov "Who is the worker?".
[953] De Stefano "The rise in 'just-in-time workforce': On demand work, crowd work and labour protection in the 'gig-economy" *ILO Conditions of Work and Employment Series no. 71*. (2016) ("The rise in 'just-in-time workforce'").
[954] Aloisi "Commoditized workers: Case study research on labour law issues arising from a set of 'on-demand/gig-economy' platform" 2016 *Comp. Lab, L. & Pol'y J* 653, 670 "Commoditized workers".
[955] See e.g. Koornhof "The enforceability of incorporated terms in electronic agreements" 2013 *Speculum Juris* 3.

workers in a continuous probation period. This translates into heightened employment vulnerability, and ties them to a specific platform. Should they opt to move to a new competitor, their "professional career" would be irremediably lost.[956] It is generally said that the ranking system, combined with the approval rating and other obscure elements of an indescribable algorithm, is a though way of implementing internal rules and condition workers' autonomy.[957]

5.4 Commodification of Work

The "uberised economy", crowd work and "work on demand via app" have introduced a serpent of commodification of labour into the garden of employment.[958] In the "uberised economy" technologies provide access to an extremely scalable workforce. Workers are provided at a click of a button and compensation on a "pay as you go basis". "Humans-as-a service" under Amazon's AMT template perfectly conveys the idea of an extreme form of commodification.[959] Another dimension to the work practices is the potential reshaping of the boundaries of the enterprises and challenged boundaries of the firm. In Coasin terms, they facilitate a further configuration of "market" and "hierarchy" patterns.[960] These development coalesce with the established phenomenon of "fissured workplace"[961] and "hierarchical outsourcing" discourses.[962]

Commodification and re-commodification of workers are not confined to the uberised economy.[963] The salient features of digital economy have simply aggravated

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[956] Prassl & Risak "Uber, taskrabbit, and Co.: Platforms as employers? Rethinking the legal analysis of crowdwork" 2016 *Comp. Lab. L & Pol'y J* 1.
[957] Aloisi "Commoditized workers" 671.
[958] See generally, Cherry "Cyber commodification" 2013 *Maryland LR* 381.
[959] De Stefano "The rise in 'just-in-time workforce'" 7.
[960] See Coase 1937 *Economica* 386; 1988 *JL Econ & Org* 3; "The problem of social costs" 1960 *Journal of Law & Economics* 1; Gilson "Contracting for innovation: Vertical disintegration and interfirm collaboration" 2009 *Columbia LR* 431.
[961] Weil *The Fissured Workplace* (2014).
[962] Muehlberger "Hierarchies, relational contracts and new forms of outsourcing" *ICER Working Paper No. 22/2005*.
[963] Spoelstra J's provocative remarks in the High Court in *S v Jordan* 2001 10 BCLR 1055 (T) 1058D-E, touched a raw nerve when he challenged the distinction between respectable women and prostitutes:

> "In principle there is no difference between a prostitute who receives money for her favours and her sister who receives, for rendering a similar service, a benefit or reward of a different kind, such as a paid-for weekend, a free holiday, board and lodging for a shorter or longer period, a night at the opera, or any other form of *quid pro quo*."

commodification. Because transactions occur virtually, such as it mainly happens in crowdwork, what it does is to conceal human activities and workers that structurally operate at the other side of a screen. Almost no human contact occurs in many crowdwork transactions, thus leading to the creation of a new group of "invisible workers".[964] However, invisible workforce can also be encountered in sectors such as domestic work and home-work.[965]

The adverse consequences of concealing "work" nature of activities and their human component nature in the uberised economy cannot be gainsaid. The matter of commodification is borne by the fact that these activities are not recognised as work. Indeed, they are benignly described as "gig", "tasks", "favours", "services", "rides" etc.

> "The term 'work' or 'worker' do not form part of the contractual lexicon. The detrimental consequences of concealing the 'work' nature of these activities and their human component can hardly be overstated. Workers can be called by clients and customers at a click of their mouse or at a tap on their mobile, perform their task and disappear again in the crowd or in the on-demand workforce materially risk being

Feminist theorists have been at the forefront of the commodification discussion, perhaps because concerns that markets can be coercive and play on the desperation that arises from abject poverty and economic inequality. They also argue that commodification will corrupt basic human values meaning that "certain moral and civic good are diminished or corrupted if bought or sold for money. In other words, particular markets might impair the value of human life and, perhaps dignity. For works engaging with marriage see: Erman "Marriage as private trade: Bridging the private/private distinction" 2001 *Harvard CRLLR* 79 (discussing how business models are similar to cohabitation, marriage, and polygamy to justify importing elements of business to improve domestic relations). Cohabitation and marriage see: *Butters v Mncora* 2012 4 SA 1 (SCA); *DE v RH* 2015 5 SA (CC). See Bonthuys "Developing the common law of breach of promise and universal partnership: Rights to property sharing for all cohabitants" 2015 *SALJ* 76; Siegel "The modernization of marital status law: Adjudicating wives' rights to earnings, 1860-1930" 1994 *Geo. LJ* 2127. On customary marriages: e.g. *Bhe v Khayelitsha Magistrate* 2005 1 SA 580 (CC); *Gumede v President of the RSA* 2009 3 SA 152 (CC); *Mayelane v Ngwenyama* 2013 4 SA 415 (CC); *Ramuhovhi v President of RSA* 2018 2 BCLR 217 (CC). See generally, Nhlapo "Customary law in post-apartheid South Africa: Constitutional confrontations in culture, gender and 'living law' 2017 *SAJHR* 1; Lewis "Judicial "translation" and contextualisation of values: Rethinking the development of customary law in *Mayelane*" 2015 *PER/PELJ* 126; Albertyn "The stubborn persistence of patriarchy? Gender equality and cultural diversity in South Africa" 2009 *CCR* 166; Mwabene "All outfits leading to the death of polygyny? Reflections on the Recognition of Customary Marriages Act 120 of 1998 and *Mayelane v Ngwenyama* 2013 4 SA 415 (CC)" 2010 *SJ* 63.

[964] See generally, Finkin "Beclouded work, beclouded workers in historical perspective" 2016 *Comp. Lab. L & Pol'y J* 603; Rogers "Employment rights in the platform economy: Getting back to basics" 2016 *Harvard LR* 479; Means & Seiner "Navigating the Uber economy" *UC Davis LR* 1511; Lobel "The law of the platform economy" 2016 *Minn LR* 87.

[965] See Risak & Warter "Legal strategies towards fair conditions in the virtual sweatshop" paper presented at IV Regulating for Decent Work Conference, ILO, Geneva, 8-10 July 2015, available at http://www.rdw2015.org/download (accessed 10-09-2017). It argued that crowdwork can be parcelled to home-work and may fall within ambit of the definition of the ILO Home Work Convention, 1996 (no. 177). The Convention embraces provision of either a product or a service, by the relevant home-worker.

> identified as an extension of an IT device or online platform. They could be expected to run as flawlessly and smoothly as a software or technological tool and then, if something goes amiss, they might receive worse reviews or feedbacks than their counterparts in other sections of the economy. This, in turn, might have severe implications on their ability to work or earn in the future as the possibilities to continue working with a particular app or to accede to better-paying jobs on crowdsourcing platforms are strictly dependent on the rates and reviews of past activities."[966]

The small scope, short duration and tiny output is inherent in micro labour. Crowd work is characterised by an opposing feature: massive scale. From point of view of employers, the gain is substantial productivity out of legion of low paid micro-workers. At the same time, for employees their livelihood are increasingly dependent on searching and carrying out tiny task or favours. The allure of micro labour is tempting:

> "The work will come to you, via apps on your smartphone, making the process of finding work as easy as checking your Twitter feed. Whatever you do, it will be your choice. Because you are no longer just an employee with set of hours and wages working to make someone else rich. In the future, you will be your very own mini-business."[967]

In sum, precarity is an accomplished fact in crowd work system of employment.[968] Micro labour is uncertain, unpredictable and risky.

The degradation of labour is felt by full range of workers in crowd work. Crowd work is insensitive to investments in employees for increased training, skills acquisition, or networking opportunities. The implication of automatic management is that there is little employee discretion over tasks, and no meaningful communication with an actual supervisor who might train or coach the worker to improve. The complexities of crowd work are amplified by temporal chaos and pressure.[969] Assignments can be cancelled while the worker is in the midst of completion. Where that happens, the requester typically does not pay. The emphasis

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[966] De Stefano "The rise in 'just-in-time workforce'" 8.
[967] Pixel "Dimed: On (not) getting by in the gig economy" *Fast Company*, Mar 18, 2014 available at http://www.fastcompany.com/3037355/pixel-and-dimed-on-not-getting-by-the-gig-economy (accessed 08-12-2017).
[968] Kalleberg "Precarious work: Insecure workers: Employment relations in transition" 2009 *Am. Sociological Rev* 1.
[969] See Spitko "A structural-purposive interpretation of 'employment' in the platform economy" 2018 *Fla. LR* 1.

on competiveness and surveillance means that workers are expected to out achieve each other.

The enduring harshness of automatic management system invites attention to the complex and elusive issue of "emotional labour". The phrase "emotional labour" was coined by sociologist Hochschild in her seminal work, *Managed Heart*.[970] Hochschild defines emotion work as labour that "requires one to induce or suppress feeling in order to sustain the outward countenance that produces the proper state of mind in others."[971] Jobs requiring emotional labour typically necessitate contact with other people external to or within the organisation, usually involving face-to-face.

Examples of work in which premium is placed on emotional labour includes predominantly service sectors such as hospitality,[972] health care,[973] and entertainment industry.[974] Airline cabin crews, for example, function as skilled emotion managers who are able to juggle and synthesize different types of emotion work dependent on situational demands.[975] Within the realm of US employment discrimination litigation involving airlines,[976] it has been graphically asserted that female attendants might provide a more soothing psychological atmosphere during the flight.[977] Similarly, it has been argued that the essence of comfortably conveying passengers necessitates employment of provocatively clad airline flight attendants so as to increase male patronage.[978]

[970] Hochschild *The Managed Heart: The Commercialisation of Human Feeling* (1983).
[971] Hochschild *The Managed Heart* (1983) 7.
[972] See generally, Hopfl "Playing the part: Reflections of aspects of mere performance in the customer-client relationship" 2002 *JMS* 255; James "Emotional labour: Skill and work in the social regulation of feeling" 1989 *Sociological Review* 15.
[973] See generally, Bolton "Who cares? Offering emotion works as a 'gift' in the nursing labour process" 2000 *Journal of Advanced Nursing* 580 and "Changing faces: Nurses as emotional jugglers" 2001 *Sociology of Health & Illness* 85.
[974] See e.g. Blair "You're only as good as your last job": The labour process and labour market in British film industry" 2001 *W E & S* 140; Wissinger "Modelling a way of life: Immaterial and affective labour in the fashion modelling industry" 2017 *Ephemera* 250.
[975] See e.g. Ashforth & Humphrey "Emotion in the workplace: A reappraisal" 1995 *Human Relations* 97.
[976] Player *et al Employment Discrimination Law: Cases and Materials* 2nd ed (1995) 116-15.
[977] For example, *Diaz v Pan American World Airways, Inc.* 442 F.2d 385 (5th Cir. 1971), held that the assumed preference of male air travellers for female flight attendants could not serve as the basis for gender being a Bona Fide Occupational Qualification (BFOQ) under section 703(*e*)(1) Title VII of the Civil Rights Act of 1964.
[978] See *Wilson v Southwest Airlines Co*. 517 F. Supp. 292 (WD Tex. 1981)

At the extreme end of precariousness, we find female stripping trade in which emotion work is embedded.[979] Stripping can be defined as work that involves seductive removal of clothing in front of an audience for tips or pay. Strippers are often characterised as self-employed workers, responsible for gaining access to, and employment from, the strip clubs in which they are involved.[980] Strippers must continuously engage in specific form of impression management termed 'emotion management'. In particular, they may engage in "surface acting" through the language of their body, or in "deep acting" by attempting to alter inner feelings. In addition, the emotional labour of strippers also requires them to both inflate and deflate the status of their customers. In this context the catchphrase "the fake is the real thing"[981] has an air of reality. In other words, they must render performances that appear genuine to accumulate emotional capital, while also ensuring economic return that does not taint this authenticity. The process has been colloquially described as "a perilous mixture of emotion and economics".[982] In short, this commodification and estrangement of both emotion and self seem to be a defining feature of the aspect of precarious labour that strippers must engage constantly at work.[983]

Although no supervisor physically observes drivers' work, the star-rating system casts customers as virtual supervisors who facilitate the monitoring and enforcement of conduct codes. In order to pass the muster of constant glare of "virtual supervisors" significant amount of "emotional labour" is required on the part of e-hailing driver partners. They have to show kindness and be cheerful with customers as this affect the rating of one's work.[984] Instantaneous feedbacks and rating of workers' performance obliterates the problems of complying with substantive and

[979] For detailed discussion see: Fogel & Quilan "Dancing naked: Precarious labour in the contemporary female strip trade" 2011 *Can Soc. S* 51.
[980] Vosko "Precarious employment in Canada: Taking stock, taking action" 2003 *Just Labour: A Canadian Journal of Work and Society* 3, available at: http://www.justlabour.yorku.ca/volume3/pdfs/vosko.pdf (accessed 17-01-2018).
[981] Schweitzer "Striptease: The art of spectacle and transgression" 2000 *Journal of Popular Culture* 65, 66.
[982] Mattson *Ivy League Stripper* (1995) 179.
[983] Fogel "Presenting the naked self: The accumulation of performative capital in the contemporary capital in the female strip trade" 2007 Gender Forum 17, available online at: http://www.genderforum.uni.koeln.de/work/article_fogel.html (accessed 14-01-2018).
[984] Dzieza "The rating game. How Uber and its peers turned us into horrible bosses" avalaible at: https://therideshareguy.com/the-rating-game-how-uber-and-its-peers-turned-us-into-horrible-bosses/ (accessed 29-06-2018).

procedural requirements for a fair dismissal based on poor workforce.[985] According to the courts,[986] an employer should be very slow to dismiss an employee for poor work performance[987] unless there has been a fair appraisal of performance and the employee has been given a chance to improve.[988] This is particularly important in cases where the required level of performance is uncertain and independent judgement thereof difficult.[989]

Deployment of customers as virtual supervisors, in more subtle ways, take care of another perennial headache for management, namely, incompatibility. Incompatibility is generally treated as aspect of incapacity and essentially involves the inability or failure by an employee to maintain harmonious relationship with his or her colleagues.[990] Some of the factors that may cause incompatibility may be related to the "personality conflicts, management style, inability to integrate into culture and the environment of the workplace and simple lack of confidence in the ability or willingness of the manager to do the job in the way the owner or senior colleagues desire could justify dismissal."[991]

[985] Item 8:2 of the Code provides:

> "(2) After probation, an employee should not be dismissed for unsatisfactory work performance unless the employer has
>
> (a) given the employee appropriate evaluation, instruction, training, guidance or counselling; and
>
> (b) after a reasonable period of time for improvement, the employee continues to perform unsatisfactory.
>
> (3) The procedure leading to dismissal should include an investigation to establish the reasons for the unsatisfactory performance and the employer should consider other ways, short of dismissal, to remedy the matter.
>
> (4) In the process, the employee should have the right to be heard and to be assisted by a trade union representative or a fellow employee.

[986] See e.g. *Damelin (Pty) Ltd v Solidarity obo Parkinson* 2017 38 *ILJ* 872 (LAC); *Unilong Freight Distributors (Edms) Bpk v Muller* 1998 1 SA 581 (SCA).

[987] This flows from the touchstone case of *James v Waltham Holy Cross UDC* 1973 IRLR 202.

[988] Cases on performance targets see: *White/Medpro Pharmaceuticals* 2001 10 BALR 1182 (CCMA); *Robinson/Sun Couriers* 2001 5 BALR 511 (CCMA); *Robinson/Sun Couriers* 2003 1 BALR 97 (CCMA). See also Grogan "Death of a salesperson: Sell or be bust" 2001 *EL* 9; "Death of salesperson Act II" 2002 *EL* 4 and "Rebirth of a salesman: Curtain falls on Act II" 2003 *EL* 13.

[989] See generally, *JDG Trading (Pty) Ltd t/a Price 'n Price v Brundson* 2000 21 *ILJ* 501 (LAC); *Buthelezi v ABI* 1999 20 *ILJ* 2316 (LC).

[990] See e.g. *Mgjima v MEC Gauteng Department of Education* 2014 ZALCJHB 414; *Jabari v Telkom SA (Pty) Ltd* 2006 10 BLLR 924 (LC); *Lotter and SA Red Cross Society* 2006 27 *ILJ* 2486 (CCMA); *Jardine v Tongaat Hullet Sugar Ltd* 2002 23 *ILJ* 547 (CCMA); *Lubke v Protective Packing (Pty) Ltd* 1994 15 *ILJ* 422 (IC). See also Benjamin "The Italian job: Eccentric behaviour as a ground for dismissal" 1993 *EL* 105.

[991] *Wright v St Mary's Hospital* 1992 13 *ILJ* 987 (IC) 1004H-J.

The risks outlined above are often said to be traded-off by workers with the flexibility associated with self-employment. There is no fixed working hours and workers are able to offer their activities on the apps and platforms whenever they want. Flexibility is Janus faced: workers can autonomously determine when to log in the app or accomplish their duties from any place equipped with Wi-Fi, the time they spend on the platform is a key issue for their daily compensation or the purpose of internal ranking. At the same time, to earn a significant sum of money, workers might also have to work more hours every day than a "standard" worker.[992] In reality, this kind of flexibility does not translate into a greater freedom for the worker, since they have to be available "around the clock".

Workers in the on-demand technology sector represent a new kind of employees, and the courts are still wrestling with vexing meta-questions about the shifting frontiers of work. While the ridesharing cases have garnered lion's share of media and scholarly attention, there are seminal cases within the on-demand economy that warrant close scrutiny.[993]

Beyond the run of the mill cases concerning misclassification of workers as independent contractors,[994] the new breed of cases in the uberised economy have

[992] Cunnigham-Parmeter "From Amazon to Uber: Defining employment in the modern economy" 2016 *Boston U LR* 1673, 1662.

[993] For eloquent discussion of selected cases see: Cherry "Beyond misclassification" 10-18.

[994] For example, *Zenalaj v Handybook*2015 WL694112 (ND Cal. 2015) concerned misclassification of house cleaners booked through a cell phone app. Handybook was sued by workers for alleged wage and hour violations under the Fair Labour Standards Act. The case predominantly involved the question whether these workers complaints were appropriate to be heard for arbitration. It is generally asserted that employers in the US are using mandatory arbitration clauses to "disarm" employees, effectively preventing them from bring most individual or class claims and thereby obtaining access to justice.[994] In the present case, there was mandatory pre-dispute arbitration clause in the contract. As a result the court was inclined to enforce these arbitration provisions. *Cobarruviatz v Maplebear* 2015 WL 4776424 (ND Cal, 2015) involved Instacart a grocery delivery service. Interestingly, Instacart brought the litigation to end by reclassifying its grocery shoppers as employees. The justification for the company was that employee classification would allow for stability in its workforce, as well as allow for training and quality control. Instacart noted that choosing groceries actually took skill, and if the company was to make an investment in training, they wanted those trained workers to stay with the company.
See Alba "Instacart shoppers can now choose to be real employees" Wired, Jan 22, 2015, available at http://www.wired.co/2015/06/instacart-shoppers-can-now-choose-real-employees (accessed 20-01-2018).

posed novel and unusual question: how could someone work without being aware of it?

Jeung[995] presents a different dimension to precarity. The Yelp site exists for the purpose of rating everything commercial – restaurants, bars, hotels, car dealership, and anyone who is Yelp member can write a review, variously praising or ranting about the service received, value for the money, or other aspect of the business that they deem relevant, subject to certain guidelines.[996] While many people treat writing Yelp reviews as an occasional pastime, or something to do only in the event of truly awful or outstanding service. In fact, some reviewers become so popular that others rely on them for advice and recommendations. While Yelp does not pay for reviews, these types of active content-contributors help it build value on its site. With time, Yelp has sought to encourage loyalty among its most active and well-respected reviewers by awarding them "Elite" status along with certain perks.[997]

In *Jeung* the plaintiffs alleged that they were entitled to minimum wage for the time spent writing customer reviews on the Yelp website. In the alternative, the plaintiffs argued that they should be entitled to recover in unjust enrichment for restitution.[998] Moreover, Yelp would hardly be a valuable site without the content written by its crowd of users. Finally, the plaintiffs contended that they had been injured when their status as "Elite" reviewers was taken away from them and when their accounts were deactivated. The case was dismissed on technicality. The plaintiff's counsel had filed some questionable and bizarre filing before abandoning the case.[999]

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[995] *Jeung v Yelp* 2015 WL 4776424 (ND Cal. 2015).
[996] www.yelp.com (accessed 22-01-2018).
[997] O'Connor "Yelp Reviewers File Class Action Lawsuit Claiming They are Unpaid Writers" The Huffington Post, Oct 31, 2013 available at http://www.huffingtonpost.com/2013/10/30/yelp-lawsuit-_n_4179663.html (accessed 17-12-2017).
[998] See e.g. Roberts "Restitutionary disgorgement as a moral compass of breach of contract" 2009 *U Cin LR* 991 and "A commonwealth of perspective on restitutionary disgorgement for breach of contract" 2008 *Wash. & Lee LR* 945.
[999] Goldman "Court says Yelp reviewers aren't employees" Forbes, Aug. 17 205, available at http://www.forbes.com/sites/ericgoldman/2015/08/17court-says-yelp-reviewers-arent-employees/#512432103fec (accessed 19-12-2017).

Rojas-Lazano[1000] also concerned about unpaid work on the Internet. The plaintiffs sued Google for the value of work done on an unpaid basis for Google without knowledge. This raised a tricky question: how could someone work without being aware of it? Most Internet users are familiar with the process during posting a comment on a web blog or signing up for a mailing list where they are asked to input a code of letters and numbers to establish that they are real person, and not an automated programme (or "bot"). The codes that websites ask users to input are known as "captchas" or "recaptchas". The plaintiffs argued that when they were inputting these captchas to verify that they weren't bots, they were also working for Google.

Google had been putting small bits of transcription work (for books or Google Earth) up on the web through the vehicle of the captchas. While filling out a captchap only took a few seconds, as millions of people posted comments on blogs or signed up for a website, in the aggregate this added up to an outstanding amount of time. Many perceived the process as establishing personhood, and even after the lawsuit, most people do not know that they are actually generating profit for Google every time they enter a catchap. The outcome of the *Yeung* confirms that landscape for plaintiffs for unpaid online work is unwelcome.

US court's unfriendly reception of claims for unpaid online work is axiomatic. The Huffington Post litigation[1001] is illustrative of this point. The case involved Huffington Post, a popular weblog that serves as a platform for current news events and left-leaning political commentary.[1002] In the run up to the 2008 election, many Huffington Post bloggers wrote accounts critical of President George W. Bush, specifically his administration's treatment of Guantanamo Bay detainees. They were also those who wrote to assist fellow Democratic voters to become more familiar with

[1000] *Rojas-Lazano v Google* 2015 WL 4779245 (ND Cal. 2015).
[1001] Farhi "Freelancer to File Class-Action Suit Against HuffPo and AOL Over Compensation" *WashingtonPost.Com* (Apr. 12, 2011), http://www.washingtonpost.com/lifestyle/style/freelancer/-to-file-class-action-suit-against-huffpost-and-aol-over-compensation/2011/04/12/AFa9QGQD_story.html (accessed 14-01-2018).
[1002] www.huffingtonpost.com.

the primary candidates.[1003] In this way, the website was able to attract a relatively sophisticated level of writing in its posts. The featured authors included professional journalists and attorneys who contributed their efforts to the Huffington Post for free, despite normally being paid for their writings. Freshly updated content helped attract wide audience to the blog, which grew exponentially, reaching 15 million hits per weekday.[1004]

In 2011 media behemoth AOL submitted 315 million acquisition bid for the Huffington Post. The web traffic that was driven the Huffington Post website was valuable to AOL, a company that had been searching both for more content providers and an expanded audience for existing content. Arianna Huffington and her financial backers stood make lucrative profit from the deal. By contrast, the bloggers who had built the blog's readership by their efforts were to receive nothing.[1005] Disgruntled, Jonathan Tasini, a journalist and labour activist,[1006] along with other unpaid bloggers filed a lawsuit challenging the terms of the deal.[1007] The bloggers claimed that as their hard work had built the blog's value, they therefore deserved a share of the profits, either through a contract claim or a claim for unjust enrichment and restitution.

The gist of the Huffington Post bloggers' claims seemed to rest in the different expectations that the parties brought with them to the deal. From the perspective of the bloggers, they performed work without payment because they believed that they were pursuing a good cause by contributing to a political website. In retrospect, they discovered that the founders of the website were to profit from the Huffington Post, and they therefore felt taken advantage of by the organisers.[1008] On the other side,

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[1003] See e.g. Kadidal "Guantanamo, Six Years Later" *Huffington Post* (Jan. 11, 2008) http://www.huffingtonpost.com/shayana-kadidal/guantanamo-six-years-late_b_81025.html (accesed 18-12-2017).

[1004] Silver "The Economics of Blogging and the Huffington Post" *NYTimes.Com* (Feb. 12, 2011), http://fivethirtyeightblogs.nytimes.com/2011/02/12/the-economics-of-blogging-and-the-huffinton-post (accessed 05-12-2017).

[1005] Berovici "AOL, Arianna Huffington Hit with Class Action Suit" *Forbes.Com* (April 12, 2011), available at http://www.forbers.com/sites/jefferovici/2011/04/12/aol-arianna-huffington-hit-with-class-action-suit (accessed 15-11-2017).

[1006] *New York Times Co. v Tasini* 533 US 483 (2001) – ruling in favour of freelance writers.

[1007] *Tasini v AOL Inc., Class Action Complaint* 11 CV 2472 (April 12, 2011) (SDNY).

[1008] Pepitone "Huffington Post blogger sues AOL for 105 million"*CNNMoney.Com* (April 12, 2011), http://www.money.cnn.com/2011/04/12/technology/huffington_post_blogger_lawsuit/index.htm (accessed 15-11-2017).

Huffington Post claimed that the bloggers did receive a substantial benefit, as they used the Huffington Post to gain exposure. In other words, it is no different to people going on TV shows: to promote their views and ideas.[1009] In simple terms, the blog provided unknown writers with an important benefit: a platform for expression and free publicity to a growing audience.[1010] The District Court dismissed the bloggers' complaint which was affirmed by the Second Circuit.[1011] In 2016 the Huffington Post writers unionised.[1012]

It is important to stress that the conclusions arrived at with respect to claims for unpaid online work in *Yeung*, *Rojas-Lazano* and *Tasini* trilogy may well be correct, whilst at the same time appreciating that the reasoning could have been significantly different. Nevertheless, the American trilogy still begs a huge question: should service arrangements in uberised economy be regulated predominantly by employment law rather than commercial law in order to ensure fair dealing? Reading through the facts of cases such as *Yeung*, *Rojas-Lazano* and *Tasini* a great deal of personal grief is palpable. The issues posed by disputes over compensation for digital work fits neatly into a more general question of fair dealing which is paramount to the juridical nature of the implied duty of trust and confidence.[1013] A claim of fair dealing is generally

[1009] Peters "Huffington Post Is Target of Suit on Behalf of Bloggers" NYTimes.Com (April 12, 2011), available at http://www.mediadecoder.blogs.nytimes.com/2011/04/12/huffington-post-is-target-on-behalf-of-bloggers/?pagemode=print (accessed 15-11-2017).

[1010] Quigen & Hunter "Money ruins everything" 2008 *Hastings Comm & Ent LJ* 203, 220 discussing the rise of amateurism and peer production blogs. The aspect of freedom of expression resonates strongly with the South African constitutional enterprise. See generally, See generally, *DA v Speaker of the National Assembly* 2016 3 SA 487 (CC) paras 12-16; *DA v ANC* 2015 2 SA 232 (CC) paras 4, 32; *Multichoice (Pty) Ltd v NPA: In Re S v Pistorius* 2014 2 All SA 446 (GP) paras 6-11; *Mail & Guardian v Chipu NO* 2013 6 SA 367 (CC) paras 51-52; *Le Roux v Dey* 2011 3 SA 274 (CC) para 47; *Afri-Forum v Malema* 2011 12 BCLR 1289 (EqC) paras 31-33; *Independent Newspapers (Pty) Ltd v Minister for Intelligence* Services 2008 1 SA 31 (CC) paras 39-41; *SABC v NDPP* 2007 1 SA 523 (CC) para 23; *Laugh it off Promotions CC v SAB International (Finance)* 2006 1 SA 144 (CC) paras, 2, 45-48; *Swartbooi v Brink* 2006 1 SA 203 (CC) para 20; *Dikoko v Mokhatla* 2006 6 SA 235 (CC) para 39; *Phillips v NDPP* 2003 3 SA (CC) para 23; *S v Mamabolo* 2001 3 SA 409 (CC); *Speaker of the National Assembly v De Lille* 1999 4 SA 863 (SCA) para 20.

[1011] *Tasini v AOL Inc*., F. Supp. 2d 734, 745 (SDNY 2012) aff'd No. 12-1428-cv, 2012 WL 61766559 at *1 (2nd Cir. Dec. 2012).

[1012] Pallota "Huffington Post Becomes Biggest Unionised Digital Media Outlet" CNNN Money, Jan. 14, 2016, available at http://www.money.com/2016/01/14/media/huffington-post-union/index.html (accessed 15-11-2017).

For academic commentary discussing alternative form of trade unionism in the gig economy see: Hirsch & Seiner "A modern union for the modern economy" 2018 *Fordham LR* 1.

[1013] See e.g. *Council for Scientific Research v Fijen* 1996 17 *ILJ* 18 (A) 26D-E. See also Raligilia *Current issues concerning the duty of mutual trust and confidence in South African Labour Law* (LLM thesis, UL, 2012).

framed in terms of the employer's obligation not to act in a way calculated to destroy the relationship of mutual trust and confidence between the employer and employee.[1014] Huffington Post. It has been expressed as the duty of fair dealing in the UK.[1015] The rapid evolution of the principle has been subject to extensive and significant case law development in Australia.[1016]

The proposition that the open textured implied term of trust and confidence evolves into "psychological employment contract" has gained some acceptability in legal academic circles.[1017] In the human resources management and organisational behaviour fields the concept "psychological contract" denotes that parties to an employment relationship are engaged in a cooperative endeavour based on explicit and implicit expectation of how they will mutually benefit from the relationship.[1018] It is important to bear in mind that the word "contract" is phrased more generally and

[1014] The duty was affirmed by the House of Lords in *Mahmud v Bank Credit & Commerce International SA* 1998 AC 20. For a commentary on this implied duty: Freedland *The Personal Employment Contract* (2003) 154-170 and "Constructing fairness in employment contracts" 2007 36 *ILJ (UK)* 136; Brodie "The heart of the matter: Mutual trust and confidence" 1996 25 *ILJ (UK)* 121; "Beyond exchange: The new contract of employment" 1998 27 *ILJ (UK)* 79; A fair deal at work" 1999 *OJLS* 83; "Mutual trust and the values of the employment contract" 2011 30 *ILJ (UK)* 84; "Mutual trust and confidence: Catalysts, constraints and commonality" 2008 37 *ILJ (UK)* 329; Hon Mr Justice Lindsay "The implied term of trust and confidence" 2001 30 *ILJ (UK)* 1; Brooks "The good and considerate employer: Developments in the implied duty of mutual trust and confidence" 2001 *UTLR* 26.

[1015] *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* 2011 UKSC 58.

[1016] See generally, *MacDonald v State of South Australia* 2008 SASC 134; *Downe v Sydney West Area Health Service (No. 2)* 2008 NSWCA 159; *Russell v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* 2008 NSWCA 217; *Koehler v Cerebos (Australia) Ltd* 2005 HCA 22 CLR 44. See generally Riley "Mutual trust and Good faith: Can private contract law guarantee fair dealing in the workplace" 2003 *AJLL* 28; "What about the workers? The move toward establishing a system of rights for employees" 2008 *UNSWLR* 64; "The boundaries of mutual trust and good faith" 2009 *AJLL* 73; "Siblings but not twins: Making sense of 'mutual trust' and 'good faith' in employment contracts" 2012 *MULR* 521; and "Beyond contract: Reconceptualising the fundamentals of the law of work" *Labour Law Research Conference, June 2013*, Barcelona; Godfrey "Contracts of employment: The renaissance of the implied term of trust and confidence" 2003 *ALJ* 764; Stewart "Good faith and faith dealing at work" in Arup *et al (eds) Labour Law and Labour Market Regulation: Essay on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (2005) 579.

[1017] See generally, Stone "The new psychological contract" and "Knowledge at work: Disputes over the ownership of human capital in the changing workplace" 2002 *Conne LR* 721; Fisk "Reflections on the psychological contract and the ownership of human capital" 2002 *Conne LR* 765; DiMatteo "Justice, employment, and the psychological contract 2011 *Oregon LR* 445.

[1018] For a primer on the HRM paradigm, see Anderson & Schalk "The psychological contract in retrospect: Not the exception but the norm" 1994 *JOB* 245; Guest "Is the psychological contract: Worth taking seriously?" 1998 *JOB* 649; Cavanagh & Noe "Antecedents and consequences of relational components of the new psychological contract" 1998 *JOB* 323; Robinson & Rousseau "The psychological contract in retrospect and prospect" 1998 *JOB* 245; Turnley & Feldman "The impact of psychological contract violations on exit, loyalty, and neglect" 1999 *Human Relations* 895.

does not strictly conform to the restrictive precepts of classical contract.[1019] The "psychological contract" represents the employee's and employer's beliefs or perceptions about the terms of the employment relationship. It is often said that when parties to this "psychological contract" experience a relationship breakdown and their dispute ends up in a courtroom, the application of the hard principles of contract law can produce outcomes which defeat the expectations engendered by the "psychological" contract. This is well illustrated by the ever burgeoning jurisprudence concerning disputes regarding unfair labour practice,[1020] implementation of affirmative action and employment equity cases.[1021] In short, these perennial disputes continue to exert a vice-like grip on the court rolls of not only the Labour Court and Labour Appeal Court but the appellate courts as well.

On the broader question of fair dealing, the links between *Yeung*, *Rojas-Lazio*, *Tasini* trilogy and the high profile case of *Makate*[1022] extend much deeper. That *Makate* intriguingly passed unnoticed by both the *ILJ* and BLLR does not in any way belie its labour law credentials.[1023] The case concerned payment of compensation for the use of the applicant's idea in developing a product called "Please Call Me" which generated billions of rands for the employer. This product enabled a cell phone user with no airtime to send a message to the other cell phone user, asking her to call him. At the time, the applicant was employed as a trainee accountant. The employee was applauded in the Vodacom's internal newsletter for conceiving the product. However, the company reneged on verbal understanding concluded between the employee and its executive to pay him a share of revenue.

At the first instance, it was held that, for unexplained reasons, both then CEO and Director of Product Development and Management, sought to "write the plaintiff

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[1019] Davis "Refusing to step beyond the confines of contract: The jurisprudence of Adv Erasmus SC" 1985 6 *ILJ* 425.
[1020] See generally Grogan *Employment Rights* 4th ed (2014) 123-143.
[1021] See e.g. *SA Police Service v Solidarity obo Barnard* 2014 35 *ILJ* 2981 (CC). See also Albertyn "Adjudicating affirmative action within a normative framework of substantive equality and the Employment Equity Act" 2015 *SALJ* 711.
[1022] *Makate v Vodacom (Pty) Ltd* 2016 6 BCLR 790 (CC); 2016 4 SA 121 (CC).
[1023] Maloka "Please Call Me: Reflections on Mutual Trust and Confidence in the light of Disputes over Employee-generated Innovation" paper delivered at the *International Mercantile Law Conference*, UFS 2015.

out of the "Please Call Me' script for financial and other reasons'.[1024] The High Court ordered the company to commence negotiations in good faith with Makate for determining a reasonable compensation payable to him in terms of the agreement. In the court of last resort the findings of the court below were affirmed. Reflecting on the lack of fair dealing on the part of the employer, Jafta J said:

> "The stance taken by Vodacom in this litigation is unfortunate. It is not consistent with what was expected of a company that heaped praise on the applicant for his brilliant idea on which its 'Please Call Me' service was constructed. The service became so popular and profitable that revenue in huge sums of money was generated, for Vodacom to smile all the way to the bank. Yet it did not compensate the applicant even with a penny for his idea. No smile was brought to his face for his innovation. This is besides the fact that Vodacom may have been entitled to raise the legal defences it advanced. As a party, it was entitled to have its day in court and have those defences adjudicated. This is guaranteed by section 34 of the Constitution. However, it is ironic that in pursuit of its constitutional right, Vodacom invoked legislation from the height of the apartheid era, to prevent the applicant from exercising the same right." [1025]

The findings in *Makate* are emblematic of the pivotal role of fair dealing in the resolution of disputes over employee generated knowledge. The manner in which the benefits of employee-generated innovation are allocated is a thorny issue straddling employment law and intellectual property law.[1026] This is particularly evident in the distinction between those types of innovation that attract intellectual property *rights* and those that don't (a category that is often regarded as "know-how").[1027] The problem of capturing knowledge at work and disputes over the ownership of human capital in ever changing world of work has been subject of sustained appraisal in the Commonwealth.[1028] In not compensating the applicant and persisting in legal defences even after the trial court had emphatically found an agreement was

[1024] *Makate* para 22.
[1025] *Makate* para 104.
[1026] See generally, Tong "Employee-made intellectual property: Statutory considerations for the contractual regulation of ownership" 2015 36 *ILJ* 670; Muswaka "Ownership of copyright in works created in the course of employment: *King v South African Weather Services* 2009 3 SA 13 (SCA)" 2011 *SJ* 105; Okediji "Trading posts in cyberspace: Information markets and the construction of proprietary rights" 2003 *Boston College LR* 545.
[1027] See e.g. *Victoria University of Technology v Wilson* 2004 60 IPR 392; *Stevenson Jordan and Harrison Ltd v MacDonald and Evans* 1952 1 TLR 101. See also Reid "Academics and intellectual property: Teaching the tightrope" 2004 *Deakin LR* 759; Monotti "Who owns my research and teaching materials: My university or me?" 1997 *Syd LR* 425; Stewart "Ownership of propertyin the context of employment" 1992 *AJLL* 1; Wotherspoon "Employee inventions revisited" 1993 22 *ILJ (UK)* 119.
[1028] See Riley "Who owns human capital? A critical appraisal of legal techniques for capturing the value of work" 2015 *AJLL* 1.

concluded, Vodacom's dishonourable conduct is a textbook example of breach of a psychological contract.

If anything the trends in US case law over unpaid online work emphasise the centrality of fair dealing. Likewise, psychological contract needs to be part of the legal calculus in uberised service arrangements. As previously, noted Stone's work on 'the new psychological contract' engages with the question of what it is that employees are bargaining for, in the new global business environment where long term job security is dissolving under the corrosive influence of the new "flexibilisation".[1029] The author argues that when forced to decide who owns the employee's general human capital, courts factor the implied-term of new psychological contract into their determination and should treat as suspect employer efforts to restrict the portability of the employee's human capital through restrictive covenants or confidentiality agreements and trade secret litigation. None of these needs to detain us.

If we return to the *Yeung*, *Rojas-Lazano*, *Tasini* trilogy, it is easy to appreciate that claims for compensation for voluntary online work resonate with the notion of psychological contract. The arguments marshalled by bloggers that they were taken advantage of by the founders of the Huffington Post essentially are complaints about breach of psychological contract. The aggrieved journalists performed work without payment because they believed that they were contributing to a political website that promoted the causes in which they supported.

Just as *Tasini* confirmed the courts' hostility to claims for unpaid online work, *Otey*[1030] stands on a different footing because the central issue was misclassification of workers and failure to pay a minimum wage. Crowdflower is a crowd working platform that recruited thousands of workers both in the US and globally to carry out small micro-tasks. Unlike Uber which involves a platform matching up a driver who is performing a service in the real world, *Otey* involve work performed solely on computer. In this kind of crowd work, large tasks such as constructing a website is

[1029] See Freedland *The Contract of Employment and the Paradoxes of Precarity* Legal Research Paper Series Paper No 37/2016 June 2016.
[1030] *Otey v Crowdflower* 3:12-cv-05524-JST (ND Cal. 2013).

broken down into its constituent parts such as coding, tagging, and describing items or pictures. Platform then farm out these micro tasks to multitude of individual workers across the world. After completion, the tasks are then re-aggregated and compiled to finish the job. Workers sued Crowdflower for failure to pay a minimum wage under FLSA and Oregon's minimum wage law. The workers allegations attracted wide media coverage describing the poor wages of crowd work. Crowdflower maintained that these platform workers were independent contractors, not employees.

Before the issue could be determined, however, the case moved into settlement negotiations. During the first round of negotiations, the parties reached an agreement by which Crowdflower would compensate for the difference between what workers were paid and statutory minimum wage. They also agreed to pay for attorney's fees and to cease operations as crowd work platform for a period of ten years. The judge, however, rejected the settlement as inadequate. The revised settlement increased the amount of monetary compensation for plaintiffs, including administrative costs and attorney's fees, but contained no ban on Crowdflower continuing to broker crowd work. Consequently, while the judgements in *Rojas-Lazano* and *Tasini* have been remarkable for what individual judges have done, the settlement in *Otey* is remarkable for what the judge refused to do. In declining to sanction an earlier unfavourable settlement, instead approving a revised one, the judge's enlightened approach is likely to encourage other plaintiffs to bring suits.

5.5 Fitting Square Pegs into Round Holes: The Uber/Lyft Litigation

The genesis of the ridesharing litigation in which applying existing labour laws to on-demand workers is like being "handed a square peg and asked to choose between round holes"[1031] is the modern business phenomenon popularly known simply as Uber.[1032] The Uber/Lyft cases raise a plethora of novel and complex issues

[1031] *Cotter* 1081.
[1032] In *Aslam* para 1 the Employment Tribunal ("the ET") recorded how Uber's then Chief Executive, Mr Kalanick, described the business in February 2016:

concerning the invisible hand of the algorithm,[1033] "pure fiction",[1034] twisted language,[1035] the problem of dense legal documents couched in impenetrable prose,[1036] and even a brand new lexicon.[1037] Even more difficult issues in respect of the jurisdictional complexities implicating conflict of laws arise from the fact that the

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> "Uber began life as a black car service for 100 friends in San Francisco - everyone's private driver. Today we're a transportation network spanning 400 cities in 68 countries that delivers food and packages, as well as people, all at the push of a button. And … we've gone from a luxury, to an affordable luxury, to an everyday transportation option for millions of people."

[1033] Ziewitz "Governing algorithms myth, mess, and methods" 2016 *Sci. Tech. & Hum. Values* 3.

[1034] The ET in *Aslam* para 91 concluded that any supposed driver/passenger contractor was a "pure fiction" bearing no relation to the dealings and relationships between the parties. It noted:

> "Since it is essential to that case that there is no contract for the provision of transportation services between the driver and any Uber entity, the Partner Terms and the New Terms require the driver to agree that a contract for such services (whether a 'worker' contract or otherwise) exists between him and the passenger, and the Rider Terms contain a corresponding provision. Uber's case is that the *driver enters into a binding agreement with a person whose identity he does not know (and will never know) and who does not know and will never know his identity, to undertake a journey to a destination not told to him until the journey begins, by a route prescribed by a stranger to the contract (UBV) from which he is not free to depart (at least not without risk), for a fee which (a) is set by the stranger, and (b) is not known by the passenger (who is only told the total to be paid), (c) is calculated by the stranger (as a percentage of the total sum) and (d) is paid to the stranger.* Uber's case has to be that if the organisation became insolvent, the drivers would have enforceable rights directly against the passengers. And if the contracts were 'worker' contracts, the passengers would be exposed to potential liability as the driver's employer … *The absurdity of these propositions speaks for itself. Not surprisingly, it was not suggested that in practice drivers and passengers agree terms. Of course they do not since (apart from any other reason) by the time any driver meets his passenger the deal has already been struck (between ULL and the passenger).* …" [emphasis added].

[1035] For e.g. calling the driver ("an independent company in the business of providing Transportation Services") "Customer" (in the New Terms). This of choice of terminology has the embarrassing consequence of forcing Uber to argue that, if it is a party to any contract for the provision by the driver of driving services, it is one under which it is a client or customer of "Customer". *Aslam* paras 37 and 87 footnote 37. Another example concern the right (in UBV) to levy the cancellation fee. Presumably Uber would have to say that sum was also payable under a private (unwritten) contract made between the driver and the passenger, two individuals who not only did not know each other's identities but had never met or even communicated remotely. *Aslam* para 90 footnote 45.

[1036] See e.g. *Uber BV* para 73, *Aslam* paras 28-33 and 37-38. This bring to mind the remarks of Hazlitt *The Spirit of Ages* (1824) cited by Cameron "When judges fail justice" 2005 *SALJ* 580, 580, denouncing Bentham for writing in a "barbarous philosophical jargon, with all repetitions, parentheses, formalities, uncouth nomenclature and verbiage of law – Latin". He accused Bentham of writing in "a language of his own that darkens knowledge". His ultimate rebuke to Bentham was most sharp: "His works," he observed, "have been translated into French – they ought to be translated into English." What Hazlitt said with respect to Bentham's writing applies with equal force to the arcane contractual terms contrived by Uber. This is an illustration of the phenomenon of which Elias J warned in the case of *Consistent Group Ltd v Kalwak* 2007 IRLR 560 para 25 of "armies of lawyers" contriving documents in their clients' interests which simply misrepresent the true rights and obligations on both sides.

[1037] For e.g. "On-boarding" for recruitment and/or induction and 'deactivation' for dismissal. In *Ngalonkulu/Uber* 2018 9 BALR 1020 (CCMA) Uber driver's account was "de-activated" for alleged fraud. The arbitrator found that a dismissal has been proved. See also Huert "Uber deactivated a driver for tweeting a negative story about Uber" Forbers 2014. Available at: http://www.forbes.com/sites/ellenhuet/2014/10/16/uber-driver-deactivated-over--tweet/#545e7b8a36c8 (accessed January 2018).

alleged employer, Uber BV the entity that owns the Uber app is a Dutch corporation based in Netherlands.[1038] In other words, litigating against Uber BV or its local subsidiaries, distinguishing between discrete legal entities connected to the app, thereby identifying who is the real employer of either partner-drivers or drivers only turns into a "forensic minefield."[1039] It is important to appreciate that in a given situation there is no contractual relationship between Uber's local marketing agent and drivers.

According to Posner CJ, "Uber, at its core, is just an app that you download to your smartphone and use to get a nearby Uber driver to come pick you up."[1040] From its inception in 2009 Uber has emerged as the standard bearer for many other apps of the "gig economy". Uber has facilitated the efficient matching between suppliers and consumers.[1041] On average, more than 5 million trips take place through the Uber app every day.[1042] By dethroning in Schumpeterian[1043] fashion the template applied by traditional taxi on companies, Uber extracts profits in the transportation sector by circumventing the usual regulatory costs of doing business. Uber has substantially lowered market transaction costs, particularly search costs, relative to established taxi

[1038] The jurisdictional quandary arises from the fact the service agreement between the drivers and UBV provides that the laws of Netherlands apply and disputes may be resolved by submission of the dispute to the International Chamber of Commerce for Mediation and Arbitration. See *Morekure* paras 4, 9, 13; 24, 26 and 56-57; *Aslam* paras 3 and 103-112.

[1039] *Driveline* para 8 minority alluding to the formalism which prevailed under the old Industrial Court. This apparent from the review of jurisdictional ruling by CCMA commissioner in *Uber SA* paras 44, 50, 59 and 97.

[1040] *Illinois Transportation Trade Association Trade v City Chicago* Nos. 16-2009 (October 07, 2016).

[1041] Ridesharing services are often referred to as Transportation Network Companies or "TNCs." For example, California Public Utilities Code $5431(a) (West 2016) defines a TNC as a company "that provides prearranged transportation services for compensation using an online-enabled application or platform to connect passengers with drivers using a personal vehicle". See also Mahesh "From Jitneys to App-based ridesharing: California's "third way" approach to ride-for-hire regulation" 2015 *Cal. LR* 965, 1009.

[1042] *Uber SA* para 1.

[1043] Schumpeter *Capitalism, Socialism, and Democracy* (1950) 82-84 discussing "capitalist competition … which strikes not at the margins of the profits and the outputs of the existing firms but at their foundations and their very lives".

companies. Indeed, it has disrupted cab industry across jurisdictions.[1044] In South Africa Uber has birthed violent conflict in metre taxi industry.[1045]

5.5.1 Driver Recruitment or "On-boarding"?

Uber's modus operandi is simple: after downloading the mobile app and creating a personal account, every user can request the nearest available Uber driver using a GPS to pinpoint the driver's position. When a passenger requests transportation via the Uber App, Uber conveys the request to the nearest driver who is signed on the Uber App and not already providing transportation booked via the application. If the driver declines the request or does not accept it within 15 seconds, the request is forwarded to the next closest driver.

Those interested in becoming Uber drivers can sign up online.[1046] In order to be included in the Uber's drivers' pool, they must attend a specified location, produce certain documents and undergo a form of induction. The documents to be produced are: Driver's ID, license information, evidence of the vehicle's registration, insurance and Public Driver's Permit ("PDP"). Drivers are held to some safety standards. [1047] The

[1044] For example, the Metropolitan Taxi Commission in St. Louis originally refused to let Uber operate in the city limits because of a lack of background checks for drivers. Uber then sued the Taxi Commission in federal court, alleging anti-trust violations for their exclusion. See Thorsen *St Louis Area Taxi Drivers File Suit Against Uber*, St Louis Post-Despatch, Nov. 16, 2015, available at: http://www.stltoday.com/mews/loca/metro/st-louis-area-taxi-drivers-file-suit-against-uber/article_f2ca69f-90cb-58a6-b513-d122cb6189cd.html (accessed 17-12-2017).

[1045] In South Africa the entry in the market has birthed violence and killing between uber drivers and metre taxis. See for e.g. Tswanya "Police probe Uber driver's killing in his Mitchells Plain backyard" *Cape Argus* 28 March 2018, Gwangwa "We'll take Uber off the roads, cabbies threaten" *IOL* 6 February 2018 available at https://www.iol.co.za/motorin/industry-news/well-take-uber-off-the-roads-cabbies-threateb-13123229 (accessed 18-03-2018).; Makhetha "Taxify driver killed 'like an animal'" *SowetanLive* 30 January 2018 available: https://www.sowetanlive.co.za/news/south-africa/2018-01-30-taxify-driver-killed-like-an-animal (accessed 30-01-2018).; Buthelezi "New laws could shake things up for Uber" *Industry News* 31 July 2017 available at: https://www.iol.co.za/motoring/industry-news/ne-laws-could-shake-things-up-for-uber-1055881 (accessed 31-07-2017).

[1046] See e.g. *Aslam* paras 39-42; *Morekure* paras 14-16.

[1047] Uber continues to be at the centre of another unwelcome publicity storm involving allegations of sexual assault against its drivers. See for e.g. Kale "Reported against its London drivers last year" available: https://braodly.vice.com/.../uber-drivers-are-the-center-of-another-rape-allegations (accessed 04-02-2018); Kerr "Uber driver 'washed his genitals with a bottle of water after raping drunk passenger who told him she had HIV'" *The Sun* 24 August 2017 available: *https://www.thesun.co.uk/.../uber-driver-rape-allegation-snaresbrook-crown-court-london* (accessed 31-10-2017); New Reporter "Uber agrees to settle US lawsuit filed by India rape victim"

lexicon for this process is 'on-boarding'. The partner (or partner-driver) clicks to indicate acceptance of the terms of the agreement. The agreement is detailed and dense, and it identifies partners (and partner drivers) as independent contractors. In addition in terms of the agreement Uber sets fare and takes a percentage of the cashless transaction via the mobile app.

Once the driver has complied with all the requirements, she becomes active and can start driving.[1048] Drivers may choose when they wish to drive logging on and off on the app. There is no minimum amount of time they should drive per week or month. However, if they are inactive, they are "archived" and can be "reactived" when they again become active.

The Uber model recognises three classes of relationships. 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 has 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.[1049] 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.

The second class 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 satisfied, the driver is registered and activated. The driver pays no fee to Uber BV, and receives no payment to UBV. The driver's remuneration is received from the partner concerned, in accordance with whatever terms the driver and

http://ewn.co.za/2017/12/09/uber-agrees-to-settle-us-lawsuit-filedby-india-rape-victim (accessed 31-12-2017).

[1048] See e.g. "Uber agrees to settle US lawsuit filed by India rape victim" http://www.ewn.co.za/2017/12//09/uber-agrees-to-settle-us-lawsuit-filed-by-india -rape-victim.
[1049] *Terms and Conditions*, Uber, https://www.uber.com/legal/usa/terms (last updated April 8, 2015) (accessed 27-12-2017).

partner may have agreed. The contractual arrangement in the second type of relationship is nothing but a refined tripartite employment relationship.[1050]

The third class 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' class.

5.5.2 *O'Connor v Uber Technologies Inc.*

In *O'Connor* a federal district court in California assessed Uber's claim that it was not an employer but instead a "technology company" that generated "leads" for its "partners".[1051] Dismissing this contention as "semantic framing," the *O'Connor* court held that the question of whether an on-demand platform acts like an employer should focus on "the substance of what the firm actually does."[1052] Viewed from this perspective, the *O'Connor* court concluded that Uber did not sell technology to the public like a software firm but instead provided transportation services to the public by harnessing its drivers' labour. Given the central role that its partners played in carrying out Uber's business model, the primary question in *O'Connor* centred on the level of control that the rideshare platform actually retained over drivers.[1053]

Downplaying its ability to determine working conditions, Uber emphasised its lack of control over drivers' schedules. Like other rideshare businesses, Uber does not dictate when its drivers log onto its platform.[1054] In fact, Uber only requires drivers to provide one ride to customers every 180 days. Placing on this unique aspect of on-demand work, some scholars have argued that the presence of worker flexibility should guide judicial evaluations of workplace relationships in the gig economy.[1055] *O'Connor* acknowledged that this aspect of control "might weigh heavily in favour of a finding of

[1050] For e.g. *Uber SA* para 50. See generally, Theron "Prisoners of a paradigm: labour broking, the 'new services' and non-standard employment" in Le Roux & Rycroft (eds) *Reinventing Labour Law: Reflecting on the first 15 years of the Labour Relations Act and future challenges*" (2012) 58; Harvey "Labour brokers and workers' rights: Can they co-exist in South Africa?" 2011 *SALJ* 100; Botes "A comparative study on the regulation of labour brokers in South Africa and Namibia in the light of recent legislative developments" 2015 *SALJ* 100.
[1051] *O'Connor* 1141-42.
[1052] *O'Connor* 1141-42.
[1053] *O'Connor* 1138.
[1054] *O'Connor* 1138.
[1055] Means & Seiner "Navigating the Uber economy" 2016 *UC Davis LR* 1511, 1538-39.

independent contractor status," but nevertheless held that the "more relevant inquiry is how much control Uber had over its drivers while they *[were] on duty* for Uber.[1056] Put in another language, the court determined that a proper employment inquiry should consider scheduling as only one of many control-based subjects. By examining other ways in which Uber exercised power over drivers once they logged onto the platform, the *O'Connor* court invited a broader discussion of the power that on-demand firms retain in their relationships with drivers. Although Uber claimed that its drivers could reject "leads" that Uber sent them while they were on duty. Uber's handbook contradicted this point by telling drivers that Uber "expect[ed] on-duty driver to accept all [ride] request" and that the company would make a "follow-up with all drivers [were] rejecting trip.[1057]

On the issue of scheduling reflected aspects of bidirectional control (with drivers controlling when they logged in and Uber controlling drivers once they logged in), the issue of wages showed how Uber exclusively controlled the drivers' compensation. The *O'Connor* court noted that Uber set the price that customers paid for rides and that the company kept a "fee per ride" of roughly twenty percent of the billed amount. Uber's "partners" negotiated none of these terms. Thus, on the critical issue of pay, the *O'Connor* court found that Uber retained one-way control.[1058]

Broadening the subjects of control beyond hours and compensation, the *O'Connor* court questioned whether Uber drivers actually enjoyed the fabled freedom that the gig economy promises workers. For instance, the court explained that the e-hailing company maintained a detailed performance protocol that directed driver to dress professionally, send client a text message, open doors for clients, and ensure that "radio is off or on soft jazz or NPR."[1059] Furthermore, Uber maintained a "Zero Tolerance" policy that prohibited drivers from soliciting clients outside the Uber app.[1060] Uber enforced these substantive areas of control by threatening its "partners" with deactivation (.i.e. dismissal).[1061] The ridesharing company's contract with its drivers

[1056] *O'Connor* 1152-51.
[1057] *O'Connor* 1139.
[1058] *O'Connor* 1142.
[1059] *O'Connor* 1149-50.
[1060] *O'Connor* 1142.
[1061] *O'Connor* 1150.

specifically reserved "the right, at all times and at Uber's sole discretion, to reclaim, prohibit, suspend, limit or otherwise restrict… the Driver from accessing or using the Driver App."[1062] Evidence showed that Uber regularly acted upon this power by regularly terminating the bottom five percent of its driver pool.[1063]

The court also considered how Uber transformed its customers into virtual supervisors. It explained how Uber monitored its "partners" with customer star ratings and made deactivation decisions based on this feedback.[1064] Reflecting on this system, the court determined that the customers' role as virtual supervisors enabled Uber to "constantly monitor certain aspects of a driver's behaviour", thereby giving the company "a tremendous amount of control over the "manner and means" of its drivers' performance.[1065] In short, by balancing the drivers' control over scheduling and Uber's control over many other aspects of work, it held that sufficient facts supported the drivers' challenge to their status as independent contractors.[1066]

5.5.3 *Cotter v Lyft*

Cotter mirrors many aspects of *O'Connor*. *Cotter* considered minimum wage claims of drivers' primary competitor, Lyft.[1067] The court acknowledged how initial appearance might point toward independent contractor status: "At first glance, Lyft driver don't seem much like employees … A person might treat driving for Lyft as a side activity, to be fitted into his schedule when time permits and when he needs a little extra income."[1068] On the other hand, the court noted that Lyft driver "don't seem much like independent contractors either," given the level of control that the ridesharing platform maintained over pay rates and performance criteria.[1069]

Acknowledging these contradictory levels of control, the court addressed Lyft's central contention that the company was "merely a platform, and that drivers performed

[1062] *O'Connor* 1149.
[1063] *O'Connor* 1143.
[1064] *O'Connor* 1151.
[1065] *O'Connor* 1151-52.
[1066] *O'Connor* 1142.
[1067] *Cotter* 1069.
[1068] *Cotter* 1069.
[1069] *Cotter* 1069.

no service for Lyft."[1070] The court categorised this claim as "obviously wrong" and noted that unlike a peer-to-peer sales company such as eBay that does nothing more than connect buyers and sellers, Lyft gave its drivers detailed instructions on how to do their jobs. Echoing many of Uber's requirements, Lyft expected its on-duty members to accept dispatches and warned drivers that low acceptance rates (defined as repeatedly falling below seventy five percent) would result in deactivation.[1071] Lyft also gave drivers its "Rules of the Road," which directed them to keep their cars clean, to help passengers with luggage, to hold an umbrella for passengers, to play the passenger's preferred type of music, to follow GPS directions if passengers had no preference, and to "greet every passenger with a big smile and first bump."[1072]

While Lyft claimed that this code was merely suggestive, the court observed that the "title 'Rules of the Road' does not sound like a list of suggestions," but instead evinced real, stringent unidirectional control.[1073] Lyft's own Terms of Service bolstered this point by giving the company "sole direction to bar your use of the Service in the future, for any reason or no reason".[1074] Lyft not only retained one-way control over drivers' performance but often acted upon that power as well. An example is the dismissal one driver in the *Cotter* litigation after he substituted his car without receiving permission from the platform to use a different vehicle. Another example concerned plaintiff dismissed after she posted an average passenger rating of 4.5 stars (out of five stars).[1075]

With regard to the obligations that come with control, the court suggested that a platform's duty to its staff may change depending on the amount and frequency of control present in the work relationship. For instance, in *Cotter* another driver drove for

[1070] *Cotter* 1078. Lyft's description of its operation after someone request a ride through the smartphone application:

> "The platform then notifies one specific driver, who may choose to accept, decline, or ignore the ride request. If the driver accepts the ride, he or she is "matched: with the rider and may proceed to pick up the rider and provide the ride …If the driver declines or ignores the ride request and a certain amount of time passes, the ride request is then transmitted to another driver, if one is available …and so on."

[1071] *Cotter* 1071.
[1072] *Cotter* 1072.
[1073] *Cotter* 1079.
[1074] *Cotter* 1072.
[1075] *Cotter* 1073-74.

Lyft only ten hours per week. Reflecting on these limited opportunities for control, the court left open the possibility that "other Lyft drivers with heavier or more regular schedules might properly be deemed employees. In this way, the court intimated that increased instance of control may give rise to heightened duty to classify certain drivers as employees.

Although Lyft exercised a great deal of control over the drivers when they were on duty, they also enjoyed many freedoms such as the ability to choose their work hours and to select the neighbourhoods where they would drive. Based on these factors, the court held that the control analysis favoured the drivers, but not so much as to conclusively categorise them as Lyft's employees.

5.5.4 *Aslam v Uber BV*

Across the Atlantic, a similar story plays it out in *Aslam*.[1076] This high profile case received a great deal of attention. The facts and issue in *Aslam* were not dissimilar from *O'Connor* and *Cotter*. The claimants were current or former Uber drivers in the London area who, along with others, had brought various claims in the Employment Tribunal ("the ET"), which required them to be "workers" for the purposes of section 230(3)(*b*) Employment Rights Act 1996 ("ERA"),[1077] regulation 36(1) Working Time Regulations 1998 ("WTR")[1078] and section 54(3) National Minimum Wage Act 1998

[1076] *Uber BV*.

[1077] For the purposes of the ERA, section 230(3) defines "worker" as follows:

> "230. Employees, workers etc.
>
> …
>
> (3) In this Act "worker" … means an individual who has entered into or works under (or, where the employment has ceased, worked under) -
>
> (a) a contract of employment, or
>
> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker's contract shall be construed accordingly."

[1078] The definition of "working time" as provided by regulation 2(1) WTR reads:

> " working time", in relation to a worker, means -

("NMWA"). The ET concluded that any Uber driver who had the Uber app switched on, was within the territory in which they were authorised to work (here, London) and was able and willing to accept assignments was working for Uber London Ltd ("ULL") under a "worker" contract and was, further, then engaged on working time for the purposes of regulation 2(1) WTR.

The realism of the ET's approach may be seen from the discrepancies in the language between how Uber's case was presented in the proceedings (consistent with the contractual documentation) and other material emanating from Uber, which appeared incompatible. Take for example, the various references to "*Uber drivers*", "*our drivers*" and to "*Ubers*" or "*an Uber*" (that is, to Uber vehicles);[1079] the assertion that Uber had provided "job opportunities", potentially generating "tens of thousands of jobs";[1080] and the use of the language of "commission".[1081]

The ET also found as far-fetched the proposition that Uber in London is a mosaic of 30,000 small businesses linked by a common 'platform'.[1082] In the ET's view the situation did not reflect the reality: the drivers could not grow their "businesses", "unless growing business simply means spending more hours at the wheel".[1083] The drivers had no ability to negotiate terms with passengers (save to agree a fare reduction) and had to accept work on Uber's terms. Aggrieved by the ET decision, Uber continued the battle before the Employment Appeals Tribunal ("EAT").

5.5.4.1 *Uber BV v Aslam*

The central question before EAT[1084] was whether the ET had erred in law in finding that the claimants were employed by ULL as workers; in particular, whether

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(a) any period during which he is working, at his employer's disposal and carrying out his activities or duties,

…

and "work" shall be construed accordingly."

[1079] *Aslam* para 67.
[1080] *Aslam* para 68.
[1081] *Aslam* para 69.
[1082] *Aslam* para 90.
[1083] *Aslam* para 90.
[1084] *Uber BV*.

they were working under a contract with ULL whereby they undertook to personally perform services for ULL (questions that underpinned each of the ET's findings challenged by the appeal). In rebuttal, Uber's case is that Uber drivers are working in business on their own account directly for their passengers: ULL acts as agent for those drivers in their relationship with passengers; the drivers do not work for ULL.[1085] It contended that the claimants' contract was with UBV, the entity that owned the Uber app, which allowed them to access the app, in consideration of which they would pay UBV commission of 20 or 25% of the fare for each journey. Further it pressed the point that neither drivers nor passengers were under any obligation to use the Uber app; if they did not do so, they would pay nothing to UBV.[1086] ULL's function was to hold the PHV operator licence for London and to meet the regulatory requirements for that licence. These involve dealing with complaints and lost property, accepting bookings; as such ULL was operating in the same way as a traditional mini-cab company,[1087] although its scale was much greater because of the app.

In dismissing Uber's appeal, the EAT found that the ET had been entitled to reject the characterisation of the relationship between Uber drivers and Uber, specifically ULL, in the written contractual documentation. It had found (applying *Autoclenz*[1088]) that the reality of the situation was that the drivers were incorporated into the Uber business of providing transportation services, subject to arrangements and controls that

[1085] *Uber BV* para 81.

[1086] *Uber BV* para 81.

[1087] Reliance was placed on *Mingeley v Pennock (trading s Amber Cars*) 2004 ICR 727 CA; *Khan v Checkers Cars Ltd* UKEAT/0208/05; *Akhtar Hussain t/a Crossleys Private Hire Cars v The Commissioner of Customs & Excise* (No. 16194) 1999.

[1088] In *Belcher* the Supreme Court upheld the decision of the ET that the claimant car valeters were, notwithstanding the express terms under which they worked employed by the respondent company as 'workers' for the purposes of , *inter alia*, WTR. Those terms, which were drafted on behalf of the company and the claimants were required to sign, declared that they were sub-contractors, that they had to provide their own materials, that there was no obligation on them to provide any services or on the company to give them work, and that they were free to provide substitutes (suitably qualified) to carry out the work on their behalf. The ET found that the terms did not reflect the true agreement between the parties since, *inter alia*, the claimants were required to perform defined services under the direction of the company and were required to carry out the work offered and to do so personally (despite the substitution clause). Moreover, they would not have been offered the work they had not signed the terms. For further discussion: Bogg "Sham employment in the Supreme Court" 2012 *ILJ (UK)* 328; Prassl "Pimlico Plumbers, Uber drivers, Cycle couriers, and court translators: who is a worker? 2017 *LQR* (forthcoming), *Oxford Legal Studies Research Paper No*. 25/2017. Available at SSRN: https://ssrn.com/abstract=2948712 (accessed 07-08-2017).

pointed away from their working in business on their own account in a direct contractual relationship with the passenger each time they accepted a trip. Having thus determined the true nature of the parties' bargain, the ET had permissibly rejected the label of agency used in the written contractual documentation.[1089] The ET had not thereby disregarded the principles of agency law but had been entitled to consider the true agreement between the parties was not one in which ULL acted as the drivers' agent.

Emphasizing the foregoing, Eady J went on to point out that ET's finding were neither inconsistent nor perverse. In particular, the ET had permissibly concluded there were obligations upon Uber drivers that they should accept trips offered by ULL and that they should not cancel trips once accepted (there being potential penalties for doing so). If regard is had to Uber's own description of a driver's obligation when "on-duty", [1090] there could be no objection to ET's approach that the drivers were required not only to be in the relevant territory, with the app switched on, but also to be "able and willing to accept assignments. These findings had informed the ET's conclusions not just on worker status but also on working time and as to the approach to be taken to their rights to minimum wage. Unavoidably the assessment it had carried out was fact and context specific. To the extent that drivers, in between accepting trips for ULL, might hold themselves out as available to other PHV operators, the same analysis might not apply. It would be a matter of fact in each case whether and for how long a driver remained ready and willing to accept trips for ULL.[1091]

5.5.5 *Uber SA Technological Services (Pty) Ltd v NUPSAW & SATAWU obo Morekure*

Like their American and British counterparts in *O'Connor*, *Cotter* and *Aslam*, the drivers in *Morekure* were logged off and/or archived from the app. They referred unfair dismissal disputes to the CCMA citing Uber SA as the employer party. The question that the CCMA commissioner had to answer was whether the 'deactivated' drivers were

[1089] *Uber BV* para 109.
[1090] *Aslam* para 85.
[1091] *Uber BV* para 125.

employees of Uber SA for the purposes of the LRA as amended, as defined in section 213 of the statute.

Naturally, Uber SA objected to the CCMA's jurisdiction in the unfair dismissal cases, claiming that the drivers were not employees of Uber BV with whom they have a contract, let alone Uber SA which is a subsidiary of Uber BV. The drivers were independent contractors and not employees vis-vis Uber BV. In essence Uber SA pointed out that any relevant contractual relationship existed as between the drivers and Uber BV, which was not party to the dispute. For their part, drivers relied on control and the economic realities to establish the existence of employer-employee relationship with Uber SA. The driver maintained that Uber SA exercises extensive control over drivers conduct; through a system of ratings by customers, policies regarding cancellation rates, and deactivation.[1092]

Applying the Code of Good Practice: Who is an employee?, in particular the realities test, the arbitrating commissioner found that the Uber drivers are employees of Uber SA.[1093] It was Uber SA that appoints and controls drivers while the relationship between drivers and Uber BV is distant and completely anonymised.[1094] The CCMA further noted that findings were consonant with purposive interpretation of section 213 of the statute, the Constitution as well as the overarching objectives of the LRA. The reasoning of the commissioner was also informed by the fact that implications for Uber SA of finding that the drivers were employees for the purposes of the LRA were not adverse:

> "If one equates deactivation with dismissal, Uber already has a policy setting out the reasons for deactivation, much like a company's disciplinary policy. It already monitors performance, gives warnings and suggestions for improvement even though this is apparently structured in a way so as to avoid the appearance of enforcing discipline. The right to challenge one's dismissal by referring a dispute to the CCMA may result in time spent defending itself at CCMA processes, but employers with far fewer resources manage this as part of the cost of doing business. Uber presents itself as fair and reasonable in its treatment of drivers and if this is so, there is no reason why fairness should not be tested."[1095]

[1092] *Morekure* paras 28-29.
[1093] *Morekure* paras 52
[1094] *Morekure* paras 43-47.
[1095] *Morekure* paras 60.

The ruling by Everett C that the CCMA has jurisdiction to determine the dismissal dispute referred by Uber drivers as they are employees of Uber SA represents a significant but short-lived victory for drivers. A close examination of the commissioner's ruling in respect of joinder of the holding company Uber, as second respondent in the unfair dismissal cases subsequently proved fatal to the drivers' case in the Labour Court. Everett dismissed the application to join Uber BV because referral to conciliation did not embrace it as the alleged employer.[1096] She relied on the majority judgement Constitutional Court decision in *Numsa v Intervalve*, in which it was held that employers not cited in the referrals to conciliation cannot be joined in Labour Court proceedings.[1097] In plain terms, referral to conciliation of an unfair dismissal dispute is an absolute prerequisite for adjudication. In sum, the drivers' case ultimately turned on the technicality, the exclusion of Uber BV as the employer from the conciliation.

5.5.5.1 Which is the Employing Entity?

Besides reviewing and setting aside the CCMA ruling, the Labour Court judgment in *Uber SA* illuminates jurisdictional complexities involving conflict of laws arising from the fact that the employer identity is usually blurred in uberised service arrangements. Uber BV incorporated in the Netherlands, owns and operates the Uber app, the tool through which it conducts business on six continents, in approximately 70 countries and almost 500 cities. The local presence of Uber BV is through a marketing subsidiary, in the case of South Africa it is Uber SA. Hence Uber BV's business identity obfuscates its identity as the alleged employer party in labour litigation. This justifiable confusion emerges clearly from the unfair dismissal dispute between Uber drivers and Uber SA. During the course of referral and conciliation process in the CCMA, two legally separate entities emerged as possible candidates, namely, Uber SA and Uber BV. When the referrals were made to the CCMA, the employer was cited as 'Uber'. That was not surprising, since that was no doubt how the drivers identified their employer.[1098] Likewise, Uber BV assumed that the referral has been made as against it, since it

[1096] *Morekure* para 4.
[1097] *NUMSA v Intervalve* paras 32 and 40.
[1098] *Uber SA* para 36, 44 and 83-88.

regarded itself as the corporate entity against who the drivers have any claim. The confusion is also apparent from the CCMA amended citation which read 'Uber SA Technology (Pty) Ltd as the employer.

The extent to which Uber's business identity turns labour disputes resolution process into a "forensic minefield" is also revealed by the fact that Everett C conflated Uber SA and Uber BV and created a reference point described as 'Uber"[1099] She discontinued her reference to "Uber" and proceeded to make findings specifically in relations to Uber SA.[1100] In this regard the arbitrator made same mistake as the drivers who interchangeably referred to Uber SA and Uber BV as "Uber".[1101] 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. By failing to approach the determination of facts on the basis of the critical distinction between two distinct legal entities - Uber BV and Uber SA, rendered the commissioner's factual findings incorrect and reviewable.

In considering the CCMA's findings with respect to the existence of employer-employee relationship between Uber SA and driver, the LC found the commissioner's reasoning flawed. The Labour Court noted that the drivers had failed to discharge the onus they bore to establish the existence of an employment relationship with Uber SA.'[1102] The facts disclosed that Uber SA did no more than provide administrative and marketing support to Uber BV. Given the concession made 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. If anything, it is difficult to square up the commissioner's findings with eminent authorities[1103] and interpretation of section 200A of the LRA. The LAC had held that it is a necessary precondition for a party to

[1099] *Morekure* paras 43-49

[1100] *Morekure* paras 50 the Commissioner concluded:

> '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 licences. Uber SA approves the vehicle they will drive. The relationship between drivers and Uber BV is distant and completely anonymised. 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.'

[1101] *Uber SA* para 80.

[1102] *Uber SA* para 97.

[1103] *Liberty Life Association Ltd v Niselow* 1996 17 *ILJ* 673 (LAC) para 683A-B; *Myeni* para 49.

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 section 200A is claimed. Consequently, the commissioner committed a material error of law, warranting the setting aside of her ruling.

The decision reached by the Labour Court is correct on narrow technical grounds, however, is deeply problematic for two reasons. Like the majority decision in *NUMSA v Intervalve*, it is built on overly robust adherence to formalities. Referral for conciliation is indispensable. It is a precondition to the Labour Court's jurisdiction over unfair dismissal disputes.

What emerges from Uber cases is that Uber BV and its local subsidiaries in their dealings with drivers function as a single composite voice. The opacities of form inherent in service arrangements between different Uber entities and drivers are contrived to obfuscate and complicate the relationship. If re-examined, *Aslam* and *Morekure*, the identity of the employer was blurred. From Cape Town to London, what the drivers knew is that they were working for Uber. It is perhaps worth repeating what was said in *Morekure*:

> "The confusion between Uber SA and Uber BV is precisely the situation that sections 200B and 198 of the LRA seek to address by providing for joint and several liability. The local subsidiary of an international company must be regarded as the employer to avoid severe disadvantage to South Africans working for foreign companies. *An ordinary driver could not have insight into inter-company arrangements and Uber SA presents itself for all intents and purposes.* The Uber office in Cape Town has a general manager, with whom some drivers actively engage, and emails come from an Uber Cape Town email address."[1104]

It will be recalled that in *Aslam* the ET expressed similar view holding that

> "UBV is a Dutch company the central functions of which are to exercise and protect legal rights associated with the App and process passengers' payments. *It does not have day-to-day or week-to-week contract with the drivers. There is simply no reason to characterise it as their employer. We accept its first case, that it does not employ drivers. ULL is the obvious candidate*. It is a UK company. Despite protestations to the contrary in the Partner Terms and New Terms, it self-evidently exists to run, and does run, a PHV operation in London. *It is the point of contact between Uber and the drivers. It recruits, instructs, controls, disciplines and, where it sees fit, dismisses drivers. It determines disputes affecting their interests*."[1105]

[1104] *Morekure* para 32 [emphasis added].
[1105] *Aslam* para 98 [emphasis added].

More importantly, the justifiable confusion as to the identity of the real employer between Uber BV and Uber SA caused the omission of one the parties from the referral to conciliation. The commissioner's ruling and the LC judgement demonstrate that the confusion as to the identity of the alleged employer redounded to the benefit of both Uber BV and Uber SA. To borrow the language used by Nkabinde J in the substantial dissenting opinion in *NUMSA v Intervalve*, "it would allow for a situation whereby employees, in a complex working relationship created by the employers, are saddled with an undue burden of having to establish who their true employer is."[1106] It is submitted, with respect, that *Uber SA* is another example of rewarding a corporate group that complicates the working relationship.

5.6 The Fallacy of Entrepreneurialism?

The Uber/Lyft case law also exposes the illusion of driver entrepreneurialism. The Uber/Lyft narrative suggests that everyone with a car in the driveway is a business entity, an independent "transportation provider". The notion that Uber drivers are engaged in entrepreneurial activity does not correspond with reality. It should be recalled that in *Aslam* Judge Snelson quite scathing about Uber's rhetoric of driver entrepreneurialism , stating, "the notion that Uber in London as a mosaic of 30, 000 small businesses linked by a common 'platform' is to our minds faintly ridiculous.[1107] Uber spoke of assisting the drivers to "grow" their business. The basis of this fallacy becomes clear when we consider the fact that no driver is in a position to do anything of the kind unless growing his business simply means spending more hours at the wheel.

The Uber/Lyft case law begs a huge question: To what extent does Uber/Lyft narrative redefine servitude as autonomy and relatively unskilled work as entrepreneurialism? Both Marx and Weber regarded the ownership of means of production as crucial for understanding the nature of power and authority relationship between labour and capital.[1108] As an ideal self-employment is linked to ownership; autonomy and control over production, clearly distinguishing crafts-people,

[1106] *NUMSA v Intervalve* para 180.
[1107] *Aslam* para 90.
[1108] See Curran & Burrows "The sociology of the petit capitalism": A trend report" 1986 *Sociology* 265, 267; Dale "Social class and the self-employed" 1986 *Sociology* 430,450.

independent professional and small business proprietors from waged workers.[1109] The situation of Uber drivers workers differ dramatically from the ideal type of the self-employed since while they do own the means of production (i.e., a vehicle), they exercise little control over production, and do not accumulate capital. The driver's car and her labour are the only assets.[1110]The short point is that the platform provides leads, connecting drivers to passengers, and seamlessly processing payment of fares. The ability of drivers to influence the level of profit (other than by working more hours) is virtually non-existent.[1111] The drivers have almost no "entrepreneurial control" over business decisions.

For many of the recruits into the ranks of the self-employed and entrepreneurship is no longer obvious.[1112] The fact that drivers put personal resources in addition to their energies at the platform's disposal does not make them into independent businesses. Uber gets control of the car, but need not purchase it outright, pay for its maintenance, or account to its owner for the return on this asset or its depreciation.[1113] The vehicle becomes capital to Uber and Lyft. What the e-hailing companies do is to design a productive process in which execution of the work has been reduced primarily to the application of labour effort, work that requires no special assets and little in the way of experience or expertise.[1114]

By design then, the application prevents drivers from competing with one another for passengers, as they would if they were sellers in a market for transportation services.[1115] Instead, drivers compete with one another to keep their positions with Uber and Lyft. As already noted, e-hailing companies compare drivers' performance and terminate drivers with relatively low passenger ratings or other performance metrics. The driver picks up the passenger to keep a job with Uber, not in response to price

[1109] Eardey & Corden *Low Income Self-Employment* (1996) 13; Stanworth & Stanworth "The self-employed without employees – autonomous or atypical?" 1995 *IRJ* 221.
[1110] *Berwick v Uber Techs. Inc*., No11-46739EK, 2015 WL, *6 (Cal. Dep't of Labour June 3, 2015).
[1111] Davidov "The status of Uber drivers: A purposive approach" 2017 *Span. Lab. L & Emp. RJ* 1.
[1112] See generally, Dubal "Wage slave or entrepreneur? Contesting the dualism of legal worker identities" 2017 *Cal. LR* 65.
[1113] Frazier "Sharing is caring: Are Uber, Lyft drivers independent contractors?" 2016 *Utah Emp. LL* 1, 2.
[1114] Cunnigham-Parmeter "From Amazon to Uber" 1684-85.
[1115] *O'Connor* 1141.

signals and other information that indicates the transaction will be a good bargain. The applications likewise prevent drivers from competing over price. Uber and Lyft set passenger fares – they appropriate the price mechanism. The drivers do not and cannot negotiate with passengers (except to agree a reduction of the fare set by Uber).

The existence of worker autonomy in the gig economy may be more illusory than first appearance suggest. Examining the unique ways in which peer-to-peer platforms influence working conditions, Uber/Lyft cases have questioned whether on-demand workers actually enjoy entrepreneurial power.[1116] The illusion that the service is the product of an individual worker also tends to create the appearance that the worker provides most of the means of production.

5.7 The Complexities of Uber/Lyft Business Identity: A Modified Ponzi Scheme?

The extent to which Uber has become the exemplar of the platform economy and inspired new narrative about advanced information and communication technologies, and business identity can hardly be overstated. This narrative tells us that Uber facilitates a market between independent businesses and buyers administering technology that lowers the costs of exchange. More importantly, the ridesharing companies have argued that they were in a separate line of business than the drivers. Lyft describes itself as a technology company that operates a mobile application-based platform that facilitates transactions between third parties offering rides and individuals seeking rides. Equally, Uber claims that it is a technology company that does not provide transportation services to passengers. Further, it has developed a technology platform – the Uber app – that people seeking transportation can use to connect with transportation providers. By contrast, the partner drivers were an entirely dissimilar business and occupation. Put simply, the work the drivers perform, that of transporting passengers is distinct from both Uber and Lyft's core business of developing mobile lead generation and payment processing software. Rather than the drivers provide Uber and Lyft with services, it was the other way around. Uber and Lyft claimed that the drivers

[1116] *O'Connor*; *Cotter*.

pay them for access to leads via the App and to benefit from their marketing efforts and payment processing.

To understand the narrative appeal, one must begin with the simple truth that has little to do with bedazzlement. Two reasons related to the cross cultural appeal to the exceptionalism of ICT foster Uber's narrative.

> "First, the idiom of advanced information technologies partially obscures the rift – where arbitrage can flourish – between the company's corporate identity and its direction of productivity. Second, the narrative draws on the enigma of the algorithm, and in particular, discourses that associate algorithmic programming with inscrutability and rationality that transcends human consciousness – much like the neoclassical theory's awe of the free market."[1117]

Two threshold questions therefore arise. First, whether e-hailing drivers are "employees" or "independent contractors"? Second, does Uber redefine the firm and its role as an employing entity?

The preceding discussion has already given its answer to the first of these questions: an analysis of a quartet of recent cases *O'Connor*, *Cotter*, *Aslam* to *Morekure* shows that classification of drivers as independent contractors is simply a stratagem to conceal disguised employment relationship. The existence of driver autonomy in the uberised economy may be more illusory than first appearance suggest. If one examines the unique and pervasive ways in which peer-to-peer platforms influence working conditions, courts across jurisdiction have correctly questioned whether e-hailing drivers actually enjoy entrepreneurial power.[1118] Admittedly, this disproportionate influence on working condition ranges from setting non-negotiable wage rates, to implementing behaviour codes, to "deactivating" (i.e. dismissing) individuals who perform poorly. Ultimately, this reflects a more conventional employer-employee dynamic.

The importance of the second question, however, overshadows the first one. Uber is where questions of the firm-corporation nexus and the use of ICTs to organise production intersect: Does Uber, as it proclaims, facilitates a market between independent transportation businesses and customers by creating technology that

[1117] Tomassetti "Does Uber redefine the firm? The post-industrial corporation and advanced information technology" *Hofstra Lab. & Emp. LJ* 6.
[1118] *O'Connor*; *Cotter*.

lowers the costs of exchange? The basic picture is that Uber is a firm that sells transportation services and hires employees to produce its services Examined through the lens of Coasian theory, Uber is an entity whose formal boundaries bear little relation to the organisation of productive activity. Coase understood the firm to be a productive enterprise and assumed that the corporation would be its useful servant. In other words, its underlying purpose was to help the firm maximise profits via the efficient production and sale of goods and services.[1119] That the purpose of the corporation is to facilitate productive is so entrenched the terms "firm" and "corporation" are used interchangeably.[1120]

The question of Uber/Lyft business identity paradox cannot be answered without adequate attention to Taylorism and Fordism.[1121] Here we are alluding to the separation of conception from execution and management. Frederick Taylor's theory of scientific management prescribed that enterprises should break down skilled work into unskilled work and remove discretion and improvisation. This was supposed to facilitate greater control over production by making it easier to command, monitor, and pace the work, and to assess individual effort. Under Fordism, technology would remove the functions of conceptualising and management from workers by embodying these in the machine.[1122] The narrative of Uber and Lyft's business identity is the natural offspring of Taylorist division of labour, the separation of management and execution. The focal point of Uber/Lyft narrative is that they produce and sell software which helps connect independent transport services providers with passengers. To sum, they were engaged in software development and not in the transportation industry, and thus the services drivers provided were not part of the business operated by them.

The normative question about the relationship between the firm and its business form plays a pivotal role in employment status disputes. Although often

[1119] Coase *Nature of the Firm* 389-391.
[1120] See Williamson "Corporate governance" 1984 *Yale LJ* 1197.
[1121] Chandler *The Visible Hand: The Managerial Revolution in American Business* (1997) 275-276.
[1122] Stone *From Widgets to Digits: Employment Regulation for the Changing Workplace* (2004) 13-50. The appropriation by large enterprises of the work of markets in the US was also a dual appropriation of another kind – the appropriation of property from skilled artisans and its concentration into the entrepreneur and eventually large stockholders, and the appropriation of knowledge and skill from artisanal work and its transfer into machines and engineers, all under the discretion of a management hierarchy.

overlooked business identity is a regulatory fulcrum of many important rights and duties. In collective labour relations it carves out the nuts and bolts of issues such as organisational rights,[1123] the scope and extension of agreements,[1124] and the bargaining process itself. Whether employer is and employees are engaged in particular industry is determined by the nature of the enterprise.[1125]

Equally important, the normative question outlined above, is the trend for companies to "shed" productive activity into formally separate unit, like subcontractors and franchises, and then disclaim their role as the employer of workers in these entities.[1126] From a perspective of fissured employment,[1127] the companies are "shedding employment", reflecting a weakening nexus between productive enterprise and business form.[1128] The fuller implications of this disassociation between the boundaries of the formal business entity and boundaries of productive unit will receive closer examination shortly.

The point of immediate relevance is that Uber's business identity has been an issue not only in labour law, but also in areas such as competition law[1129] and consumer

[1123] Business identity is the primary engine of s 8(1) of the LRA empowering majority unions to enter into collective agreements setting thresholds of representativity for the granting of organisational rights. See generally, *SACOSWU v POPCRU* 2017 9 BLLR 905 (LAC); *BHP Billiton Energy Coal SA Ltd v CCMA* 2016 ZALCJHB 193; *United Association of SA v BHP Billiton Energy Coal SA Ltd* 2013 34 *ILJ* 2118 (LC); *UASA v Impala Platinum Ltd* 2010 31 *ILJ* 1702 (LC). For extended discussion see: Esitang & Van Eck "Minority Trade Unions and the Amendments to the LRA: Reflections on thresholds, democracy and ILO Conventions" 2016 37 *ILJ* 771; Kruger & Tshoose "The impact of the Labour Relations Act on minority trade unions: A South African perspective" 2013 *PER/PELJ* 285.

[1124] S 213 the LRA defines that "workplace" means "the place or places where the employees of an employer work". It adds a proviso:

> "If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation."

See e.g. *AMCU v Chamber of Mines of SA* 2017 38 *ILJ* 831 (CC) paras 24-26, 29. See Du Toit, D "The extension of bargaining council agreements: Do the amendments address the constitutional challenge?" 2014 35 *ILJ* 2637; Coetzer "Between a rock and a hard place – *Concor Projects (Pty) Ltd t/a Concor Opencast Mining v Commission for Conciliation, Mediation &Arbitration & others*" 2015 *ILJ* 96.

[1125] See generally, *NBCRFI v Marcus NO* 2011 2 BLLR 169 (LC); *Coin Security (Pty) Ltd v CCMA* 2005 7 BLLR 672 (LC); *CWIU v Smith & Nephew Ltd* 1997 9 BLLR 1240 (CCMA).

[1126] Collins "Ascription of legal responsibility" 736-737, 740.

[1127] Weil *Fissured Workplace: Why Work Became so Bad for so Many and What Can Be Done to Improve* (2014) 7.

[1128] Weil *Fissured Workplace* 43-44, 57.

[1129] *Meyer v Kalanick* No 15 Civ 9796, 2016 WL 1266801 *1 (S.D.N.Y. Mar. 31 2016).

protection law.[1130] In fairness, it must be observed that many disputes concerning labour law's perennial problem, the judge's conception of the alleged employer's business identity reflects a normative expectation about the firm-corporation relationship that was assumed in the Coasian theory. To be precise, the expectation that a company's business identity and its corporate form should correspond with the organisation of productive activity. Otherwise, what the company is seeking to do, "sounds vaguely like a modified Ponzi scheme."[1131]

A good illustration of the problems created by the disjuncture between company's business identity and its organisation of productive activity is provided by a companion of cases: *Awuah; De Giovani*;[1132] *Schwann*[1133] and *Oliviera*.[1134]

In *Awuah* and *De Giovani* franchisee janitors claimed that they were employees of the companies. They also alleged that the companies paid them thousands of dollars for the opportunity to work a menial job. In rebuttal, Coverall and Jani-King stated that the janitors provided services outside the usual course of their business.

The respondent company in *Awuah*, Coverall sold commercial cleaning services and categorised the janitors it hired as "franchisees" rather than employees. Unlike a typical franchise model, such as those that are commonplace in the fast food and motor dealerships, Coverall negotiated and maintained client relationships.[1135] Franchisees could not solicit or bid for clients. Coverall assigned janitors to clean areas of its clients' commercial space, and janitors paid Coverall upfront for the assignment. They also pay for the use of Coverall's proprietary cleaning system. In return, Coverall provided training, often leased equipment to janitors, and paid them directly, deducting fees and royalties from monthly checks.

The nub of Coverall's submission was that its franchisees are in a different line of business, namely, commercial cleaning business, whereas it is in the franchising. In other words, its business was managing janitors but not actually cleaning. The

[1130] See e.g. *Reardon v Uber Techs Inc.* 115 F. Supp. 3d 1090 (ND Cal. 2015).
[1131] *Awuah v Coverall N. Am. Inc;* 707 F. Supp. 2d 81, 82 (D. Mass. 2010).
[1132] *De Giovani v Jani-King International Inc* 968 F. Supp. 2s 447 (D. Mass. 2012).
[1133] *Schwann v FedEx Ground Package System Inc* No. 11-11094-RGS, 2013 WL WL3353776, *5 (D. Mass. July 3, 2013).
[1134] *Oliviera v Advanced Delivery Systems Inc* No. 091311, 2010 WL 4071360 (Mass. Sup. Ct July 2010).
[1135] *Awuah* 82-84.

implication is that Coverall does not employ anyone who cleans. The judge found this argument misplaced:

> "Describing franchising as a business in itself, as Coverall seeks to, sounds vaguely like a description for a modified Ponzi scheme – a company that does not earn money from the sale of goods and services, but from taking in more money unwitting franchisees to make payments to previous franchisees."[1136]

This sends an unmistakable message: either Coverall is a productive enterprise in the business of commercial cleaning, making the janitors part of the enterprise, or it is discredited kind of business, a modified Ponzi scheme. In short, business identity should reflect the company's product markets, the fruits of its coordination.

Similarly, in *De Giovani* the central argument was that Jani-King develops a cleaning system and promotes and maintains the Jani-King brand. Jani-King franchise owners provide cleaning services to the market. These are distinct lines of business, conducted at different levels of a system for distributing a service. What the company does is to build and enforce Jani-King brand.[1137] In contrast, franchise owners deliver commercial cleaning services to the company's clients, and their businesses pivot around how to do that efficiently and effectively.

The court found Jani-King's argument faulty:

> "[Jani-King] attempts to create a distinction between levels in the distribution of the services arguing that the function it performs is not cleaning but developing a cleaning system and promoting the brand. To this end, the defendants [Jani-King] point out that franchise owners do not perform the same tasks that they perform because they do not sell franchises, bill clients, or develop proprietary materials. However, this contention is inconsistent with the statutory test's focus on the nature of the service provided by business."[1138]

By all outward appearances the company's definition of its business as "building and enforcing a brand" ignored the fact that it "holds itself out as a leader in commercial cleaning, and contracts directly with customers to provide commercial cleaning services."[1139]

The case of *Schwann* provides another illustration. The familiar dispute was whether delivery drivers were employees or independent contractors. FedEx claimed

[1136] *Awuah* 84.
[1137] *De Giovani* 3.
[1138] *De Giovani* 99.
[1139] *De Giovani* 99.

that it was not in the package delivery business, but rather in the business of operating a "sophisticated information and distribution network."[1140] To do so, it "contracted with a network of independent owner-operators" to actually provide the services.[1141] FedEx claimed that its real employees were not the drivers, but engineers, managers, and IT specialists it hired "to operate, develop, maintain, and improve its distribution and information network."[1142] It drew attention to the fact that "*none of these employees pick-up and deliver packages.*"[1143] Accordingly, "there is zero overlap between the work regularly performed by contractors [drivers] and that regularly performed by [FedEx's] employees.[1144] In short, FedEx defined its business as creating a network and giving drivers access to it.

The court disagreed, invoking the lack of congruence that would be implied between FedEx's business identity on the one hand, and its corporate persona and product markets on the other: "Without the drivers' delivery services to put FedEx's information and distribution network to use, FedEx would 'cease to operate,' at least as the type of entity the public has come to believe it to be (and which image FedEx has cultivated through its advertising and public filings)."[1145] In rejecting FedEx's fallacious argument that it does not provide delivery services by simply refusing to recognize its delivery drivers as employees, the judge relied on *Oliviera.* In that case, a home delivery company charged with misclassifying its delivery drivers as independent contractors argued that it did not provide delivery services because it only managed the delivery of the retailers' furniture to customers. On the other hand, the drivers carried out the actual deliveries. The *Oliviera* court gave a short shrift to the company's attempt to distinguish between coordination and realising the fruits of coordination because without the drivers there would be no furniture to pick up or deliver to retailers' customers.

FedEx and Advanced Delivery Systems' attempts to distinguish their business from the activities performed by drivers do not square with reality. The underlying point is that business identity claims should be compatible with the persona the company

[1140] *Schwann* 5.
[1141] *Schwann* 8.
[1142] *Schwann* 2-3.
[1143] *Schwann* 11.
[1144] *Schwann* 11.
[1145] *Schwann* 6 (citation omitted).

projects to investors and customers. For instance, FedEx is not a true productive enterprise without the drivers' execution to put its network "to use" – to realise the fruits of its coordination. FedEx's definition of its "real business" as "logistics" as opposed to delivery services was fallacious. It is akin to the U.S. army arguing that its business is weapon development and logistical planning, while it leaves the delivery of warfare to soldiers operating as independent contractors.[1146]

Analysis of A*wuah*, *De Giovani, Schwann* and *Oliviera* indicate that courts envision the firm to be productive enterprise, where an organisation is engaged in the production and sale of good or services. While the network and brand are catchphrases of modern business, they are not in, themselves, productive activities. Without workers whose services generated their brand profile and value in the eyes of investors and public, they could not claim to the legitimate use of the corporate form. The court would confer social legitimacy on a corporate entity only if its identity reflected an underlying productive enterprise. Tomasetti perhaps provides the fullest explanation:

> "A productive enterprise did not sit around and come up with ideas or practice 'logistics.' In their vision of the firm, conceptualising and managing production alone, without actually carrying it out, did not constitute a productive enterprise. It made the company a kind of 'Ponzi scheme.'"[1147]

The issue of Uber's business identity means that we cannot sail past the conundrum of unravelling the opacities of form. Remember Uber and Lyft's claims about their business identity: they were in the business of "software development" not transportation services. What they do is to administer technology that lowered the costs of market exchange between independent seller and buyers. The bottom line, then, is that drivers resided outside the bounds of their enterprises.

Notwithstanding that *Cotter* and *O'Connor* have resoundingly rejected the argument as fatally flawed in numerous respects, Uber has strenuously persisted in the contention that it is a "technology company" that merely generates 'leads' for its transportation providers through its software. Put bluntly, Uber eschewed its identity as "transportation company". At the same time, the company acknowledges that its revenue depended on selling rides and that it advertises itself as a transportation service.

[1146] *Schwann* 4.

[1147] Tomassetti "Does Uber redefine the firm?"50-51 (footnotes omitted).

If accepted, this means that Uber can uncouple its business from its marketing. This raises the intricate question concerning disharmony between the company's business identity, its corporate form on the one hand, and the organisation of productive activity on the other.

The common argument advanced by Uber and Lyft is straightforward: they are neutral technological platforms, designed simply to enable driver and passengers to transact the business of transportation. The chief problem with this logic is that it does not correspond with the practical reality. Uber and Lyft would not be viable business entities without drivers. The only sensible interpretation is that the ridesharing companies run transportation business.

The *O'Connor* court rejected the Uber's self-definition as a mere 'technology company" because the company does not sell its software in the manner of a typical distributor. Moreover, Uber is deeply involved in marketing its transport services, qualifying and selecting drivers, regulating and monitoring their performance, disciplining (or deactivating) those who fail to meet standards, and setting fares.[1148] The judge offered these comments:

> "Uber does not simply sell software, it sell rides. Uber is no more a 'technology company' than Yellow Cab is a 'technology company' because it uses CB radios to dispatch taxi cabs, John Deer is a 'technology company' because it uses computers and robots to manufacture lawn mowers, or Domino Sugar is a 'technology company' because it uses modern irrigation techniques to grow its sugar cane. Indeed, very few (if any) firms are *not* technology companies if one focuses solely on *how* they create or distribute their products."[1149]

In similar vein, the court in *Cotter* emphatically rejected Lyft's portrayal of itself – one might even say disguise itself – as purveyor of an "app". The judge elaborates:

> "Lyft concerns itself with far more than simply connecting random users of its platform. It markets itself to customers as an on-demand ride services, and it actively seeks out those customers. It gives drivers detailed instructions about how to conduct themselves. Notably, Lyft's own drivers' guide and FAQs state that drivers are "driving for Lyft." Therefore, the argument that Lyft is merely a platform, and that drivers perform no service for Lyft, is not a serious one."[1150]

[1148] *O'Connor* 1142.
[1149] *O'Connor* 1141.
[1150] *Cotter* 1078.

In the case of *Aslam*, the Employment Tribunal dismantled Uber's business identity as being a 'transportation network' providing drivers with 'entrepreneurial opportunities' in these terms:

> "It is, unreal to deny that Uber is in business as supplier of transportation services. Simple common sense argues to the contrary. The observations under our first point above are repeated. Moreover, the Respondents' case here is, we think, incompatible with the agreed fact that Uber markets a 'product range.' One might ask: Whose product range is it if not Uber? The 'products' speak for themselves: they are a variety of driving services. Mr Aslam does not offer such a range. Nor does Mr Farrar, or any other solo driver. The marketing self-evidently is not done to promote Uber's name and 'sell' its transportation services."[1151]

In the foregoing cases, adjudicators rejected the Uber/Lyft narrative and concluded instead that the companies produced, marketed, and sold ride services, and that these activities defined their business identities. In the end, Uber and Lyft were not legitimate, if their business identities were based on the activity of coordination alone, shunned the fruits of that coordination.

Uber/Lyft narrative attempts to both obscure and legitimise a tenuous connection between business and the organisation. From industrial paradigm that govern how we conceive about labour and economy, the Uber/Lyft narrative is appealing. Workers in the brick-and-mortar workplace, particularly in the transportation sector, have long been the subjects of legal disputes over employment classification, with judges frequently ruling that they were independent contractors.[1152]

Competition law also provides an illuminating example of the complexities of Uber as employing entity and a firm. To illustrate: By disavowing its status as a firm that produced ride services, but appropriating the market's coordinating mechanism of price competition among drivers, Uber made itself susceptible to claims of *per se* restraint of trade.[1153] In *Meyer*, an Uber passenger, on behalf of a class of Uber passengers, sued Uber's CEO, Travis Kalanick, for orchestrating a price-fixing conspiracy under the Sherman Act. The Sherman Act prohibits combinations that constitute an unreasonable restraint of trade. The plaintiff alleged that Kalanick had organised both a vertical and horizontal combination. A vertical combination is an agreement between buyers and

[1151] *Aslam* para 89.
[1152] See McPeak "Sharing tort liability in the new sharing economy" 2016 *Conne LR* 171.
[1153] For discussion see: Tomassetti "Does Uber redefine the firm? 29-30.

sellers to set resale prices, and a horizontal combination is an agreement among competitors to set prices. The more serious charge was that of a horizontal restraint, because these were "*per se*" illegal, whereas courts evaluate vertical restraints under a more contextual "rule reason" standard. The basis of horizontal allegation was that "drivers agree with Uber to charge certain fares with the clear understanding that all other Uber drivers are agreeing to charge the same fares, and therefore could not undercut one another on price.

Whether Kalanick had organised only a vertical combination, but not a horizontal, *per se* illegal one is an important question. Behind that question, with its lawyerly remoteness, lies the distinction raised in the Uber narrative: Was Uber in the business of producing ride services or was it only an intermediary? Kalanick contended that the plaintiff had at best indicated a vertical arrangement between Uber and each driver, not a horizontal agreement among drivers. An analogy was drawn to a situation in which retailers agree with a manufacturer not to discount the resale prices of the manufacturer not to discount the resale prices of the manufacturer's goods by more than a certain amount, an arrangement court have found to be legal. The court rejected the argument, distinguishing the Uber arrangements from that of the retailers and manufacturers on the basis of Uber's own characterisation of itself, as pleaded in the complaint: "Uber is not selling anything to drivers that is then resold to riders."[1154] Ironically, the Uber narrative rebounded adversely on Kalanick.[1155]

5.8 It Looks Like a Duck, Walks Like a duck, Quacks Like a Duck. But is it a Taxi?

Granted that Uber looks like a taxi service and acts like a taxi service, but is Uber a taxi service? This is the question which the Court of Justice of the EU had to answer in *Uber Systems Spain*.[1156] In October 2014, *Associacion* Professional Elite Taxi

[1154] *Meyer* 6.

[1155] The plaintiff also alleged that a successful organising effort by New York drivers to persuade Uber to raise fares was evidence of an illegal conspiracy. Incidentally, this augurs the troubling prospect of using antitrust law to suppress workers from organising. In retrospect, such workers find themselves in similar position as most workers prior to the New Deal: at once lacking labour protections See Paul "The enduring ambiguities of antitrust liability for worker collective action" 2016 *Loy. U. Chi. LJ* 969.

[1156] ECLI: EU: C: 2017:364.

(Elite Taxi) a professional organisation of taxi drivers brought action asking the Spanish court to order Uber Spain to cease using the UberPop service in Barcelona because use of this service allegedly amounts to unfair competition. In particular, Elite Taxi maintained that Uber Spain is not entitled to provide the UberPop service in the city of Barcelona because neither Uber Spain nor the owners or drivers of the vehicles have the licences and authorisation required under the city of Barcelona's Regulation on taxi service.

Since the Spanish court considered that an interpretation of several provisions of EU law was necessary in order for it to give judgement, it referred four questions to the CJEU for a preliminary ruling. The first two questions concern the classification of Uber's activities in the EU law. Does Uber provide (1) a transport service and (2) an electronic intermediary service or an information society within the meaning of Article 1(2) of Directive 98/34/EC (the Technical Standards Directive)?[1157] If Uber's activities can be considered in part to be an information society service, can the electronic intermediary service benefit from the freedom to provide services as guaranteed in Article56 TFEU and Directives 2006/123/EC (the E-commerce Directive). The second two questions concern the conclusions which must be drawn from that classification.

The first phase of the opinion comprises some general remarks about the significance of the ruling and the impact of different types of competence on the outcome. The Advocate General also assumed that the respondent in the case should be the Dutch company (Uber BV), which operates the app in the EU, rather than the Spanish Company Uber Spain, which is responsible for marketing.

The Advocate General takes the view that, although it is for the national court to determine and assess the facts, the service in question is a composite service, since part of it is provided by electronic means while the other part, by definition, is not.

[1157] Directive 98/34/16EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, OJ 1998, L204/37. This directive has since been replaced by Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and rules on Information Society services, OJ 2015, L241/1.

A composite service may fall within the concept of 'information society service' where (1) the supply which is not made by electronic means is economically independent of the service which is provided by that means (as is the case, for example, of intermediation platforms for purchasing flights or making hotel bookings) or (2) the provider supplies the whole service (that is, both the part provided by electronic means and the part provided by other means) or exercises decisive influence over the conditions under which the latter part is provided, so that the two services form an inseparable whole, a proviso being that the main component (or indeed all essential elements of the transaction) is supplied by electronic means (as is the case, for example, of the online sale of goods).

According to the Advocate General, the service offered by Uber does not meet either of those two conditions. In that regard, the Advocate General observes that the drivers who work on the Uber platform do not pursue an autonomous activity that is independent of the platform. On the contrary, that activity exists solely because of the platform, without which it would have no sense. The Advocate General also points out that Uber controls the economically important aspects of the urban transport service offered through its platform. Indeed, Uber (i) imposes conditions which drivers must fulfil in order to take up and pursue the activity; (ii) financially rewards drivers who accumulate a large number of trips and informs them of where and when they can rely on there being a high volume of trips and/or advantageous fares (which thus enables Uber to tailor its supply to fluctuations in demand without exerting any formal constraints over drivers); (iii) exerts control, albeit indirect, over the quality of drivers' work, which may even result in the exclusion of drivers from the platform; and (iv) effectively determines the price of the service.[1158]

All those features mean that Uber cannot be regarded as a mere intermediary between drivers and passengers. In addition, in the context of the composite service offered by the Uber platform, it is undoubtedly transport (namely the service not provided by electronic means) which is the main supply and which gives the service meaning in economic terms.

[1158] *Uber Systems Spain* paras 43-49 of the Opinion.

The Advocate General concludes that, in relation to the supply of transport, the supply whereby passengers and drivers are connected with one another by electronic means is neither self standing[1159] nor the main supply.[1160] Consequently, the service offered by Uber cannot be classified as an 'information society service'.[1161] Instead, the service amounts to the organisation and management of a comprehensive system for on-demand urban transport.

Moreover, Uber does not offer a ride-sharing service, since the destination is selected by the passenger and the driver is paid an amount which far exceeds the mere reimbursement of costs incurred.

Taking account of the fact that the supply of transport constitutes, from an economic perspective, the main component, whilst the service of connecting passengers and drivers with one another by means of the smartphone application is a secondary component, the Advocate General proposes that the court's answer should be that the service offered by the Uber platform must be classified as a 'service in the field of transport'.

It follows from that interpretation that Uber's activity is not governed by the principle of the freedom to provide services in the context of 'information society services' and that it is thus subject to the conditions under which non-resident carriers may operate transport services within the Member States[1162] Whatever the outcome of the Uber Spain case, the ruling of the CJEU is likely to provide further fuel for the debate about how to regulate business within the framework of uberised economy.[1163]

5.9 How Do You Bargain with an app?

If we go back to the ILO's venerable Convention on Fundamental Principles and Rights at Work, it recognises four categories namely freedom of association and the

[1159] See point 1 above.
[1160] See point 2 above.
[1161] *Uber Systems Spain* para 65 of the Opinion.
[1162] Article 91 TFEU. In this case, possession of the licences and authorisations required by the city of Barcelona's regulations.
[1163] See generally, Hartzopoulos & Roma "Caring for sharing? The collaborative economy under EU Law" 2017 *CMLR* 90; Edelman & Geradin "Efficiencies and regulatory shortcuts: How should we regulate companies like Airbnb and Uber?" 2016 *Stan. Tech. LR* 293.

effective recognition of the right to collective bargaining, elimination of all forms of forced or compulsory labour, effective abolition of child labour, elimination of discrimination in respect of employment and occupation. The 1998 ILO Declaration on Fundamental Principles and Rights at Work calls upon all the Member States of the ILO to respect and promote these principles and rights, whether or not they have ratified the relevant Conventions.[1164]

As already indicated, significant risks for workers in the uberised economy arise with regard to exercise of freedom of association. Given the intense competition existing on crowd work and work demand via apps, workers may be unwilling to cooperate with each other and opportunistic behaviours may easily be incentivised. It should not be forgotten that reputation and ratings play a major role in securing continuation of work with a particular platform or app. Workers may feel particularly reluctant to exercise any collective right as it could adversely impact on their reputation.[1165] Added to this, is the possibility of being easily dismissed via simple deactivation or exclusion from a platform or app that may heighten the fear of retaliation that can be connected to non-standard forms of work, in particular contingent ones.[1166]

The decline of traditional unionism has been well-documented and widespread.[1167] In the uberised economy, it is almost non-existent. This has compelled workers to consider alternative ways to have their voices heard in the workplace. Workers in the on-demand economy face an increasingly steep battle in their attempts to be recognised as "employees" under labour legislation. Uber/Lyft cases demonstrate that the courts and litigants have faced an uphill struggle when applying the binary

[1164] See https://www.ilo.org/declaration/lang—en/index.htm (accessed 29-07-2016)

[1165] Dagnino "Uber law: prospective *giuslavoristiche sulla* sharing/on-demand economy" in Adapt Studies . e-Book series (Bergamo, Adapt, 2015) available at https://www.bollettinoadapt.t/uber-law-prospective-gisulavoristiche-sull-sharingon-demand-economy (accessed 01-05-2017).

[1166] For an account of more recent manifestation see: Toli "Subcontracting at OR Tambo International: Precarious work and attacks on workers' rights" *Daily Maverick* 23 Nov 2017, https://www.dailymaverick.co.za/opinionista/2017-11-23-subcontracting-at-or-tambo-international-precarious-work-and-attacks-on-workers-rights/#Whb_V4fg.whatsapp (accessed 23-11-2017).

[1167] See generally, Budeli "Workers right to freedom of association and trade Unionism in South Africa: A historical perspective" 2007 *Fundamina* 58; Budeli *et al Freedom of Association and Trade Unionism in South Africa: From Apartheid to the Democratic Constitutional Order* Institute of Development & Labour Law Monograph UCT 02/2008; Steenkamp *et al* "The right to bargain collectively" 2004 25 *ILJ* 943; Myburgh SC "100 years of strike law" 2004 25 *ILJ* 662; Crainshaw "Shifting sands: Labour market trends and unionisation" 1997 *SALB* 28; Hiatt & Jackson "Union survival strategies for the twenty-first century" 1996 *Labour Law* 165.

distinction between employees and independent contractors to workers in the gig economy.

If we look beyond the narrow confines of statutory protections, a number of alternative avenues for workers emerging such as digital organising like blogs and forums, to app-based drivers' association, or worker-owned co-ops which are non-traditional unions. The fact that such a "union" or "Guild" lacks autonomy and is aligned to the employer, means that it cannot meet the statutory requirements for registration as a union.[1168] In contrast, embracing the dual roles of labour and entrepreneurs, writers in the 1930s formed a union and created an administratively complex but functional system for regulating wages, conditions of employment, and intellectual property rights in industry renowned for short-term, episodic, independent and erratically supervised work in geographically dispersed locations.[1169] The Writers Guild of America has bargained on a sectoral, multi-employer basis on behalf of writers at the low end and the very high end of pay, power and responsibility.

Unlike the Writers Guild of America, the Freelancers Union does not engage in collective bargaining on behalf of its members.[1170] Instead it provides services to individuals who wish to purchase them, although membership is free. In May 2016, Uber announced the creation of a drivers' union it called the "Independent Drivers Guild",[1171] which operates in New York City. This drivers association falls far short of providing full union status, but offers workers "a forum for regulator dialogue and afford them some limited protections". The manifest purpose of the Guild is to represent drivers who (purportedly) wanted to remain independent while still being allowed to enjoy the benefits of a collective association of Uber.

[1168] S 95 of the LRA.
[1169] For discussion see: Fisk "Hollywood writers and the gig economy".
[1170] See FreelancersUnion.Org, http://www.freelancersunion.org (accessed 29-09-2017).
[1171] MacMillan "Uber Agrees to Work with a Guild for Its Drivers in New York" *Wall St. J*, May 10, 2016, https://www.wsj.com/articles/uber-agrees-to-with-a-for-its-drivers-in-new-york-city-1462913669 (accessed 20-08-2016).

From the American perspective, the quasi-union status of Uber Guild raises anti-trust concerns.[1172] The spectre of antitrust liability somewhat thwarts drivers' ability to take collective action to their economic circumstances. According to Regan:

> "This possible antitrust liability for non-traditional worker groups illustrates the paradox in modern labour law. The changing economy begs for more modern and less formal worker collective action, but labour law remains locked in a model that is no longer relevant to an increasing number of workers. As a result, groups are forced to make a decision: 1) act like a traditional labour union and accept the burdens and hurdles of current labour that accompanies that choice; or 2) seek new ways of representing workers, but limit their actions out of fear of antitrust liability. Although this paradox begs for legislative or judicial solutions, such help does not appear to be on the horizon."[1173]

By contrast the Commissioner in *Morekure* struck a far more optimistic tone with regard to the question whether drivers can bargain with an app? She noted that the Uber drivers are already organised into worker/driver groups such as The Guild and The Movement.[1174] If collective bargaining and the right to strike are considered a social good for workers in standard employment relationships, it stands to reason the same should apply to Uber driver who in precarious employment. [1175] In short, the lesson to be drawn from the experience of the writers' union in Hollywood is that the gig economy should embrace bargaining by independent workers in order to realise the potential of the disruptive economy.[1176]

[1172] See e.g. Paul "The enduring ambiguities of antitrust liability for worker collective action" *Loyola U. Chi. LJ* 969, 988-990 and "Uber as a for-profit hiring hall: A price-fixing paradox and its implications" 2016 *UCLA Law-Econ Research Paper Series NO* 16-13; Kennedy "Comment, Freedom from independence: Collective bargaining rights for 'dependent contractor" 2005 *Berkeley Emp. & Lab. L.* 134, 168-169; MacPherson "Collective bargaining for independent contractors: is the status of the artist act as model for other industrial sectors" 1999 *Can Lab. & Emp. LJ* 355; Horne "Self-employed women's union: Tackling the class-gender intersection" 1995 *SALB* 34.

[1173] Hisch & Seiner "A modern union for the modern economy" 2018 *Fordham LR* 1, 58

[1174] *Morekure* para 61.

[1175] S 23(1)(d) of the Constitution. ILO Committee of Experts' assessment of article 2 of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), cited in *Bader Bop* para 31. Article 2 of the Convention on Freedom of Association and Protection of the Right to Organise provides:

> "Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation."

[1176] According Fisk "Hollywood writers and the gig economy" 32, three important insights about employee classifications, labour law, and antitrust law in the gig economy emerge:

> "First: Collective bargaining has enabled writers to negotiate better compensation, health and pension benefits, recognition, and novel forms of profit-sharing and intellectual property rights that would not exist but for unionisation.

5.10 Conclusion

The labour law's perennial headache of "who is an employee" resurfaces with yet another reincarnation. Courts who formulate the answer to this question by reference to existing multifactorial tests may find the challenge insurmountable, meaning either that they will look for new tests altogether or simply decide that "uberised" workers are not employees. But if we adopt a purposive approach to determine who is the employee – as courts and scholars around the world increasingly do – the novelty of work arrangements does not divert us from asking the same question: should workers under this arrangement enjoy the protection of labour laws (all or some of them), given the goals of these law? If the answer is in the positive, then they should be considered employees. In this respect, no new tests are needed; just an examination of the new factual situations in the light of labour law's goals.

Second, Independent workers should not uniformly be deemed to be independent contractors whose concerted activity is unprotected by the NLRA and prohibited by antitrust law. The definition of independent contractor could be substantially narrowed without doing violence to the purpose of or policy of labour law and antitrust law. There has been robust competition over terms of employment and in hiring writers. Television and film production have thrived even with talent guilds.

Third: Collective bargaining by writers who exercise supervisory and production executive roles has contributed to the success of the Writers Guild. Thus, contrary to the notion that supervisors must be excluded from the protections of bargaining to protect either employer or the rank and file from conflicted loyalties of the supervisor, the inclusion of show runners in the Writers Guild and its collectively bargained protections is one of the things that has preserved the ability of writers to bargain at all.

CHAPTER FIVE

DETERMINING THE EMPLOYER-EMPLOYEE RELATIONSHIP IN THE CONTEXT OF VICARIOUS LIABILITY

6.1 Introduction

If we are to grasp fully the significance of the employee/independent contractor dichotomy, and in particular, the perennial problem of determining the existence of employer-employee relationship, it inevitably follows that there ought to be a room for bottom-up examination of vicarious liability. More profoundly, the definition of "employee" upon which the employer status is greatly dependent, developed from the common law tort principles involving vicarious liability of employer not employment law dogma.[1177] The definitions of employee and employer are not only of significance to labour law. They are critical in determining delictual/tort liability.

The common law concept of vicarious liability has been and still is, a notoriously difficult question for labour law as well as the law of delict/tort.[1178]As Professor Laski crisply put it, the concept's "seeming simplicity conceals in fact a veritable hornet's nest of stinging difficulties".[1179] Vicarious liability is bedeviled by the fact that it is considered to be a species of strict, no-fault secondary liability since it requires no proof of personal wrongdoing on the part of the person who is subject to it.[1180] In sum, consistent admonitions down through the years from academia and the bench caution against the pitfall of over simplifying the concept of vicarious liability.[1181]

The basis of the concept of vicarious liability is that the hazards of the enterprise should be borne by the enterprise itself.[1182] Explained in another way, it means that the tortious acts of the wrongdoer are the responsibility of a third party who did not cause

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[1177] *Hearst* 120 note 19, explaining that the common law definition of employee evolved from tort principles involving vicarious liability.

[1178] Okpaluba & Osode *Government Liability* (2010) 293-360. See, for instance, *K v Minister of Safety & Security* 2005 (6) SA 419 (CC) ("*K*"); *Bazley v Curry* 1999 2 SCR 534 (SCC) ("*Bazley*"); *Jacobi v Griffiths* 1999 2 SCR 570 (SCC) ("*Jacobi*"); *Lister v Hesley Hall Ltd* 2002 1 AC 215 (HL); *State of NSW v Lepore* 2003 212 CLR 511 (HCA) ("*Lepore*"); *NK – Bernard v Attorney General of Jamaica* 2005 IRLR 398 (PC).

[1179] Laski "The basis of vicarious liability" 1916 *Yale LJ* 105, 110.

[1180] *Sagaz Industries* para 26.

[1181] See generally, Seavey "Speculations as to '*respondeat superior*'" 1934 *HLE* 433; 434; Williams "Vicarious liability and the master's indemnity" 1957 *MLR* 220, 437; Atiyah *Vicarious Liability in the Law of Torts* (1967) 41. See also *Sagaz Industries* para 38; *Penney v Lahey* 2002 NFCA 42 (CanLII).

[1182] *Sagaz Industries* para 35.

the harm personally.[1183] In many instances, that third party is a company or other employing entity with an employment relationship with the wrongdoer. The short point is that vicarious liability is inextricably linked to the existence of an employment relationship. It stands to reason that it is untenable to anchor liability on the employer for acts of an independent contractor.[1184] An independent contractor carries out his work, not as a representative but as a principal. In addition, a ready assumption is that the employer does not have a tight control over the activities of an independent contractor as compared to an employee.[1185] Hence the preoccupation with obtaining greater clarity, first whether the wrongdoer was an employee and, second, if she was acting in the course of her employment when the wrongful act was committed. For this reason, the initial question about affixing vicarious liability concerns the existence of employer-employee relationship between the wrongdoer and the principal.

Re-examining the binary distinction between employees and independent contractors through the prism of vicarious liability presents a two-fold opportunity: First, it allows us to probe the diverse permutations of control in vicarious liability disputes. And second, to grapple with the penetrating question of how delict/tort law is poised to unravel the novel liability problems emerging from the uberised economy.

6.2 A primer on Delict/Tort Law

Tort law provides a system of private liability for injuries caused by wrongful act of another. A delict is said to have been committed when the defendant's wrongful and culpable conduct causes harm to another in the form of either patrimonial loss or infringement of an interest of personality.[1186] The idea that the wrongdoer must be held

[1183] *Majrowski v Guy's and St Thomas' NHS Trust* 2006 3 WLR 125 (HL) para 8.
[1184] See Phegan ''Employers' liability' for independent contractors in tort law' 2000 *JR* 395; McKendrick "Vicarious liability and independent contractors – A re-examination" 1990 *MLR* 770; Mischke "Vicarious liability: When is the employer liable for the wrongful acts of employees?" 2002 *CLL* 11.
[1185] Recall the employee's duty of subordination. It is often said that who owns labour must control the labourer, ownership of labour means power over people. See generally, Davidson *The Judiciary and the Development of Employment Law* (1984) 7; Collins "Market power, bureaucratic power and the contract of employment"; Brassey "The nature of employment"; Jordaan "The law of contract and the individual employment relationship" 1990 *AJ* 73.
[1186] Visser "Delict" in Du Bois (ed) *Wille's Principles of South African Law* 9th ed (2011) 1091. The leading text on the law of delict in South Africa include: Loubser & Midgley *The Law of Delict in South Africa* 3

liable for damages is supported by several objectives, including compensating injuries, deterring future injuries, providing for corrective justice, and allocating costs.[1187]

As respects the basic negligence claim, delictual liability usually hinges on the basis of one's fault, the plaintiff must prove a duty, a breach of duty,[1188] causation[1189] and damages.[1190] The fundamental difference that must be borne in mind when dealing with delict is that in South African law the notion of wrongfulness plays a central role in establishing liability.[1191] But delict also encompasses the concept of liability without fault in some instances, such as with strict liability or vicarious liability. In these situations, the policies underpinning delict support imposing liability beyond the actor directly at fault. Thus, the no-fault liability remains an important concept in the law of delict.

It has been stated clearly that strict liability applies to certain abnormally dangerous activities that cause harm, irrespective of the level of due care exercised by the actor.[1192] In this sense strict liability merely requires that the defendant was engaged

ed (2016); Van der Walt & Midgley *Principles of Delict* (2016); Neethling *et al Law of Delict* 7 ed (2014); Burchell *Principles of Delict* (1993).

[1187] See generally, Geistfeld "The coherence of compensation-deterrence theory in tort law" 2012 *DePaul LR* 383, 384; Goldberg & Zipursky "Tort law and moral luck" 2007 *Cornell LR* 1123, 1127 (emphasising corrective justice purpose of tort law over "moral luck"); Schwartz "Reality in the economic analysis of tort law: Does tort law really deter? 1994 *UCLA LR* 377 430; Shmueli "Legal pluralism in tort law theory: Balancing instrumental theories and corrective justice" 2015 *U Mich J.L. Ref* 745, 749-750.

[1188] See e.g. *Minister van Polisie v Ewels* 1975 3 SA 590(A) 596H, 597B-C; *Adminstrateur, Natal v Trust Bank van Afrika* 1979 3 SA 824 (A), 833A-B.

[1189] See e.g. *Lee v Minister of Correctional Services* 2013 2 SA 144 (CC) - causation liability for tuberculosis contracted in prison. For a helpful analysis of the case see: Okpaluba "Protecting the right to personal liberty in Namibia: Constitutional, delictual and comparative perspectives" 2014 *AHRLJ* 580; Neethling & Potgieter "The Law of Delict" in Botha (eds) 2013 *Annual Survey of South African Law*, 793, 809-817.

[1190] See generally, Neethling *et al Damages* (2004) 363; Visser & Potgieter *Law of Damages* (2003) 1.

[1191] Brand JA in *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 6 SA 138 (SCA) paras 10-11 stated:

> "[W]hen we say that negligent conduct causing pure economic lass or consisting of an omission is not wrongful, we intend to convey that public or legal policy considerations determine that there should be no liability, that the potential defendant should not be subjected to a claim for damages, his or her negligence notwithstanding … Perhaps it would have been better in the context of wrongfulness to have referred to a 'legal duty not to be negligent'. Thereby clarifying that the question being asked is whether in the particular circumstances negligent conduct is actionable, instead of just a 'legal duty'."

On the smouldering debate concerning wrongfulness see: Du Bois "Getting wrongfulness right: a Ciceronian attempt" in Scott & Visser (eds) *Developing the Law of Delict: Essays in Honour of Robert Feenstra* (2000) 1; Fagan "A duty without distinction" in Scott & Visser (eds) *Developing the Law of Delict* (2000) 49 and "Rethinking wrongfulness in the law of delict" 2005 *SALJ* 90, Brand "Reflections on wrongfulness in the law of delict" 2007 *SALJ* 76.

[1192] *Rylands v Fletcher* (1868) 3 HL 330. See generally, *Restatement of (Third) of Torts: Liability for Physical and Emotional Harm* § 20 (*Am. Law. Inst*. 2010); Grey "Accidental Torts" 2001 *Vand. LR* 1225, 1262.

in a certain category of activity and defendant's conduct caused plaintiff injury. One primary justification for a strict liability theory is premised on cost allocation: the actor causing harm is most able to bear the cost of the loss.[1193] Likewise, enterprise liability, a modern expression of strict liability, is also rooted in the notion that the actor who benefits from the enterprise should also shoulder the burden of it, regardless of precautions taken.[1194] Strict liability and enterprise liability are prime examples of "just distribution of burdens and benefits" based on the sense of fairness.[1195]

Vicarious liability or imputed negligence can be categorised as another specimen of no-fault liability in tort. According to vicarious liability principles, the actor at fault is not the only one held liable. Instead, fault is imputed on a third party with a special relationship to the actor, in spite of the fact that the third party did not personally commit the wrong. Agency principles reinforce vicarious liability, and several types of vicarious liability have emerged, namely, the doctrine of *respondeat superior*[1196] and joint enterprise liability.[1197]

6.2.1 Vicarious Liability Principles

Vicarious liability means that the tortious acts of the wrongdoer are the responsibility of a third party who did not cause the harm personally. In many situations, that third party is a company or other entity with an employment relationship with the wrongdoer. Rather, for vicarious liability, an employer that did nothing wrong stands in the shoes of the wrongdoer and is on the hook to the plaintiff for the full extent of the damages incurred. It is important to bear in mind that vicarious liability does not diminish the personal liability of the direct wrongdoer.[1198] The chief criticism levelled at

[1193] See Keating "The theory of enterprise liability and common law strict liability" 2001 *Vand. LR* 1285, 1286-1287; Calabresi "The decision for accidents: An approach to non-fault allocation of cost" 1965 *Harvard LR* 713 and "Some thoughts on risk distribution and the law of torts, 1961 *Yale LJ* 499.
[1194] See generally, Douglas "Vicarious liability and administration of risk I" 1928 *Yale LJ* 584; Kornhauser "An economic analysis of the choice between enterprise and personal liability for accidents" 1982 *Cal. LR* 1345; 1350; Keating "The idea of fairness in the law of enterprise liability" 1997 *LR* 1266, 1267.
[1195] Keating 2001 *Vand. LR* 1328.
[1196] Holmes, "Agency" 1891 *Harvard LR* 345, 358 describing the historical origins of *respondeat superior* principles. See also, Wigmore "Responsibility for tortuous acts: Its history" (part 1) 1894 *Harvard LR* 315 and (part 2) 1894 *Harvard LR* 383.
[1197] *Restatement of (Third) of Torts: Apportionment Liability* δ 13 cmts. A & b (*Am. Law. Inst*. 2000).
[1198] *London Drugs Ltd v Dennis Gerrad Brassart and Hank Vanwinkel* 1992 3 SCR 299 (SCC) 460 ("*London Drugs*"); Fleming *The Law of Torts* 9th ed (1998) 411.

the attributing liability on the employer is that neither the theoretical underpinning of vicarious liability nor a convincing rationale for imposing this strict, no-fault liability on the employer has been satisfactorily offered or clearly articulated by the courts in what is predominantly judge-made law.[1199] The short point is that "there is no precise unanimity between judges (or between academics) about the rationale: no single accepted truth."[1200]

Several tort theories provide a firm basis for vicarious liability. An individual wrongdoer may be unable to pay a judgement, leaving the victim undercompensated. Vicarious liability allows for adequate compensation and cost allocation to a potentially wealthier principal, shifting the burden of non-recovery away from the victim.[1201] Prosser and Keeton[1202] postulate three logical bases for vicarious liability.

The first, known as the "master's tort theory", posits that the employer is vicariously liable for the acts of his employees because the acts are regarded as authorised by him so that in law the acts of the employee are the acts of the employer.[1203] Stated differently, the compelling reason for imputing employee's wrong on the employer is that the latter has more or less fictional "control" over the conduct of the servant. It is frequently said that the employer has set the whole thing in motion and is therefore accountable for what has transpired. In the same breadth, an eminent judicial voice affirms that one who acts through another, acts personally.[1204] The proposition underscores the essential point that "those who choose to carry on their activities through the medium of an artificial legal persona must accept the burden as well as the privileges which go with their choice."[1205]

However, in *Majrowski* the House of Lords jettisoned the "master's tort" approach in favour of the "employee's tort" approach, whereby the principles of

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[1199] *Sagaz Industries* paras 25-32; *Lister* para 65; *Bazley* para 26; *Jacobi* para 29; *Vabu* 37-38. See also Fleming *The Law of Torts* 9th ed (1998) 410; Okpaluba & Osode *Government Liability* 309-319.

[1200] Per MacDuff J in *JGE v The English Province of Our Ladt of Charity and the Trustees of the Portsmouth Roman Catholic Diocesan Trust* 2012 1 All ER 723 para 10.

[1201] Sykes "The economics of vicarious liability" 1984 *Yale LJ* 1231, 1235.

[1202] Prosser *Prosser and Keeton on the Law of Torts* 5ed (1984) 500 δ 69.

[1203] Williams "Vicarious liability: Tort of master or of the servant" 1956 *LQR* 522.

[1204] *Quarman v Burnett* 1840 6 M & W 499, 509.

[1205] *S v Coetzee* 1997 3 SA 527 (CC) para 98; *Bernstein v Bester NO* 1996 2 SA 751 (CC) para 85; *Company Secretary of Arcelormittal SA v Vaal Environmental Justice Alliance* 2015 1 SA 515 (SCA) para 1; *Nova Property Group Holdings Ltd v Cobbet* 2016 4 SA 317 (SCA) paras 16-17.

vicarious liability imposes upon an employer liability for his employee's act, not his (employer's) wrongs. In this respect vicarious liability exists not because the employer is liable but because of what the employee has committed. In this instance, it was contended that Regulation 31 in issue imposed no duty the employer.[1206] The duty was imposed solely on the person in charge. Consequently, imputing the employee's act to the employer did not gives rise to a claim against the employer. Lord Nicholls formulated a response to the effect that an employer's liability is not restricted to responsibility for acts done by an employee in the course of his employment.[1207]

The second, known as the "servant's tort theory" attributes liability to the employer simply because the employer was employee's superior and therefore in charge or command of the employee.[1208] It has been suggested that the employer is the one who selected the delinquent servant and trusted him, and so should bear the brunt for his wrongdoing, rather than an innocent party who has had no opportunity to protect himself.[1209]

The third, known as "deep pocket aphorism",[1210] is acknowledged as one of the underlying rationale for vicarious liability. It is generally said that when the question arises as to who is most able to pay for the damage caused by the employee-wrongdoer, "the reason for employer's liability's is [that] the damages are taken from a deep pocket."[1211] Given that there is no sound theoretical/legal basis for the imposition of vicarious liability, even the "deep pocket" aphorism is not without its drawbacks. The "deep pockets" justification on its own does not accord with an inherent sense of what

[1206] *Majrowski* para 14.
[1207] *Majrowski* para 145.
[1208] See e.g. *London Drugs* 336; *Bazley* paras 26-36. See generally, Atiyah *Vicarious Liability in the Law of Torts* (1967) 6-7; Fridman *The Law of Torts in Canada* vol 2 (1990) 314-315; Burns "*Respondeat superior* as an affirmative defence: How employers immunize themselves from direct negligence claims" 2011 *Michigan LR* 657, 671.
[1209] Williams 1956 *LQR* 522.
[1210] Prosser *Prosser and Keeton on the Law of Torts* 5ed (1984) 500 $69.
[1211] See *Soblusky v Egan* 1960 103 CLR 215, 229. See also McCarthy "Vicarious liability in the agency context" 2000 *Queensland University of Technology* 1; Baty *Vicarious liability: A short history of the liability of employers, principals, partners, associations and trade unions* (1916).

is fair.[1212] Alternative rationale put forward by the courts for the imposition of vicarious liability are policy and deterrence.

The leading South African case illustrating policy as the rationale for holding the employer vicariously liable for the negligence or improper conduct of its employees is *Feldman*.[1213] According to Watermeyer CJ:

> "… a master who does his work by the hand of a servant creates a risk of harm to others if the servant prove to be negligent or inefficient or untrustworthy; that because he has created this risk for his own ends he is under a duty to ensure that no one is injured by his servant's improper conduct or negligence in carrying on his work and that the mere giving by him of directions or orders to his servant is not a sufficient performance of that duty. It follows that if the servant's work or his activities *incidental or connected* with carried out in a negligent or improper manner so as to cause harm to a third party the master is responsible for that harm.[1214]

As well, the overriding factor of policy dictates that the employer should be made to bear the burden of paying out damages only where circumstances make it fair to require him to do so. Besides an ability to bear the loss, it must also seem just to place liability for the wrong on the employer.[1215] *K*[1216] spelled out the *raison d'etre* for the operation of the law of vicarious liability to include "deep-seated sense of justice that is served by the notion that in certain circumstances a person in authority will be held liable to a third party for injuries caused by a person falling under his or her

[1212] See generally, Flannigan "Enterprise control: The servant-independent contractor distinction" 1987 *UTLJ* 25, 29; Davis "Vicarious liability, judgement proofing and non-profits" 2000 *UTLJ* 407, 409-412; Note "An efficiency analysis of vicarious liability under the law of agency" 1981 *Yale LJ* 168, 169-173.

[1213] *Feldman v Mall* 1945 AD 733.

[1214] *Feldman* 741.

[1215] In *Bazley* para 31 McLachlin J addressed this concern as follows:

> "Vicarious liability is arguably fair in this sense. The employer puts in the community an enterprise which carries with it certain risks When those risks materialise and cause injury to a member of the public despite the employer's reasonable efforts, it is fair that the person or organisation that creates the enterprise and hence the risks should bear the loss. This accords with the notion that the person who creates a risk should bear the loss when the risk ripens into harm."

[1216] *K v Minister of Safety & Security* 2005 6 SA 419 (CC).

authority."[1217] It is a fact that employers of wrongdoers usually have deeper pockets than the wrongdoers themselves.[1218] Hence the State is usually in the firing line.[1219] MacMahon J, in the *Gorsline*[1220] case, had a practical view of this aspect of vicarious liability:

> "Even more plainly, the likelihood of recovery of a substantial award is improved if the victim has access to the employer's pocket. The bluntness of that justification is tempered by the rationale that it must be fair and just that the employer pay. Justice is found in the logic that it was the employer who created the risk, and so it should bear the loss. It is the employer who can best recover or minimize its loss by price adjustment, insurance, or resort to a tax base of a public body. Simply, it is a cost of doing business and thus recoverable through the business."[1221]

[1217] *K* para 24. See also Wagener "*K v Minister of Safety & Security* and the increasingly blurred line between personal and vicarious liability" 2008 *SALJ* 673; Fagan "Reconsidering *Carmichele*" 2008 *SALJ* 659 and "The confusions of *K*" 2009 *SALJ* 156; Boonzaier "State liability in South Africa: A more direct approach" 2013 *SALJ* 330.

[1218] *Lepore* para 303.

[1219] Cases on government liability ranging from bureaucratic negligence to police liability litigation are permanent features of the law reports. The latest addition to governmental liability jurisprudence is the arbitration between *Families of Mental Health Care Users Affected by the Gauteng Mental Marathon Project and National Minister of Health of the RSA* 2018 ("*Life Esidimeni Arbitration*") concerning the tragic demise of 144 psychiatric patients, and for which 55 mental health care users are still unaccounted for in the aftermath of their transfer from *Esidimeni* facilities in 2016. At paras 209-217 *Life Esidimeni Arbitration*, the former DCJ Dikgang Moseneke awarded one million each to the affected families for constitutional damages arising from the State's pervasive and reeking violation of the Constitution. The failure by the Limpopo High Court in *Komape v Minister of Basic Education* 2018 ZALMPPHC 18 paras 55-72 to award constitutional damages stands in sharp contrast to the progressive trend exemplified in *Life Esidimeni Arbitration*. The case concerned the tragic death of a five year old learner as a result of drowning in a school pit latrine in 2014. A more recent horrific learner pit toilet death case arose in the Eastern Cape, see: Etheridge "Girl, 5, dies falling into pit toilet at Eastern Cape school" *News 24* 28-03-18 available at https://www.news24.com/.../girl-5-diesafter-falling-into=pit-toilet-at-eastern-cape-sch (accessed 24-03-2018). For serious scholarly engagement see: Okpaluba & Budeli-Nemakonde "Quantification of damages for wrongful arrest, detention and malicious prosecution: A contextual analysis of contemporary appellate court awards in South in South (part 1)" 2017 *TSAR* 526; Okpaluba "Does prosecution' in the law of malicious prosecution extend to malicious civil proceedings? A Commonwealth update (part 1) and (part 2)" 2017 26 (2) *Stell LR* 402 and 2017 *Stell LR* 26 (3) 564; "Establishing state liability for personal liberty violations arising from arrest, detention and malicious prosecution in Lesotho" 2017 *AHRLJ* 134; "Current issues of constitutional damages litigation: A contextual analysis of recent Commonwealth Decisions" 2013 *Obiter* 252; "Reasonable and probable cause in the law of malicious prosecution: A review of South African and Commonwealth decisions" 2012 *PER/PELJ* 241; "Proof of malice in the law of malicious prosecution: A contextual analysis of Commonwealth decisions: 2012 *JJS* 65; "Constitutional & delictual damages for judicial acts and omissions: A review of *Claasen* & recent common law decisions" 2011/12 *Lesotho LJ* 1-36; 63. "Development of Charter damages jurisprudence in Canada: Guidelines from the Supreme Court" 2012 *Stell LR* 55; "State Liability for acts and omissions of police and prison officers: Recent developments in Namibia" 2013 *CILSA* 184 and "Of 'forging new tools'".

[1220] *SGH v Gorsline* 2001 ABQB 163 (CanLII).

[1221] *Gorsline* para 64.

Nonetheless, reference to the "long purse"[1222] rationale underscore the conceptual discomfort over attribution of vicarious liability on pragmatic grounds. The fairness argument is buttressed by the fact that the employing enterprise is in an ideal position to spread the losses "through insurance and higher prices, thus minimizing the dislocative effect of the tort within society".[1223]

The authors of *Government Liability* summarise policies at the heart of vicarious liability as follows:[1224]

- Dr Baty's "deep pocket" aphorism;
- Professor Atiyah's "principle of loss-distribution";[1225]
- Chief Justice Watermeyer's creation of risk of harm[1226] and McLachlin J's proposition that the employer's enterprise has created the risk and must therefore bear the responsibility of the employee's consequent wrong and that where the employee's conduct is closely tied to a risk that the employer's enterprise has placed on the community, the employer may justly be held vicariously liable for the employee's wrong;[1227]
- Howie JA's proposition that "fairness and reasonableness" do not require that "an employer should, in effect, be an insurer for the employee's wrongs in a situation such as the present";[1228] and
- Zulman JA's opinion in *ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd*[1229] to the effect that "it would not be sound social policy to hold an innocent master liable or responsible to a third party, where his servant steals his master's own

[1222] Seavey 1934 *Harvard Legal Essays* 450 writes:

> "The bald statement that a master should pay because he can pay may have little more than class appeal, although it is in conformity with the spirit of our times to believe that if one is successful enough either to operate a business or to employ servants, in addition to the income taxes taking off the upper layers of soft living, he should pay for the misfortunes caused others by his business or household."

[1223] *Bazley* para 31.
[1224] Okpaluba & Osode *Government Liability* 314.
[1225] Atiyah *Vicarious Liability* 22.
[1226] *Feldman* 741.
[1227] *Bazley* para 31.
[1228] *Ess Key Electronics (Pty) v FNB of Southern Africa Ltd* 2001 1 SA 1214 (SCA) para 18.
[1229] 2001 1 SA 372 (SCA) para 6.

property… Indeed [such act] is the antithesis of an act carried out in the course and scope of the servant's employment."

The second policy justification for imputing vicarious liability on the employer is "deterrence of future harm as employers are often in a position to reduce accidents and intentional wrongs by efficient organisation and supervision."[1230] This means that by holding the employer responsible, "the law furnishes an incentive to discipline servants guilty of wrongdoing".[1231] According to *Bazley* this policy ground is related to the first policy ground of fair compensation, as "[t]he introduction of the enterprise into the community with its attendant risk, in turn, implies the possibility of managing the risk to minimise the cost of the harm that may flow from it."[1232] Imposing vicarious liability is unlikely to result in heightened deterrence where those who control institutions or enterprises that engage in the intimate touching, for instance, in the process of conducting an abdominal ultrasound, and/or treatment of vulnerable individuals, to minimise the risk of harm to patients.[1233]

The deterrence factor does not arise as persuasive in cases involving sexual assault on children in an institutional setting.[1234] The situation with the school authorities is that they may not be able to prevent such assaults, much as criminal sanctions have failed to deter them. In *Lepore*, Gummow and Hayne JJ held that an allegation of negligence in choice or supervision of teachers, if made, would have required careful attention to matters such as the extent to which, at the time of assaults, school authorities could reasonably have known of the prevalence of such assaults. This approach is not surprising given that courts have held that even criminal law with its deterrent factors of incarceration and other forms of punishment has not succeeded in deterring sexual offenders against children and other crimes against humanity.[1235]

[1230] *Sagaz Industries* para 32; *John Doe v Bennet* 2002 NFCA 47 (CanLII).
[1231] Feldthusen "Vicarious liability for sexual torts" in *Torts Tomorrow* 1998 221, 224.
[1232] *Bazley* para 34.
[1233] *Weingel v Seo et al* 2005 265 DLR (4th) (Ont CA) para 51.
[1234] See e.g. *Jacobi* para 81.
[1235] See generally, Spies "Perpetuating harm: The sentencing of rape offenders under South African law" 2016 *SALJ* 389; Stevens "Recent developments in sexual offences against children – A constitutional perspective" 2016 *PER/PELJ* 1; Goldblatt "Violence against women in South Africa – constitutional responses and opportunities" in Dixon & Roux (eds) *Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution's Influence* 05(2017) Available at SSRN: https://ssrn.com/abstract=2872478 (accessed 13-1-2017).

Jacobi addressed the attribution of vicarious liability to a Boys' and Girls' Club for incidents of sexual assault perpetrated on children by its program director who had been employed to supervise the non-profit organization's activities and staff.[1236] The majority, through the judgment of Binnie J, dismissed the appeal from a judgment that had allowed an appeal from the attribution of vicarious liability to the Club. The rationale of the majority in *Jacobi* for declining to impose vicarious responsibility on the non-profit Boys' and Girls' Club was the lack of a sufficiently strong connection between the tortious act and the "job-creating enterprise" necessary to justify imposition of "no-fault liability on the employer."[1237] Accordingly, it would be difficult if not infeasible for an enterprise to structure inducements and precautions to deter sexually unacceptable conduct towards children.

Jacobi provides support for pragmatic social policy concern stemming from the foreseeability of the crippling of capacity of many charitable non-profit institutions and organizations to respond to the needs of those they serve, and the potential that these essential societal structures will be dismantled. The fears over the fate of those institutions and their programs were shared by the majority in *Jacobi* with the admonition that such organizations "might vote with their feet" if impressed with vicarious liability for actions "unknown, unauthorized and unforeseen".[1238]

6.3 Determining the Existence of Employer-Employee Relationship

The relationship that most commonly attracts vicarious liability is that of employer/employee. In order to come to grips with the application of strict, no-fault liability, the familiar problem of determining the existence of employment relationship once again merits a close attention. In effect, this allows us to take a second bite at labour law's recurrent headache of unravelling true employees from genuinely independent contractors. The distinction between an employee and an independent contractor is "rooted fundamentally in the difference between a person who serves his employer in

[1236] For detailed exposition of attribution theory, see Morgan "Recasting vicarious liability" 2012 *CLJ* 615.
[1237] *Jacobi* para 58.
[1238] *Jacobi* para 44.

his, the employer's business, and a person who carries on a trade or business of his own".[1239]

The requirement that employment relationship must exist is a convenient starting point in the enquiry into whether vicarious liability should be imposed. It is settled law that the relationship of employer to independent contractor does not generally give rise to vicarious liability.[1240] In a case where the wrongful act was committed by an independent contractor, a subcontractor, or the employee of the subcontractor, the force of argument would not justify the imposition of liability on employers. Here, the circumstances are such that the policy considerations underlying strict liability will not be satisfied because the employer does exercise control over the wrongdoer.[1241]

Determining whether a wrongdoer is an employee or an independent contractor remains an elusive proposition. The case of *Rieck*[1242] illustrates that the meaning of the term "employee" is dependent on the framework of the legislation in question. The respondent claimed damages for bodily injuries arising out of an incident in which she sustained gunshot wound after being taken hostage by robbers. The appellant's employees had fired gun-shots at the fleeing vehicle in an attempt to stop the vehicle. After conclusion of the trial, but before judgement, the appellant applied to introduce a special plea that the respondent's claim was precluded by section 35(1) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 ("COIDA"). It did so on the basis that the respondent was party to an employment contract with a labour broker, pursuant to which she was working for the appellant, so that on a proper construction of the definitions of "employer" and "employee", the appellant was her "employer" and thus immunised against actions for damages under section 35(1).

The Supreme Court of Appeal held that since a reasonable person would not have fired at the vehicle, the causing of bodily harm to the respondent had been wrongful as well as negligent, and it followed that the appellant was vicariously liable

[1239] *Marshall v Whittaker's Building Supply Co* 1963 109 CLR 210, 217.
[1240] *Burnie Port Authority v General Jones (Pty) Ltd* 1994 179 CLR 520, 575; *Vabu* para 32
[1241] See *Kandis v State Transport Authority* 1984 154 CLR 672, 692; *Northern Sandblasting (Pty) Ltd v Harris* 1997 188 CLR 313, 329-330; *Torette House Pty Ltd v Berkman* 1939 39 SR (NSW) 156, 170.
[1242] *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* 2007 2 SA 118 (SCA).

to the respondent for the harm caused. The court proceeded to provide a correct interpretation of the definitions of "employee" and "employer" which is the person with whom he is in contractual relationship of employment, even when he performs his contractual obligations for some other person. The appellant was admittedly not such a person and is not immunised against actions for damages by section 35.

ER24 Holdings[1243] grappled with the meaning of "employee" as defined in section 1 of COIDA.[1244] The essential question was whether a volunteer worker could recover damages for serious injuries caused by the employee of ER 24. On the facts, the court concluded that as the volunteer work was not remunerated, whether in cash or in kind, she was not an employee for the purposes of the Act.[1245]

6.4 The Role of Control in Vicarious Liability Disputes

Just as control appears as a crucial factor in drawing the line between workers who fell inside and outside of the labour law's umbrella, it also has a direct bearing on whether an employer will or will not be held vicariously accountable. Nearly every employment protection depends on the existence of employer/employee relationship, and every test considers the level of control that putative employers retain over workers.[1246] The presence of control determines the existence of employer/employee relationship for the purpose of vicarious liability. Despite novel permutations of retained influence, the foundations of control remain the same: it is expressed in the language of the employer being able to give orders and instructions to the employee regarding the manner in which the latter should carry out his or her work.[1247]

[1243] *ER24 Holdings v Smith NO* 2007 6 SA 147 (SCA).

[1244] S 1 of COIDA reads as follows:

> "'employee' means a person who has entered into or works under a contract of service or apprenticeship or learnership, with an employer, whether the contract is express or implied, oral or in writing, and whether the remuneration is calculated by time or by work done, or is in cash in kind…"

[1245] *ER24 Holdings* para 10.

[1246] Carlson "Why the law still can't tell an employee when it sees one and how it ought to stop trying" 2001 *Berkeley J. Emp. & Lab. L.* 295, 339.

[1247] See e.g. *Hopital Notre-Dame de 'Esperance and Theoret v Lauent* 1978 1 SCR 605 (SCC) 613; *Humberstone v Northern Timber Mills* 1949 79 CLR 389; *Zuijs v Wirth Bros (Pty) Ltd* 1955 93 CLR 561.

Capturing a countervailing trend in the case law, the ensuing discussion explains how other courts have taken wide ranging approach to control. By analysing each line of cases, a refocused vision of control can emerge that better captures the diverse forms of influence that firms retain in contemporary employment relationships.

6.4.1 The Australian Approach

In an attempt to navigate the haze of multitiered work relationships, courts in Australia have looked beyond the element of control and "organisation" test for answers. The emphasis is an approach that takes into consideration the overall relationship between the parties: the so-called "multi-factor test" enunciated in *Stevens*.[1248] By moving away from the actual exercise of control to the right to exercise it,[1249] this laid the basis for a nuanced approach to resolving a choice between employee status and independent contractor status. Despite reservations about control, it cannot be denied that it still has direct bearing on whether an employer will or will not be vicariously liable especially where an employer lends or leases its employee to another person.[1250]

[1248] *Stevens v Brodribb Sawmilling Co (Pty) Ltd* 1986 160 CLR 16,36-37 where Wilson and Dawson JJ held that: "In many, if not most cases, it is still appropriate to apply the control test in the first instance because it remains the surest guide to whether a person is contracting independently or serving as an employee. That is not now a sufficient or even an appropriate test in its traditional form in all cases because modern conditions a person may exercise personal skills so as to prevent control over the manner of doing his work and yet nevertheless be a servant…. The other *indicia* of the nature of the relationship have been variously stated and have been added to from time to time. Those suggesting a contract of service rather than a contract for services include the right to have a particular person to do work, the right to suspend or dismiss the person engaged, the right to the exclusive services of the person engaged and the right to dictate the place of work, hours of work and the like. Those which indicate a contract for services include work involving a profession, trade or distinct calling on the part of the person engaged, the provision by him of his own place of work or of his own equipment, the creation by him of goodwill or saleable assets in the course of his work, the payment by him from his remuneration of business expenses of any significant proportion and the payment to him of remuneration without deduction for income tax. None of these leads to any necessary inference, however, and the actual terms and terminology of the contract will always be of considerable importance."

[1249] Stevens 129. See also Brassey "The nature of employment" 1990 11 *ILJ* 889, 891-892.

[1250] See e.g. *Koruppan Bhoomides v Port of Singapore Authority* 1978 1 WLR 189; *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Ltd* 1947 AC 1, 10 (HL); *McDonald v The Commonwealth* 1945 46 SR (NSW) 129, 132.

The touchstone cases of *Vabu* and *Boylan Nominees*[1251] are emblematic of contemporary Australian approach to the problem of binary distinction between employees and independent contractors in resolving the question of vicarious liability. The facts in *Vabu* were that an unidentified courier cyclist wearing Vabu uniform had negligently injured a pedestrian during the course of his couriering activities. The pedestrian sued the courier company (the respondent) who engaged the couriers. The company paid the couriers based on fixed rates per delivery. It deducted a certain amount from their remuneration to contribute toward the cost of insurance. The couriers were required to use their own bicycles, but the company provided radio equipment and it allocated job by radio. It directed them to conduct their work in accordance with specific instructions concerning dress, appearance, language, delivery procedures and dealing with clients. The couriers were able to deal with the company as sole traders or members of a partnership or by means of their own companies.

The High Court of Australia had to consider the nature of the couriers' engagement and whether this constituted an employment relationship or an independent contractor relationship. A strong majority of the court[1252] found that, on the facts, the courier were employees of the respondent and consequently the respondent was vicariously liable for the tort of its employee. Whilst there were factors which indicated the existence of an independent contractor relationship, these were outweighed by other factors evidencing an employment relationship. The majority held further that in general under contemporary Australian conditions, the conduct of an enterprise in which persons are identified as representing that enterprise should carry an obligation to third persons to bear the cost of injury or damage to them as may fairly be said to be characteristic of the conduct of that enterprise. In coming to the contrary conclusion, the Court of Appeal fell into error in making too much of the circumstances that the bicycle couriers owned their bicycles, bore the expenses of running them and supplied many of their own accessories. However, on a thorough examination of the nature of the engagement between Vabu and the couriers, certain factors emerge from

[1251] *Boylan Nominees (Pty) Ltd t/a Quirks Refrigeration v Sweeney* 2006 227 ALR 46 (HCA) ("*Boylan Nominees*").
[1252] Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ in a joint judgment. McHugh J concurred in the result but not the reasoning. Callinan J dissented.

the facts to support a conclusion that the work practices imposed by Vabu indicated that the couriers were employees. The compelling factors were:

- The couriers were not providing skilled labour or labour which required special qualifications.
- The evidence showed that the couriers had little control over the manner of performing their work. There was not just a right to exercise control in collateral or incidental matters, rather, there was no considerable scope for actual exercise of control. Vabu's whole business consisted of the delivery of documents and parcels by means of couriers.
- The couriers presented to the public and to those using the courier service as emanations of Vabu. They were to wear uniforms bearing Vabu's log.
- There is the matter of deterrence, that is, the knowledge of Vabu as to the dangers to pedestrians presented by its bicycle couriers and the failure to adopt effective means for the personal identification of those couriers by the public.
- Vabu superintended the couriers' finances and there was no scope for the couriers to bargain for the rate of their remuneration.
- The situation in respect of tools and equipment also favours a finding that the bicycles couriers were employees. Apart from providing bicycles and being responsible for the cost of repairs, couriers were required to bear the cost of replacing or repairing any equipment of the company that was lost or damaged, including radios and uniforms.[1253]

McHugh J in this case did not adopt the traditional servant/independent contractor distinction. Rather, he found the respondent liable on the basis of agency principles.[1254] According to his lordship,[1255] rather than expanding the definition of employee or accepting the employer and independent contractor dichotomy, the preferable course was to hold that employers could be vicariously liable for the tortious conduct of agents who were neither employees nor independent contractors. To hold

[1253] *Vabu* paras 48-57.
[1254] *Boylan Nominees* para 84.
[1255] *Vabu* para 69. *R v Commonwealth Industrial Court Judges, Ex parte Cocks* 1968 121 CLR 313, 317, 325 and 327; *R v Coldham; Ex parte Australian Social Welfare Union* 1983 153 CLR 2971, 312-313; *Re Finance Sector Union of Australia; Ex parte Financial Clinic (Vic) (Pty) Ltd* 1992 178 CLR 352, 373.

that the couriers were employees would also require overruling the taxation decision of the Court of Appeal[1256] which classified all couriers (including motor vehicle drivers and bicycle riders) who worked for Vabu as independent contractors.

McHugh J also agreed with the majority that certain aspects of the work relationships between the respondent and the couriers suggested an employer-employee relationship according to the classical test, since the employer `had the power of selection of his employee; the payment of wages or other remuneration; the employer's right of suspension or dismissal. Nonetheless, the couriers were far removed from "the paradigm case of an independent contractor – the person who has a business enterprise and deals with any member of the public or a section of it upon terms and conditions that the contractor sets or negotiates."[1257]

Boylan Nominees represents an engaging contrast to the approach exemplified by the *Vabu* case. The judicial record in *Vabu* demonstrated that the agency principle adopted in *The Producers*[1258] was inapplicable to a case where injury was caused to a third party by the defendant's "mechanic". The *Boylan Nominees* majority also found the circumstances of *Vabu* to be dissimilar from those at issue for the following reasons:[1259]

- Mr Comninos, "our mechanic", who caused the injury, conducted a separate business, as indicated by his invoicing of Boylan for each job and Boylan's apparent insistence that he maintain his own insurance. The possible interposition of Mr Comninos' company underlined this finding that Mr Comninos was conducting his own business. Unlike the bicycle couriers in *Vabu* who were clearly not running their own business and were unable to make an independent career as freelance couriers.
- Boylan did not exercise control over the way the mechanic worked, whereas the bicycle couriers in *Vabu* were unable to exercise any significant degree of control over their work.

[1256] *Vabu Pty Ltd v Federal Commissioner of Taxation* (1996) 33 ATR 537.
[1257] *Vabu* para 68.
[1258] *Colonial Mutual Life Assurance Society Ltd v The Producers and Citizens Co-operative Assurance Company of Australia Ltd* 1931 46 CLR 41 (HCA).
[1259] *Boylan Nominees* para 31 and 32.

- Mr Comninos provided his own equipment and skill. Although the bicycle couriers in Vabu supplied their own bicycles, this represented a relatively small capital outlay and also provided the couriers with a form of transport and recreation outside work.
- Mr Comninos was not presented to the public as an "emanation" of Boylan.

Despite the documents referring to Mr Comninos as "our mechanic", this was simply an admission that he acted at the behest of Boylan. The employers in *Vabu*, by contrast, required the couriers to wear uniforms bearing their logo as a way of advertising their business and making it easy for the public to identify the courier's as their "own staff".

6.4.2 The Canadian Approach

In their attempts to clarify the meaning of control because no clear standard exists to outline the boundaries of employer-employee relationship, Canadian courts have resorted to a "comprehensive and flexible" approach. One of the most helpful authorities is the decision of Alberta's Public Service Employee Board (as it then was), in *The Crown in Right of Alberta*.[1260] That was a case deciding whether instructors of the Alberta Correspondence School were employees of the Crown or independent contractors. The decision is helpful in two respects. First, the Board undertook a thorough review of the various tests that the courts and administrative tribunals applied to the task of determining whether an employer-employee relationship exists on a given set of facts.[1261] *Alberta Correspondence School* also suggests that the absence of control does not equate to the absence of an employment relationship, but that control *exercisable* – not just actually exercised – by the employer is still relevant. This suggests that the court can take account of the *potential* for control that a candidate for employer status has over the employees in question.

The second way in which *Alberta Correspondence School* is helpful is in its discussion of the importance of the statutory purpose for which the question is being answered. It concluded that the purpose of the statute, though not entirely capable of overriding the facts and other legal tests, is highly important, and it comes into play

[1260] *Alberta Union of Provincial Employees v The Crown in Right of Alberta* 1988 PSERBR 856.
[1261] *Alberta Correspondence School* paras 37-41.

principally as a factor in influencing the weight to assign to the other *indicia* of control, entrepreneurship, and organizational integration. It said:

> "The final approach is the 'statutory purpose test' which, as its name suggests, directs that one look to the underlying purpose and policy of the particular statute in determining whether a person is an employee. One can hardly take issue with this…. Unless a decision maker knows the purpose of a law it cannot be properly interpreted." [1262]

We can distil the following guidance from *Alberta Correspondence School*:

- There is no definitive test for identifying an employer-employee relationship. There is instead a group and considerations that are more or less applicable depending upon the facts of the case and the purpose for which the determination is being made.
- Where the purpose of the determination is a statutory one, the objectives of the statute can be highly relevant in selecting the test and weighing the considerations that are available to the decision-maker.
- The approach of the decision-maker should be "comprehensive and flexible".[1263]
- The "control test" of *Montreal Locomotive Works*,[1264] expanded by *York Condominium*,[1265] is still an important test that will often decisively identify the employer-employee relationship. The enquiry into control, however, must not limit itself to *indicia* of day-to-day supervision over the work. Where control is shared, the decision-maker should look to the degree of control exercised over all aspects of the work, not just daily supervision.
- The control test, however, may be insufficient or even unsuitable in many modern relationships, especially where the ownership of the enterprise, and the knowledge and technical expertise necessary to operate the enterprise, do not reside in the employer.
- The "entrepreneur" test, encapsulated by the question "Whose business is this?" can be a useful method of analysis in identifying the employer-employee relationship. The entrepreneur test allows the decision-maker to take into account

[1262] *Alberta Correspondence School* paras 50.
[1263] See also *Pointe-Claire (City) v Quebec (Labour Court)* 1997 1 SCR 1015.
[1264] *Montreal v Montreal Locomotive Works* 1947 1 DLR 161 (PC 1946) (Can.).
[1265] *York Condominium Corporation No. 46 and Medhurst Hogg & Associates Ltd* 1977 OLRB Rep. 645

factors like ownership of the means of production, chance of profit and risk of loss, and responsibility for management of the enterprise.

- The "organisation" test, asking whether the "employee" is an integral part of the would-be employer's organisation, is probably unsuitable as a major test of the employment relationship. But it is still a valid question to ask because a thorough, ongoing integration into an enterprise will tend to characterise the relationship as one of service, not for specific services.

It is important also to appreciate the "enterprise test" as propounded by Flannigan[1266] and endorsed by La Forest J in a dissenting opinion in *London Drugs*,[1267] to the effect that the employer should be vicariously liable where: (1) he controls the activities of the employee; (2) he is in a position to reduce the risk of loss (3) he benefits from the activities of the employee; and (4) the true cost of a product or service ought to be borne by the enterprise offering it. Regardless of how the comprehensive and flexible approach is articulated, control's ubiquity means that it remains a concomitant factor in the determination of vicarious liability.[1268]

Sagaz Industries remains a *cause celebre* for the instructive analysis on vicarious liability. The plaintiff in *Sagaz Industries* was the principal supplier of car seat covers for a large retail store. The store terminated the supply relationship and switched to a competitor of the plaintiff because a marketing company retained by the competitor had bribed an employee of the retail store to switch suppliers. The plaintiff brought an action for damages against the competitor corporation and the marketing company for unlawful interference with economic relations. The trial judge assessed damages against the marketing company, but dismissed the action against the competitor. He held that the competitor corporation could not be held vicariously liable for the tortious acts of the marketing company, which was an independent contractor. After reasons for judgement were released, but before formal judgement was entered, a witness who had not testified at the trial provided an affidavit admitting to conspiracy to bribe the

[1266] Flannigan 1987 *UTLJ* 25, 30.
[1267] *London Drugs* 336.
[1268] Harper "Defining the economic relationship appropriate for collective bargaining" 1998 *Boston College LR* 329, 334 – characterising the common law test as "means to determine which party should be responsible for setting the level of precaution".

employee, and implicating others. The plaintiff brought a motion to have the trial reopened to hear the fresh evidence. The trial judge dismissed the motion, holding that he could not conclude that the evidence, if presented at trial, would probably have changed the result, and that the evidence could have been obtained before trial by the exercise of reasonable diligence. The Ontario Court of Appeal overturned that decision and found the competitor corporation vicariously liable.

In rejecting the finding of the Court of Appeal, the Supreme Court of Canada alluded to the fact that there was no employer-employee relationship between the competitor corporation and the marketing company. The marketing company was an independent contractor, a relationship that typically could not give rise to a claim for vicarious liability. Turning to the test formulated in *Market Investigations,*[1269] and subsequently applied in *Lee Ting Sang*,[1270] Major J held that the critical question was whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the extent of control the employer exerts over the worker's activities will always be a weighty factor. In addition, the issue of genuine entrepreneurial powers could point to independent contractor status. The factors here that may tilt the scale include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk undertaken by the worker, the degree of financial responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.[1271] It bears repeating that there is no universal test to determine whether a person was an employee or an independent contractor. The relative weight of each will depend on the particular facts and circumstances of the case.

Husak has expressed scepticism about the word "control" that hinges on employer's strict liability. Rather, the author employed the less rigid term "supervision".[1272] To this end, "no defendant who is held vicariously liable is selected randomly; the principles used to identify this defendant are not arbitrary. Vicarious

[1269] *Market Investigations Ltd v Minister of Pensions and National Insurance* 1968 3 All ER 732 (QBD).
[1270] *Lee Ting Sang v Chang Chi-Keung* 1990 2 AC 374, 382 (PC).
[1271] *Sagaz Industries* para 47.
[1272] Husak "Varieties of strict liability" 1995 *Can JL & Jur* 189, 125.

liability is imposed on someone who is in a position to have supervised and thus prevented the occurrence of the harm." The Supreme Court of Canada, relying on this definition in *Blackwater*,[1273] held that the degree of fault for the purposes of apportioning liability between two employers may vary depending on the level of supervision. Where, however, an employee has two or more masters, it is more likely than not that one must exercise more control or play more important role than the other, hence apportionment of damages reflected that approach. Adopting this approach, the Supreme Court concluded that the defendant state was a senior partner in the "joint enterprise, hence the 75-25 apportionment of responsibility was in order.

6.4.3 United Kingdom

Inconsistency pervades UK legal decisions determining who is, and who is not an employee.[1274] The endemic legal uncertainty is reflected by the fact that Lord Denning sought to experiment with the so-called "organisation" or "integration" test as a way of avoiding control or the quagmire of the subordination syndrome. The integration test asks whether the person worked as a part and parcel of the enterprise or whether the work "although done for the business" was[1275] not "integrated into it but [was] only accessory to it". While the integration test elided the notion of subordination, it left open the problem of defining the nature of the relationship between the employee and the enterprise that employed her.[1276]

The all-embracing "multiple" or "dominant-impression" test was pronounced by Cooke LJ in *Market Investigations*.[1277] In that case the issue was the classification for

[1273] *Blackwater v Plint* 206 258 DLR (4th) 275 (SCC) para 69.
[1274] The control test was taken to its logical conclusion when carrying a court held that nurses were not employees of a hospital when carrying out duties in the operating theatre as they took their orders from operating surgeon and not from the hospital authorities, see: *Hillyer v Governors of St Bartholomew's Hospital* 1909 2 KB 820. Cf *Cassidy v Ministry of Health* 1951 1 All ER 574.
[1275] Per Denning LJ (as he then was). *Stevenson, Jordan & Harrison Ltd v Macdonald & Evans* 1952 1 TLR 101 (CA) 11. Denning LJ had observed: "One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as integral part of the business; whereas, under the contract for service, his work, although done for the business, is not integrated into it but is only accessory to it." See also *Bank voor Handel en Scheepvaart NV v Slatford* 1953 1 QB 248 (CA) 295; *Albrighton v Royal Prince Alfred Hospital* 1980 2 NSWLR 542, 557-558. See also Winder "The contract of service" 1964 *LQR* 160.
[1276] Drake "Wage slave or entrepreneur?" 1968 *MLR* 417.
[1277] *Market Investigations* 737-738.

social security of a part-time market research interviewer. In terms of the dominant-impression test, courts are enjoined to take a holistic look at the totality of the contract so that it is read as a whole. The descriptions the parties have chosen to give the relationship are not dispositive of the employment status. The dominant impression test ushered in a checklist approach whereby not a single factor is determinative of the nature of the relationship.

The clearest illustration of the multifactorial approach is *Ready Mixed Concrete*.[1278] The case concerned the appellant company's liability for social security contributions of their workers for they were responsible only if they had contracts of service. The workers drove ready mixed concrete lorries they were buying on hire purchase agreement from the appellant company, which required in a detailed contract of 30 pages that they must, *inter alia*, use the lorry only on company business, maintain it in accordance with the company's instructions and obey all reasonable orders. Although this suggested a measure of close control, there were no requirements about hours of work and the times at which the drivers took holidays. Moreover, they could generally hire out the driving of their vehicle to another, and were paid, subject to a yearly minimum, according to the amount of concrete they transported. McKenna J identified three conditions for a contract of service. Firstly, the employee agrees that in consideration of a wage or other remuneration he will provide his own work and skill in performing some service for the employer. Secondly, the employee agrees expressly or impliedly that in the performance of that service, he will be subject to the employer's control to a sufficient degree, and thirdly, that the other provisions of the contract are consistent with it being a contract of service.

As already noted, the element of control remains important, though not decisive of the issue. In this connection, Henry LJ in *Lane*,[1279] posed the following questions: was the workman carrying on his own business, or was he carrying on that of his employer? Was the workman an employee "as a matter of economic reality?[1280]

[1278] *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* 1968 2 QB 497, 515-517.
[1279] *Lane v Shire Roofing Co Ltd* 1995 IRLR 493 (CA).
[1280] *US v Silk* 331 US 704 (1946).

The general principle that has been echoed in *Market Investigations*[1281] is clear: although the weight to be given to each factor to be taken into account in answering the question depends on the facts at hand, the question as to where the legal responsibility lies is one of law.[1282]

Echoes of *Vabu* are apparent in *Citysprint*.[1283] *Citysprint* raises a crisp point of law concerning the traditional "binary" divide between employees working under a contract of service and thus entitled to the full range of employee-protective norms, and independent contractors, self-employed under contracts for services beyond the scope of labour law. *Citysprint* concerned a cycle courier's claim for unpaid holiday pay. These claims all depended on worker status under one or several of the definitions outlined in statutes. In terms of section 230 of Employment Rights Act of 1996 ("ERA"), "employees" working under a contract of service of employment, come within the scope of protective measures once relevant qualifying periods have been met, including notably unfair dismissal protection. There is also "worker" status with entitlements including working time and national minimum wage protection. Workers are defined in section 230(3)(b) of the ERA as those working under "any other contract… whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual."

The claimant, Ms Dewhurst, a cycle courier contended that she was a worker within the meaning of section 230(3)(b) of the ERA, otherwise known as a "limb (b) worker". The manner in which the parties outlined their respective cases is both illuminating and worthy of repetition. According to the respondent's outline: "The respondent operates courier services around the UK. Self-employed van drivers, motorcycle riders and cycle couriers all make their services available to CitySprint, on relatively the same terms." [1284] In sharp contrast, when Ms Dewhurst was questioned

[1281] *O'Kelly v Trust House Forte plc.* 1983 IRLR 369 (CA); *Nethermere (St Neots) Ltd v Taverna and Gardiner* 194 IRLR 240 (CA); *Express and Echo Publications Ltd v Tanton* 1999 IRLR 367 (CA).
[1282] Cf *Chung and Shun Shing Lee v Construction & Engineering Co Ltd* 1990 IRLR 236 (PC).
[1283] *Dewhurst v Citysprint UK Ltd* ET/220512/2016 (05 January 2017).
[1284] *Citysprint* para 54.

she said: "I work hard for them so that they can maintain their relationship with their clients."[1285] To this Wade J added:

> "Not only is the phrase 'make their services available' as opposed to 'work for' a mouthful, it is also window dressing and I find Ms Dewhurst's description, to be more accurate. Her phrase expresses not only that she provided her services personally but that CitySprint was not her customer but her employer."[1286]

In short, the Employment Tribunal ("ET") found that the bicycle courier "is in a simple binary relationship with the respondent; one courier working personally for one organisation at any one time and any concept of her operating a business is a sham."[1287] Put differently, the claimant was "both economically and organisationally dependent upon CitySprint not only for her livelihood but also for how it is earned."[1288] The reasoning of the ET in this case resonates with the precarious position of bicycle couriers in *Vabu* as well as e-hailing drivers in the *Uber/Lyft* litigation.

6.4.4 United States

The American courts cautions us that the common law test contains "no shorthand formula or magic phrase that can be applied to find the answer [with respect to the definition of an employee] … all incidents of the relationship must be assessed and weighed with no one factor being decisive."[1289] With this caveat in mind, almost all legal tests for employment status under the state, federal and local law are variations of two dominant and overlapping tests: (a) the common law agency test and (b) the "economic realities" test. The dominant legal inquiry under the agency test and under most permutations of the economic realities test is the control inquiry, or the means/ends query, in which courts ask whether the alleged employer has the right to control only the "ends" of the work, or also the right to control the "manner and means" or "details" of the work.

[1285] *Citysprint* para 54.
[1286] *Citysprint* para 55.
[1287] *Citysprint* para 56. For further discussion, see: Prassl "Pimlico Plumbers, Uber drivers, Cycle couriers, and court translators: who is a worker? 2017 *LQR* (forthcoming).
[1288] *Citysprint* para 57.
[1289] *Nationwide Mutual Insurance Co. v Darden* 503 US 318, 324 (1992); *NLRB v United Insurance Co of America*, 390 US 254, 258 (1968).

The agency test is based on the doctrine of *respondeat superior*, which determined when principals were liable to third parties for the actions of their agents. Courts have never provided a clear justification as to why this test should determine the scope of the employment relationship.[1290] The economic realities test took hold after the 1944 Supreme Court decision in *Hearst*[1291] in which the court found that newspaper delivery persons were common law employees entitled to organise under the National Labour Relations Board ("NLRB"). In determining the employee status of newspapers delivery persons under the National Labour Relations Act ("NLRA"), Hearst argued that the court should look to the "mischief" the statute was intended to address to determine its scope. *Hearst's* interpretation of the common law was intended to bring within statutory coverage workers not subject to "physical control" or direct supervision, such as skilled artisans and unskilled workers doing simple work which the hirer can assess by inspection of the results.[1292] Based on the purposes of the NLRA, the court suggested that employees could be distinguished by the "inequality of bargaining power in controversies over wages, hours and working conditions".[1293] Whether there is a substantial difference between the economic realities and agency tests appears to depend on the disposition of the particular court and to the particular law of the state to a lesser extent.[1294] The charge of unwieldiness, imprecision and purposeless levied at the agency test tend to be apropos to the economic realities test as well.[1295] The charge of "simulated purposeless"[1296] is also apt.

The long running legal quarrels over FedEx drivers' employment status[1297] brings a different dimension to the issues that arose in *Vabu*. In the *FedEx* litigation of

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[1290] Linder "Towards universal worker coverage" 570.

[1291] *NLRB v Hearst Publications* 322 US 111 (1944). See also *Rutherford Food Corp. v McComb* 331 US 722 (1947).

[1292] Linder 1"Towards universal worker coverage".

[1293] *Hearst* 127.

[1294] See e.g. *United States v WM Webb* 397 US 179 (1970) 186-188; *NLRB v Town & Country Electric, Inc.* 516 US 85 (1995) 91-92; *Torres-Lopez v May* 111 F.3d 633 (9th Cir. 1997) 639-40.

[1295] See generally, Rogers "Toward third-party liability for wage theft" 2010 *Berkeley J. Emp. & Lab. L.* 31, 24-25; Goldstein *et al* "Enforcing fair labour standards in the modern American sweatshop: Rediscovering the statutory definition"1988 *UCLA LR* 983.

[1296] Linder "Simulated purposelessness".

[1297] FedEx has been litigating the employee status of its delivery drivers since the 1980s, including under its predecessor, Road Package Systems (RPS). The company expands substantial resources litigating its drivers' employment status, because the viability of it business model depends on avoiding the employment obligations faced by its main competitor, the unionised United Parcel Service (UPS). See

recent vintage[1298] overtime claims were brought against FedEx Ground Package for categorising its delivery drivers as independent contractors. Throughout, *FedEx* has asserted that its drivers are entrepreneurs and not employees. The decisions in the FedEx litigation are neither uniform nor predictable. While some federal circuit courts have declined to rule one way or the other on the issue[1299] and DC Circuit Court has rejected the drivers' claims of being employees because FedEx afforded them ample "entrepreneurial opportunity".[1300] However, the Seventh and Ninth Circuit Courts of Appeals issued opinions that definitely classified drivers as FedEx employees.[1301]

In *Slayman Inc.*,[1302] the court looked at the typical control topics of wages and daily supervision to consider FedEx's control over a diverse range of subjects such as the workers' appearance, behaviour, and equipment. After examining FedEx's operations with its drivers, the court found that "FedEx's controls its drivers' clothing from their hats down to their shoes and socks: through an elaborate appearance code.[1303] The court also alluded to the obligations that come with control by noting that it saw "no difference at all between [plaintiffs'] actual situation…and the situation of one hired to drive a [delivery] truck…owned and operated by [FedEx]."[1304] In short, FedEx retained sufficient powers over the drivers (whether "formally or functionally") such that it employed them.[1305]

Similar conclusions were reached in *Craig*, where the Seventh Circuit concluded that FedEx controlled many details of the drivers' work, from their delivery

FedEx Ground Package, NLRB No. 22-RC-12508 (Nov. 2 2004); *Estrada v FedEx Ground*, No. BC 210310, 2004 WL 5631425 (Cal. Super. Ct. July 26 2004); *Estrada v FedEx Ground Packages System*, 64 Cal. Rptr. 3d 327 (Ct. App 2007); *Sanders v FedEx Ground Package* Systems 144 NM 449 (2008); *FedEx Home Delivery v NLRB* 563 F.3d 492 (DC Cir. 2009); *Openshaw v FedEx Ground Package System 731* F.Supp.2d 987 (CD Cal. 2010); *Scovil v FedEx Ground Package System* 811 F.Supp.2d (D. Maine 2011); *Rocha v FedEx Corporation* 2014 WL 240711 F.Supp.2d (ND Ill. 2014).

[1298] See *Craig v FedEx Ground Package Sys. Inc.* 799 F.3d 818 (7th Cir. 2015) ("*Craig*"); *FedEx Ground Package Sys. Inc.* 799 F.3d 995 (8th Cir. 2015); *Carlson v FedEx Ground Package Sys. Inc.* 787 F.3d (11th Cir. 2015); *Alexander v FedEx Ground Package Sys. Inc*. 765 F.3d 981 (9th Cir. 2014); *Huggins v FedEx Ground Package Sys. Inc.* 592 F.3d 853 (8th Cir. 2010).

[1299] *Gray* 799 F.3d 1003; *Carlson* 787 F.3d 1326-27.

[1300] *FedEx Home Delivery v NLRB* 563 F.3d 492, 504 (DC Cir. 2009).

[1301] *Craig* 792 F.3d, 828.

[1302] *Slayman v FedEx Ground Package Sys. Inc.* 765 F.3d 1033, 1047 (9th Cir. 2014).

[1303] *Slayman* 792 F.3d 1042.

[1304] *Slayman* 792 F.3d 1045-46.

[1305] *Slayman* 792 F.3d 1047.

times to their reporting requirements to their hairstyles and socks.[1306] In its opinion on the same case, the Kansas Supreme Court had observed that "if a worker hired like an employee, dressed like an employee, supervised like an employee, compensated like an employee, and terminated like an employee, words in an operating agreement cannot transform that worker's status into that of an independent contractor."[1307]

FedEx Home Delivery[1308] and *Merchants Home Delivery Service*[1309] offer some insight into disclaiming of control over work relationship. In *FedEx Home Delivery*, the majority addressed the Regional Director's finding that many of the work rules contractually imposed by FedEx on its delivery drivers were the opposite of those that the NLRB had found probative of independent contracting and inconsistent with employment in prior cases – rules regarding, for example, uniforms and other appearance and grooming standards, mandatory package assignments and route assignments, specified insurance purchases, vehicle specifications and appearance requirements like logo display.[1310] The hirer's designation and provision of instrumentalities of work, the worker's inability to turn down tasks, the hirer's control over when and how long to work, and the inability to do business in its own name under the agreement, are evidence of employment status under the economic realities test.[1311] The majority held that the contract rules described the results in this case that the drivers agreed to provide,[1312] reflecting FedEx's "somewhat unique business model."[1313]

In *Merchants Home Delivery Service*, delivery drivers agreed, *inter alia*, to make deliveries "when requested" by Merchants, and Merchants issued reprimands when it felt a driver's performance did not meet contractual standards, such as those regarding vehicle appearance and maintenance, which Merchants monitored daily.[1314] After

[1306] *Craig* 335 P.3d 821.
[1307] *Craig* 792 F.3d 821.
[1308] See also Dilger "Pay no attention to the man behind the curtain: Control as a nonfactor in employee status determinations under *FedEx Home Delivery v NLRB*" (2010) *ABA J. Lab & Emp. Law* 123.
[1309] *Merchants Home Delivery Service* 230 NLRB 290 (1977), vacated 580 F.2d 966 (9th Cir. 1978).
[1310] *FedEx Home Delivery v NLRB* 563 F.3d 500-501.
[1311] *FedEx Home Delivery v NLRB* 563 F.3d 501.
[1312] *FedEx Home Delivery v NLRB* 563 F.3d 501.
[1313] *FedEx Home Delivery v NLRB* 563 F.3d 500.
[1314] *Merchants Home Delivery Service* 230 NLRB 291-292.

disagreeing with the NLRB, the court characterised the performance reprimands as control over the "results" of the drivers' work.[1315] The court came to this final conclusion:

> "Other elements relied on by the Board to show control by Merchants over the owner-operators' manner of delivery also relate to control of the result, not control of the means. For instance, Merchants must divide up the deliveries among its owner-operators, and the fact that it does so according to geographical area and in order to provide a reasonably uniform number of deliveries per delivery day relates to what it wants a particular owner-operator to do, not how it is to be done."[1316]

The pro-FedEx decisions raise the question of how courts transform work relationships between the giant package delivery company and thousands of low wage, unskilled, delivery drivers that look much like paradigms of industrial work, and without question entail disparities in economic power, into relationships of "independent contracting" and "entrepreneurialism". The decisions take what quite closely resembles an industrial employment relationship between highly supervised, relatively unskilled workers and large firm at the helm of a bureaucratic production process, and transforming it into a relationship between independent business owners and a service provider. Hirsch has cautioned that by focusing on entrepreneurial "opportunity," as opposed to actual engagement, this standard is subject to abuse by employers who may adopt policies expressly accounting for putative independent contractors' "entrepreneurial opportunities," even though those opportunities may only exist on paper.[1317]

6.4.5 South Africa

In 1979, the Appellate Division in *Smit,* placed its seal of approval on the dominant impression test as the surest guide to resolving the perennial problem of identifying an employee. For example, in *Midway Two Engineering,*[1318] the Supreme Court of Appeal held that in determining the relationship between the parties, the multiple test was to be preferred, taking into account all the relevant factors and

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[1315] *Merchants Home Delivery Service* 580 F.2d 966, 974 (9th Cir. 1978).
[1316] *Merchants Home Delivery Service* 580 F.2d 974.
[1317] Hirsch "New 'entrepreneurial opportunity' test for independent contractor status?" Workplace Prof Blog (Apr. 22, 209), http://lawprofessor.typepad.com/laborprof_blog/2009/week17/index.html (accessed 13-11-2017). See also Rubenstein "Employees, Employers, and quasi-employers" 620-622; Zatz "Beyond misclassification" 282-283.
[1318] *Midway Two Engineering and Construction Services v Transnet* 1998 3 SA 17 (SCA). See also *Van den Berg v Coopers & Lybrand Trust (Pty) Ltd* 2001 2 SA 242 (SCA) 258.

circumstances of the particular case.[1319] In *SITA*, the Labour Appeal Court 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.[1320] The "reality" test had been previously referred to by the Labour Appeal Court in *Denel* a case where a legal entity in the form of a close corporation had been interposed between what was ultimately found to be employer and employee.

The question that had to be addressed in the *Stein*[1321] case, was whether the employer was vicariously liable for the damage caused on a film set by two technicians hired to assist during a film shoot. The technical crew was hired to provide those skills set that the company could not provide for itself. The technicians brought their own equipment and used it at their own discretion and without the direction or instruction from the hiring company. After completing the assignment, the technical crew would invoice the company and would be paid accordingly. The judge held that the plaintiff had failed to establish the essential elements of vicarious liability on the part of the defendant company. In reaching the conclusion that the technicians were not employees of the company, the court relied on the dominant impression test. Van Heerden J reasoned:

> "The application of the dominant impression test thus requires a topological approach, according to which the right of control is not an indispensable requirement of the contract of service, but one of a number of indicia, the combination of which may be decisive. Other indicia which have been identified in the South African case law are: the nature of the work; the existence or non-existence of a right of supervision on the part of the employer; the manner of payment (e.g. whether the employee is paid a fixed rate or by commission); the relative dependence or freedom of action of the employee in the performance of his or her duties; the employer's power of dismissal; whether the employee is precluded from working for another; whether the employee is required to devote a particular amount of time to his or her work; whether the employee is obliged to perform his or her duties personally; the ownership of the working facilities and whether the employee provides his or her own tools and

[1319] See e.g. *McKenzie* 590F-591D; *SABC SOC Ltd v CCMA* 2017 ZALCD 22 paras 30-31; *Uber SA* para 73.
[1320] *SITA* para 12.
[1321] *Stein v Rising Tide Productions CC* 2002 23 *ILJ* 2017 (C).

equipment; the place of work; the length of time of the employment; the intention of the parties."[1322]

6.5 Vicarious liability in the context of Transportation Network Providers

Once the troublesome question of whether the wrongdoer is an employee of the defendant against whom the plaintiff seeks to recover is established, the daunting aspect of ascertaining whether the employee was acting within the scope and course of his/her employment when the delict/tort was committed arises. The scope of the term "course of employment" captures a number of different factual situations.[1323] These situations differ so widely from each other that it is hardly surprising that the treatment of the subject is sometimes confusing. This is as a result of the irreconcilable decisions given that the common-law courts and judges are by no means unanimous in their choice of terminology.[1324] However, logistical constrains precludes extensive foray into the complex question of the "course or scope of employment" or the "sphere of employment" or similar such expression designed to limit the scope of the employer's liability for the acts of the employee against third parties.[1325] In the remainder of the discussion, we touch upon the vexed issue of how delict/tort law is poised to unravel the novel liability problems emerging from the uberised economy.

It is clear that the popularity of transportation network companies (TNCs) functioning as ride-hailing and ride-sharing services such as Uber/Lyft have altered traditional conceptions of personal transportation. Simultaneously, self-driving automobiles are emerging as the future of vehicular travel. Self-driving technology is not an independent innovation; rather, it is uniquely intertwined with changes created

[1322] *Rising Tide Productions* 2024B-E.

[1323] In *Bugge v Brown* 1919 26 CLR 110 (HCA) Isaacs J, dealing with the meaning and implications of the terms "course of employment" and "scope of authority" in the law of vicarious liability, laid down what he considered to be the ten points. On the seventh point, he said the following:"The rule of law founded on that principle is that the master is responsible, provided the servant is acting in the 'the course of his employment'. That phrase and various corresponding phrases, such as 'scope of employment' … and other similar phrases are used to indicate the just limits of a master's responsibility for the wrongdoing of his servant. We have seen that the narrow view of 'limits of authority' whether actual or implied, or even where a definite prohibition against doing the act complained of exists, or where even the law itself forbids the act, does not determine the question of liability to answer for the wrings; for the act complained of may nevertheless be within the course of the employment…"

[1324] See e.g. *Kirby v National Coal Board* 1958 SC 514, 532; *Minister of Safety and Security v Jordaan Transport* 2000 4 SA 21 (SCA) para 5.

[1325] For a nuanced exposition see: Okpaluba & Osode *Government Liability* 334-359.

by transportation network companies. The technological innovations in vehicular transportation have far-reaching implications. These transformations also raise numerous liability questions.[1326] Specifically, the emergence of self-driving vehicles and transportation network companies create uncertainty for the application of tort law's negligence standard.[1327]

It will be recalled in the four cases that have attracted particular interest: *O'Connor*, *Cotter*, *Uber BV* and *Uber SA* the TNCs have argued that they were in a separate line of business than the drivers. Or, to put it another way, they were software companies that operate a mobile application-based platforms facilitating transactions between third parties offering rides and individuals seeking rides. The driver-partners were not employees of TNCs but independent micro entrepreneurs. The point was well put by Snelson J in *Aslam*, a decision endorsed by Eady QC in *Uber BV*. In dismissing Uber's cresting argument that the drivers were independent contractors because their positions afforded them "entrepreneurial opportunity", Snelson J said: "The notion that Uber in London is a mosaic of 30,000 small businesses linked by a common 'platform' is to our mind faintly ridiculous."[1328] As to Uber's contention that drivers might "grow" their businesses, this stand to be rejected because " …no driver is in a position to do anything of the kind, unless growing his business simply means spending more hours at the wheel."[1329] The fabrication of entrepreneurial opportunity masks the fact that Uber's bureaucratic coordination place drivers in precarious positions, thus rendering

[1326] See News Reporter "Pedestrian dies after being knocked by Uber self-driving car" *Associated Press* 19/03/2018 available at https://m.news24.com/World/News/pedestrian-dies-after-being-knocked-by-uber-self-driving-car-20180319 (accessed 19-03-2018); News Reporter "Fatal Uber crash could set back self-driving cars for years" *Bloomberg* 20 March 2018 available at https://mybraodband.co.za/new/motoring/252929-fatal-uber-crash-could-set-back-slef-driving-cars-for-year.html (accessed 19-03-2018); News Reporter "Our self-driving car would not have killed pedestrian like Uber – Google" Bloomberg 25 March 2018 available at https://mybraodband.co.za/news/motoring/253497-our-self-driving-car-would-not-have-killed-pedestrian-like-uber-google.html (accessed 19-03-2018).

[1327] See Wolpert "Carpooling liability? Applying tort law principles to the joint enterprise of self-driving automobile and transportation networks companies" 2017 *Fordham LR* 1863; Boeglin "The costs of self-driving cars: Reconciling freedom and privacy with tort liability in autonomous vehicle regulation" 2015 *Yale J.L. & Tech*. 171; Marchant & Lindor "The coming collision between autonomous vehicles and the liability system" 2012 *Santa Clara LR* 1321. See also Dawson "Who is responsible when you shop until you drop?: An impact on the use of the aggressive marketing schemes of "Black Friday" through enterprise liability concepts" 2010 *Santa Clara LR* 747, 751–752.

[1328] *Aslam* para 90.

[1329] *Aslam* para 90.

opportunities for commercial expansion and profit illusory. In other words, if a driver's rating declines, he/she is "deactivated" or "archived" – a moniker for termination. Uber's control over the means and manner of work is contrived as "entrepreneurial opportunity" despite the precarious position in which this placed a driver.

The critical distinction between employee and independent contractor is "the degree to which each function as entrepreneur, that is, takes economic risk and has the corresponding opportunity to profit from working smarter, not just harder."[1330] The more fundamental question is whether Uber drivers have entrepreneurial discretion to operate independent businesses? The plausible answer is that the Uber drivers' "businesses" are not viable on their own; they are not "functional economic vehicles."[1331] They do not have separate businesses and rely only on the Uber app to connect with passengers. The terms and prices are unilaterally dictated by Uber. It is beyond contention that e-hailing driver collaborators are engaged in disguised employment.[1332]

As much as Uber drivers look like entrepreneurs from a distance, however, the reality fails to convince. The stronger indications of economic dependency and vulnerabilities provide compelling reasons for classifying Uber drivers as employees. Otherwise, the oft repeated principle that "the labels placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced"[1333] would be a "lifeless slogan."

As discussed, control is not only a crucial factor in drawing the line between employees and independent contractors but it is an overriding element determining whether an employer will or will not be held vicariously liable. The control and supervision exercised by TNCs is nothing new: it is simply the scale of the arrangement that is different because of deployment of new technology. Expansive control and supervision by the "employing entity" is evident in the courier cases such as *FedEx*, *Vabu*

[1330] *Corp. Express Delivery Systems v NLRB* 292 F.3d 77, 780 (DC Cir. 2002).

[1331] *Alberta Union of Provincial Employees v The Board of Calgary* 2008 CanLII 51098 (AB LRB) para 233.

[1332] ILO Recommendation 198 concerning the employment relationship, 2006 (adopted 15 June 2006).

[1333] See *Fair Work Ombudsman* paras 17 and 21; *Belcher* paras 21-26; *SG Borello & Sons Inc. v Department of Industrial Relations* 256 Cal. Rptr 543, 547 (Cal. 1989); *Denel* para 17; *Dyokhwe* para 49-58; *Melmons Cabinet CC* paras 20–21. See generally, Cohen "Debunking the legal fiction" and "Identifying the true parties to an employment relationship"; Bogg "Sham employment in the Supreme Court"; Bosch "Contract as a barrier to 'dismissal".

and *Citysprint*. By contrast, through technology Uber/Lyft retain one-way control over drivers' performance but often acted upon that power as well.[1334] For example, although no supervisor physically observes drivers' work, the star-rating system casts customers as virtual supervisors who facilitate the monitoring and enforcement of conduct codes. Though there is a large measure of autonomy in the hands of the driver, it cannot be denied that once logged into an app, the actual day-to-day control resides with TNCs. The party imposing discipline is the TNC. Indeed, the *leit motif* behind the Uber/Lyft disputes is driver deactivation. By the same token, the quartet of Uber/Lyft cases demonstrate the fact that TNCs engage independent contractors and disclaim their status as employers, yet they may still effectively control partner-drivers' daily existence.

Take, for example, *Berwick*[1335] where the California Labour Department found Uber drivers were employees under a state statute. There, the agency analysed Uber's contract with a driver and scrutinised how Uber operates its business. It identified the driver's work as being an integral part of Uber's regular business. It further noted that Uber controls the tools and manner of its business by requiring iPhones, limiting the types of cars drivers can use, mandating that drivers have insurance, performing DMV background checks on prospective drivers, and setting all prices.

The existence of driver autonomy in the uberised economy may be more illusory than first appearance suggest. Given these realities, courts must fully assess all aspects of control and retained influence at the disposal of TNCs. Armed with this refocused vision of control and supervision, courts can cut through the independent contractor defence not only for the purposes of finding the existence of employer-employee relationship, but crucially for assigning vicarious responsibility to TNCs as

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[1334] For example, Confirmation and Cancellation Rate Process shows "Penalty Box warning" produces a standard form message which reads:

> "… we noticed that you have left your partner app running whilst you were away from your vehicle, and therefore have been unable to confirm your availability to take trips. As an independent contractor you have absolute flexibility to logo onto the application at any time, for whatever period you choose. However, being online with the Uber app is an indication that you are available to take trip, in accordance with your Services Agreement. From today, if you do not confirm your availability to take trips twice in a row we will take this as an indication you are unavailable and we will log you off the system for 10 minutes. *Aslam* para 52

[1335] *Berwick v Uber Techs Inc.*, No, 11-46739 EK, 2015 WL 4153765 (Cal. Dep't of Labour June 3, 2015).

they retain ultimate authority over the manner and means of modern work. This brings to the fore the vexed issue of vicarious liability of TNCs for wrongful acts of "employee-drivers" or "partner-drivers." In simple words, the critical question is: are early cases which have grappled with defining the scope of vicarious liability in motor vehicle accidents cases provide signposts for dealing with liability issues that are bound to emerge from Uber/Lyft cases?

Vicarious liability with respect to car accident cases[1336] has a long history and deep roots, going back at least to the federal appellate court in 1933 in *Callas*.[1337] In that case, the federal appellate court noted that the relationship between a taxi-service company and the driver is murky and difficult to decipher for liability purposes: "This case presents an aspect of the familiar but elusive problem of who is responsible for injuries caused by a cab performing under the colors and name of one of the so-called companies operating in Washington."[1338]

In *Callas*, a pedestrian operating a pushcart was struck and injured by a cab displaying the Diamond Cab Company logo. After analyzing the specific and unique structure of the company, the court noted that both *respondeat superior* and joint venture liability may apply to a taxi-service company.[1339] The cab company did not own the cabs, but it had its registered trade name and logo on the cabs, received thousands of dollars a month in revenues from cab operations, and had authority by its company charter to operate taxicabs. It was held that these facts are relevant to determine whether *respondeat superior* applies or whether a joint venture exists between the company and the drivers.[1340] In the result the court of appeals reversed the district court's directed verdict for the cab company and remanded the case.[1341]

[1336] For further discussion see: Keeler "Driving agents: to vicarious liability for (some) family and friendly assistance?" 2000 *Torts LJ* 1 ("Driving agents"); Martin "Commerce clause jurisprudence and the Graves Amendment: Implications for the vicarious liability of car leasing companies" 2007 *U. Fla. JL & Pub. Pol'y* 153; Sprouse "Grave danger? Concerns and possible solutions for individuals injured by drivers of leased vehicles 2010 *Suffolk J. Trial & App. Advoc*. 209.
[1337] *Callas v Independent Taxi Owners Association* 66 F.2d 192 (DC Cir. 1933).
[1338] *Callas* 66 F.2d 192-193.
[1339] *Callas* 66 F.2d 194-195.
[1340] *Callas* 66 F.2d 195.
[1341] *Callas* 66 F.2d 195.

Rhone[1342] rejected the taxi company's assertion that the driver was not its employee or agent. Instead, the court noted that taxi companies cannot hide behind clever arrangements to avoid typical tort liability for negligence of drivers, as such attempts deceive the public in creating a perception of responsibility on the part of the taxi company whose logo and advertising is relied upon by customers. As a result, the court held that the facts supported vicarious liability under a *respondeat superior* or agency theory.[1343] The facts in *Rhone* were that a passenger in a cab was injured and sued the driver, owner, and a taxi company that dispatched the cab. The cab was registered by the taxi company for permit purposes and bore the taxi company's logo.[1344] The taxi company also advertised its services and sent the cab in question when the plaintiff called the taxi company's advertised phone number. But the taxi company maintained that it was a "non-profit-sharing corporation, incorporated under the laws of the District of Columbia for the purpose of furnishing its members a telephone service and the advantages offered by use of the corporate name, while the company did not own this cab or any other cab."[1345] Further, the taxi company delineated its drivers as independent contractors.

Callas and *Rhone* illustrates that a factual analysis is needed when determining a taxi service liability for a driver's negligence. A final point emerging from these two early cases is that *respondeat superior*, liability for independent contractors, and joint enterprise liability are all viable avenues for the court to find vicarious liability.

In Australia the foundational authority for vicarious liability for driver's negligence is *Sobluksy*.[1346] There the owner of a vehicle was asleep in the passenger's seat at the time the driver negligently caused an accident. Another passenger sued the owner on the basis of vicarious liability. After reviewing a line of earlier English precedents, the High Court of Australia held:

> "The owner or bailee being in possession of the vehicle and with full legal authority to direct what is done with it appoints another to the manual work of managing it and to do this on his behalf in circumstances where he can always assert his power of control. Thus it means in point of law that he is driving by his agent. It appears quite immaterial that Soblusky went to

[1342] *Rhone v Try Me Cab Co* 65 F.2d 834 (DC Cir. 1933).
[1343] *Rhone* 65 F.2d 835-836.
[1344] *Rhone* 65 F.2d 835.
[1345] *Rhone* 65 F.2d 834.
[1346] *Sobluksy v Egan* 1959 103 CLR 215.

sleep. That meant no more than a complete delegation to his agent during his unconsciousness. The principle of the cases cited is simply that the management of the vehicle is done by the hands of another and is in fact and law subject to direction and control."[1347]

Another important case is *Morgan*.[1348] In this case, the House of Lords held that in order to affix liability on the owner of a car for the negligence of its driver, it was necessary to show either that the driver was the owner's servant or that, at the material time, the driver was acting on the owner's behalf as his agent. To establish the existence of the agency relationship, it was necessary to show that the driver was using the car at the owner's request, express or implied, or on his instructions, and was doing so in performance of the task or duty thereby delegated to him by the owner. The fact that the driver was using the car with the owner's permission and that the purpose for which the car was being used was one in which the owner had an interest or concern, was not sufficient to establish vicarious liability. The use of the concept of agency in this context to found liability has been criticized as artificial and wrong in principle.[1349]

6.5.1 *Respondeat Superior* and Taxi Companies

Taxi service companies do not always fit a basic employer-employee business, which makes strict liability difficult to establish in certain cases. A finding of an employment relationship is easiest when a taxi company owns its own cars. Generally speaking, the company's ownership of the car may create a rebuttable presumption of an employment relationship for the purpose of *respondeat superior*. Similarly, liability also may attach when a car is leased to the driver by the taxi company or another entity. *Ginns*[1350] concerned a taxi driver who shot a passenger over a fare dispute. The court recognised that the taxi company, through a related entity, set up a lease and payment arrangement in an attempt to categorise drivers as independent contractors to avoid liability. But the court looked at the particular facts to determine whether an employment relationship existed. In particular, the court noted that the related entity owned the cabs and leased them to drivers while the taxi company operated a dispatch

[1347] *Soblusky v Egan* 231.
[1348] *Morgan v Launchbury* 1972 2 All ER 606.
[1349] Reynolds *Bowstead and Reynolds on Agency* (2001) 8-176; Dal Pont *Law Agency* (2001) 22.35; Fridman *The Law of Agency* (1996) 304; Keeler "Driving agents".
[1350] *HT Cab v Ginns* 280 S.W.2d 360 (1955).

service that connected drivers to passengers. The taxi company earned a weekly flat fee, drivers kept all of their fares with no accounting, and drivers could choose when they worked. The court noted this chosen business setup was obviously intended to shield the taxi company from liability, but that a jury could still reasonably find that liability attaches under the doctrine of *respondeat superior*.

In a similar vein, in *Scott*,[1351] a workers' compensation case, a taxi driver was deemed an employee of the dispatch service that leased him the cab. The cab was owned by Manzi Taxi, a company that leased its cabs to a dispatch service and also happened to serve as a corporate officer for that dispatch service. The dispatch service, which then subleased the cabs to individual drivers, argued that the drivers were independent contractors.[1352] The court examined the relationship among the drivers and the dispatch service and held that the drivers were employees of the dispatch service. In particular, the dispatch service monitored the driver's movement, prevented the driver from rejecting fares, required that his radio be left on, and possessed the power to dismiss him. It was held that the dispatch service had sufficient control over the driver to deem him an employee for workers' compensation purposes.

Ownership of vehicles is not necessarily a bar to finding that drivers were employees of a taxi-service company. In *Weingarten*,[1353] another compensation case, the rationale for deeming a limo owner-driver an employee of the dispatch service was the fact the latter had "complete control over the solicitation and scheduling of voucher fares".[1354] In addition the dispatch service had "exclusive authority over the handling and processing of the voucher payment system."[1355]

In the instant case, the dispatch service had the following requirements: participants in the dispatch service must own their limousines, must supply their own insurance and other costs, must purchase a certain number of shares in the dispatch service, and must use two way radio supplied by the dispatch service. Although the dispatch service did not dictate drivers' hours, it did place drivers on a list and assigned

[1351] *Scott v Manzi Taxi & Transportation Co.* 179 AD 2d 949 (NY App. Div. 1992).
[1352] *Scott* 950.
[1353] *Weingarten v XYZ Two Way Radio Service* 183 AD 2d 963 (NY App. Div. 1992).
[1354] *Weingarten* 183 AD 965.
[1355] *Weingarten* 183 AD 965.

fares in the order they appeared on the list. While drivers could decline some fares, they were required to take certain "voucher" fares and faced penalties if they took fares from other sources. These facts, amongst others, established that, for the purposes of workers' compensation coverage, the drivers were employees of the dispatch service even though they owned their own vehicles.

6.5.2 Independent Contractor Liability for Drivers

When an independent contractor drives a taxi, vicarious liability may nonetheless attach, such as when the driver performs a non-delegable duty or has apparent authority. When is a duty non-delegable? In *Leichardt Municipal Council*,[1356] Gleeson CJ neatly expressed the proposition of law concerning the nature or content of the duty of care as follows:

> "A conclusion that, in given circumstances, a defendant who is sued in negligence owed a duty going beyond a duty to exercise reasonable care to avoid injury (or injury of a certain kind) to a plaintiff, and extending to a duty to ensure that reasonable care to avoid injury to the plaintiff was exercised, is commonly described as a conclusion that a defendant was under a non-delegable duty of care to a plaintiff."[1357]

It is not surprising that the principle of non-delegable duty has been explained as one that enables a plaintiff to sidestep the general principle that a defendant is not vicariously liable for the negligence of an independent contractor.[1358] From this, it is easy to conclude that a non-delegable duty as a personal duty cannot be discharged by having it performed by a skilled person since it "involves, in effect, strict liability upon the defendant who owes that duty".[1359] Unlike their American, and Commonwealth counterparts, the courts in South Africa have flirted with the concept of non-delegable duty of care without necessarily embracing it.[1360]

[1356] *Leichardt Municipal Council v Montgomery* 2007 HCA 6. For an especially rich account of pertinent jurisprudence on the concept of non-delegable duty, see: Okpaluba & Osode *Government Liability* 317-333.
[1357] *Leichardt Municipal Council* para 6.
[1358] *Leichardt Municipal Council* 2007 HCA 6 para 6.
[1359] *Scott v Davis* 2000 204 CLR 33 para 248.
[1360] *Chartprops 16 (Pty) Ltd v Silberman* 2009 1 SA 265 (SCA). Cf *Handaker v Idle District Council* 1937 AD 12, 18 and 23; *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 1 SA 1 (A) para 14.

In some instances in which taxis are regulated, their safe operation has been deemed a non-delegable duty by some courts.[1361] As a consequence, the taxi service has the duty to ensure taxis that are operated on its license or other regulatory compliance are operated safely. The status of the driver as an independent contractor (instead of an employee) would not insulate the taxi service from liability. Instead, the independent contractor who is carrying out a non-delegable duty for the taxi service is responsible. For example, in *Hamid*,[1362] a pedestrian was struck by a driver of a taxicab, who was operating under the permit of a third-party license holder. The court held that the permit holder was vicariously liable for the driver's negligence. The court also noted that operating a taxi service is a privilege and not a right, and taxi services are common carriers under the law. It follows that the entity holding the permit has a duty to make sure taxis are operated in a non-negligent manner, and thus is on the hook for the negligence of a driver operating under its permit.[1363]

Hamid shows that taxi or transportation companies may be vicariously liable for the tortious acts of independent-contractor drivers, including under agency law and by virtue of regulations. Another avenue for imposing liability in the context of uberised economy is joint enterprise liability.

6.5.3 Joint Enterprise Liability in the Transportation Industry

The American experience indicates that joint enterprise liability is an important tool in tort cases involving complicated relationship among transportation industry actors.[1364] TNCs are textbook examples of a complicated relationship among transportation service providers. Recall Uber/Lyft description of their business identities was unmasked as a modified Ponzi scheme: Uber and Lyft were engaged in software development and not in the transportation industry, and thus the services drivers provided were not part of the business operated by them. Put simply, they produce and sell software which helps connect independent transport services providers

[1361] See e.g. *Johnson v Pacific Intermountain Express Co* 662 SW 237 (Mo. 1983); *Styles v Dennard* 104 SE 2d 258 (Ga. Ct. App. 1958).
[1362] *Hamid v Metro Limo Inc* 619 So. 2d 321 (Fla. Dist. Ct. App. 1993).
[1363] *Hamid* 619 So. 2d 322.
[1364] McPeak "Sharing tort liability in the new economy" 211-215.

with passengers. The illusion of Uber narrative that it was a technology company and not in the transportation services was resoundingly rejected by the North California District Court: "Uber does not simply sell software; it sells rides. Uber is no more a 'technology company' than Yellow Cab is a 'technology company' because it uses CB radios to dispatch taxi cab."[1365]

Joint enterprise liability has been found based on the relationship between a driver, a car owner, and a taxi company. In *Parham*,[1366] the court upheld a jury verdict against two related taxi companies on theories of *respondeat superior* and joint enterprise liability. In that case, the driver leased the cab from the cab's owner, and together the driver and cab owner entered into an agreement with two, related taxi companies. The car bore one of the taxi company's insignia, the taxi companies required the driver to show proof of license and driving history, the driver paid a monthly due to the taxi companies, and the taxi companies required reports on any incidents. The court held that these facts supported the jury's findings of joint venture liability for the driver, cab owner, and taxi companies.

If it is possible to detect in *Parham* case some leaning towards a finding of joint venture liability for the driver, cab owner, and taxi companies, that tendency was very much marked in *Johnson*. [1367] There, a third party logistics provider, Marlo Transport, was liable for the negligence of a truck driver who was shipping some goods for an underlying customer. Marlo Transport set up a shipment for Tabor, the tractor-trailer leaseholder who employed the negligent driver.[1368] During the shipment, the tractor-trailer collided with plaintiff's husband, killing him.[1369] Tabor and his drivers were small operators who were not authorised as freight carriers under the then-existing regulatory scheme, but Marlo nonetheless engaged the services of Tabor to facilitate the transaction for hauling goods.

The Supreme Court of Missouri upheld a finding of joint venture liability as to Marlo Transport and Tabor.[1370] It noted that Marlo Transport located the customer for

[1365] *O'Connor* 10 cited in *Aslam* para 89.
[1366] *American Association of Cab Companies Inc. v Parham* 661 SE 2d 161 (Ga. Ct. 2008).
[1367] *Johnson v Pacific Intermountain Express Co* 662 SW 245.
[1368] *Johnson* 239-240.
[1369] *Johnson* 238.
[1370] *Johnson* 241-242.

Tabor, collected payment, and kept twenty-five percent of the revenue for its brokerage service. It explained the reason why the factual matrix support joint enterprise liability:

> "A joint venture is a species of partnership. The distinction between a joint venture and a conventional partnership is that the former exist for a particular, defined purpose. Although joint venture is a consensual arrangement, no particular formalities are necessary. There may perfectly well be a joint venture for a single truck haul. There is a mutual agency among venture for a single truck haul. There is a mutual agency among the venturers for activities within the scope of the venture, and all have equal right of control….Marlo, then, was instrumental in launching and directing the truck journey. This is not a situation in which Marlo should be allowed to escape liability by asserting independent contractor status. Our court have been hesitant to uphold claims for this kind of immunity…. The usual rule holds those who engage in business for profit liable in damages, on the usual negligence principles, to those who are injured in the course of the business operations. There is no reason to relieve Marlo of this normal and usual liability."[1371]

Virtually the same joint venture like partnership is manifested in the relationship between TNCs and partner-drivers. Thus, joint enterprise liability cannot be ruled out simply because Uber/Lyft misclassify drivers as independent transport service providers.

6.6 The Franchisor Vicarious Liability Analogy

It is evident from what has already been stated in Uber/Lyft companion cases that the TNCs have vigorously objected to their characterisation as employers of drivers, insisting that the latter are entrepreneurs providing transportation services to passengers. It is conveniently asserted that Uber owns no vehicles as it does not provide transportation. Uber itself, for example, maintains steadfastly that it does employ any drivers. The fact that TNCs dictate critical terms of the transaction, including the details of the driver's compensation as well as performance, is simply a means to protect the integrity of their brands as software developers. Stated another way, control exercised by ridesharing companies cannot transform entrepreneurial drivers into employees. Uber/Lyft arguments mirror submissions which prevailed in disputes about whether franchisors were employers of their franchisees or the joint employer of their franchisees' employees.

Critical to the franchise arena is the orthodox position affirmed by the courts is that franchisor-imposed quality control standards inherent to the franchise form should

[1371] *Johnson* 248.

not weigh in favour of finding that the franchisee's worker is an employee of the franchisor.[1372] If the franchisor "controls" does not equate to "employer status" and the creation of the employer-employee relationship, then by parity of reasoning, imposition of vicarious liability on the franchisor is entirely rejected. As we scrutinise the paradigms of franchising and the independent contractor relationship between franchisors and franchisees, the logic of Uber/Lyft that the relationship between TNCs and drivers is no different to that of a franchisor-franchisee seems persuasive. Viewed from this perspective, Uber/Lyft drivers are latter-day entrepreneurial franchisees.

The bedrock principle of franchising is that franchisors and franchisees operate under an independent contractor relationship; indeed, "if the law was otherwise, every franchisee who independently owned and operated a franchise would be a true agent or employee of the franchisor. It is also emphasised that the franchisor "controls" over its franchisees is specifically to ensure that the franchisor's trade mark serves its intended purpose:[1373] uniformity of goods or services of a certain type and quality, uniformity of appearance, and uniformity of operations.[1374] There are benefits accruing from this type of franchisor control: the franchisee benefits from the goodwill attached to the franchisor's brand that, in large part, arose from the standards that the franchisor imposes on its franchisees.[1375] "The goal – which benefits both parties to the contract – is to build and keep customer trust by ensuring consistency and uniformity in the quality of goods and services, the dress of franchise employees, and the design of the stores themselves."[1376] From this standpoint, tremendous control over the operations and performance of drivers through the instrumentality of a smartphone technology and customer ratings provide a means of protecting Uber/Lyft brand.

[1372] *Jacobson v Comcast Corp.* 740 F. Supp. 2d 683 (D. Md. 2010). See also *Moreau v Air France* 356 F.3d 942 (9th Cir. 2004); *Zheng v Liberty Apparel Co.* 355 F.3d 621 (2d Cir. 2003); *Chen v Street Beat Sportswear* 364 F. Supp. 2d 269 (EDNY 2005).
[1373] See e.g. *Rainey v Langen* 998 A.2d 342, 348 (Me. 2010); *Cislaw v Southland Corp.* 4 Cal. App. 4th 1284, 1284, 1292 (1992).
[1374] Kaufmann *et al* "A franchisor is not the employer of its franchisees or their employers" 55.
[1375] *Patterson v Domino's Piazza LLC* 33 P.3d 723, 725 (Cal. 2014).
[1376] *Patterson v Domino's Piazza LLC* 33 P.3d 723, 733 (Cal. 2014);

Generally, courts are reluctant to hold franchisors liable for acts of their franchisees, because franchisors are often removed from the situation.[1377] A clear trend in the franchisor case law is that the quality and operational standards and inspection rights contained in a franchise agreement are generally insufficient to support franchisor vicarious liability.[1378] Therefore, the Oregon Supreme Court judgement in *Miller*[1379] rests on shaky grounds. *Miller* involved the plaintiff who bit into sapphire stone while eating a Big Mac at a franchised McDonald's restaurant. The Oregon Supreme Court arrived at a contrary conclusion with respect to McDonald's, reversing a lower court grant of summary judgement to McDonald's in a vicarious liability case, and held instead that there was an issue of fact for trial on whether McDonald's had the right to control the precise element of its franchisee's business that allegedly resulted in the harm to the plaintiff.

This brings us to the critical franchisor vicarious liability cases of *Kerl*[1380] and *Coleman*.[1381] In *Kerl*, an individual employed by a franchised Arby's restaurant shot and fatally wounded his former girlfriend and killed her fiancée. The girlfriend and the estate of her fiancée sued both the franchisee and franchisor, Arby's Inc. At the trial court level, Arby's moved for summary judgement, which the Wisconsin Circuit Court granted and the Wisconsin Court of Appeals affirmed. On further appeal, the Wisconsin Supreme Court affirmed the lower court's grant of summary judgement to Arby's. Emphasising the franchisor's control or right of control over franchisee is not sufficient to ground a claim for vicarious liability as general matter or for all purpose, the court concluded that "… franchisor may be held vicariously liable for the tortious conduct of its franchisee

[1377] See generally, Killion "Franchisor vicarious liability – The proverbial assault on the citadel" 2005 *Franchise LJ* 162, 164; King, Jr. "Limiting the Vicarious liability of franchisors for the torts of their franchisees" 2005 *Wash. & Lee LR* 417"; Hanks "Franchisor liability for the torts of its franchisees: the case for substituting liability as a guarantor for the current vicarious liability" 1999 *Okla City U LR* 1, 3; Hanson "The franchising dilemma continues: update on franchisor liability for wrongful acts by local franchisees" 1997 *Campbell LR* 91, 105-09; Flynn "The law of franchisor vicarious liability: a critique" 1993 *Columbia Business LR* 89; Laufer & Gutnick "Minimizing vicarious liability of franchisors for acts of their franchisees" 1987 *Franchise LJ* 3, 5.

[1378] See e.g. *Schoenwandt v Jamfro Corp.* 689 (NY. App. Div. 1999); *Lewis v McDonald's Corp.* 664 NYS. 2d 461 (NY. App. Div. 1997*); Helmchen v White Pantry Inc.* 685 NE.2d 180 (Ind. Ct. App. 1997).

[1379] *Miller v MacDonald's Corp* 945 P.2d 1107 (Or. Ct. App. 1997).

[1380] *Kerl v Dennis Rasmussen Inc* 273 Wis. 2d 106 (Wis. 2000).

[1381] *Corworx Staffing Services, LLC v Coleman* No. 2005436F, 2007 WL 73893 (Mass. Super. Ct. Feb. 7, 2007).

only if the franchisor has control or a right of control over the daily supervision of the specific aspect of the franchisee's business that is alleged to have caused the harm."[1382]

At issue in *Coleman* was whether the franchisor of a temporary staffing company could be held vicariously liable for the alleged act of its franchisee, who allegedly interfered with the contractual relations of a competitive staffing business. Granting Express Services' motion for summary judgement, the court explained:

> "The franchise relationship is very different in nature from the traditional master/servant relationship applicable to a contract for employment. The franchisor must exert some degree of control over the franchise to protect its trade or service mark. As a consequence, the majority of courts look to whether the franchisor exercised control over the day-day operations of the franchise or controlled through the franchise agreement the instrumentality which caused the harm ….
> [A]pplying strict liability to a franchisor for the acts of its franchisee would be unfair because the franchisor's control usually does not consist of routine, daily supervision and management of the franchisee's business, but, rather, is contained in contractual quality and operational requirements necessary to the integrity of the franchisor's trade or service mark."[1383]

Courts adjudicating vicarious liability claims against franchisors have often reached the same result. In *Folsom*[1384] it was held that the estates of murdered employees of a franchised Burger King restaurant could not proceed in a wrongful death action against franchisor Burger King since it did not retain control over the security of the franchised restaurant. A similar result was reached in *Hart*[1385] In that case, a hotel franchisor was found not vicariously liable for an injury sustained by a guest at a franchised hotel. Analysed from this vantage point, franchising model not only enables TNCs to function beyond the protective domain of labour law, but to escape the reach of vicarious liability as well.

6.7 Imposing Vicarious Liability on TNCs

Once it is accepted that engagement of transportation service providers by TNCs is no longer a significant boundary in determining whether or not there is an

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[1382] *Kerl* 273 Wis. 2d 131-132. See also *Papa John's International Inc. v McCoy* 244 SW 3d 44, 54, 56 (Ky. 2008); *Hoffnagle v McDonald's Corp*. 522 NW 2d 8008, 814 (Iowa 1994).
[1383] *Coleman* 5-6.
[1384] *Folsom v Burger King* 958 P.2d 301 (Wash. 1998). The court in *Schlotzsky's Inc. v Hydel* 538 SE.2d 561 (Ga. Ct. App, 2000) granted summary judgement to the franchisor in an action brought by patron of a franchised restaurant who contracted an illness from consuming tainted food.
[1385] *Hart v Marriot International Inc*. 758 NYS.2d 435 (NY. App. Div. 2003).

existence of an employment relationship, and concomitant control and supervision at the hands of the TNCs, it becomes impossible to exclude vicarious liability. A discussion of the case law pertaining to *respondeat superior* and joint liability of transportation actors, policy considerations support the use of vicarious liability in the uberised economy context, particularly the idea of compensation and cost allocation. A case by case analysis is required before strict liability attaches as the TNCs vary dramatically in the services they offer and the control they exert over providers.

If the issue of liability to third parties for wrongdoing by independent contractor driver-partners was at stake in the *Uber/Lyft* quartet, it is submitted that the case law and policy considerations would have augured in favour of imposition of strict liability on TNCs. If we were to apply *Vabu* regardless as to how Uber/Lyft classify their businesses and their workers, both the facts and the broader policy concerns would support imposition of vicarious liability. The position of Uber/Lyft partner-drivers bears close resemblance to that of bicycles couriers in *Vabu*. Uber/Lyft drivers like the couriers were not providing skilled labour or labour which required special qualifications.[1386] Once logged onto the app, TNCs exert tight control over the performance of drivers. Similarly, the couriers had minimal control over the manner of performing their work. The reasoning of the *Vabu* majority that the conduct of an enterprise in which persons are identified as representing that enterprise should carry an obligation to third persons to bear the cost of injury or damage, it is submitted that this applies with equal force to TNCs as far as the question of imposition of strict liability is concerned.

Assuming that vicarious liability attached to a TNC, the daunting task that emerges is to determine whether the employee driver was acting within the scope and course of his employment when the delict/tort was committed. Allegations that Uber

[1386] In *Berwick v Uber Techs Inc.,* No, 11-46739 EK, 2015 WL 4153765 (Cal. Dep't of Labour June 3, 2015) 6 the California Department found that the plaintiff's car and her labour were her only assets. Plaintiff's work did not entail any"managerial" skills that could affect profit or loss. Aside from her car, plaintiff had no investment in the business. Defendants provided the iPhone application, which was essential to the work. But for the defendant's intellectual property, plaintiff would not have been able to perform the work.

promotes unsafe driving have surfaced.[1387] For instance, in the *Liu*[1388] case in San Francisco, an Uber driver was in between fares when he struck and killed a child in a crosswalk. Although the driver was logged into the Uber app at the time, he had just dropped off a customer and was using the app to find another fare. The Liu family sued Uber, but Uber maintained that it was not liable for the accident. This case brings to the surface the dangers in Uber's platform – such as encouraging drivers to use electronic devices and competition for fares, and the harms that can result to innocent third parties not engaged in the transaction itself.

Granted that the *Liu* claim was settled out of court, the focal question for the purposes of vicarious liability remains: could the fact that the Uber driver was between fares at the time the accident occur somewhat insulate Uber from liability? In other words, did the driver cease to act in the course or within the scope of his employment? Unlike typical driver deviation cases[1389] or situations where the employee flouted employer's instructions,[1390] the facts of *Liu* case make it clear that the driver was within the course or scope of rendering transportation services for Uber.[1391] Imposition of vicarious liability would have been fair in the circumstances.

[1387] Nelson "Miami Woman Sues Lyft over Husband's Death", *CBS Miami* (Nov. 19, 2015, 5:20PM), https://miami.cbslocal.com/2015/11/19/miami-woman-sues-lyft-over-husbands-death/ (accessed 28-08-2016).

[1388] New Reporter "Family of 6-Year-Old Girl Killed by Uber in Sun Francisco Settles Lawsuit", *CBS SF Bay Area* (July 14, 2015, 8:21 PM), https://sanfrancisco.cbslocal.com/2015/07/14/uber-lawsuit-sofia-liu-san-francisco/ (accessed 28-08-2016). The *Liu* case ultimately settled for an undisclosed sum.

[1389] See e.g. *Storey v Ashton* 1869 LR 9 4 QB 476; *Twine v Bean's Express Ltd* 1946 1 All ER 202; *Harrison v Michelin Tyre Co Ltd* 1985 1 All ER 918.

[1390] See e.g. *Van Drimmelen and Partners v Gowar* 2004 1 All SA 175 (SCA); *Moghamat v Centre Guards* CC 2004 1 All SA 221 (C); *Roux v Eskom* 2002 2 SA 199 (T); *Bezuidenhout NO v Eskom* 2003 24 *ILJ* 1084 (SCA); *MEC for Public Works, Eastern Cape v Faltein* 2006 5 SA 532 (SCA).

[1391] In *ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd* 2001 1 SA 372 (SCA) para 3 said Zulman JA said:

> "The standard test for vicarious liability of a master for the delict of a servant is whether the delict was committed by the employee while acting in the course and scope of his employment. The enquiry is frequently said to be whether at the relevant time the employee was about the affairs, or business, or doing the work of, the employer. It should not be overlooked, however, that the affairs of the employer must relate to what the employee was generally employed or specifically instructed to do. Provided that the employee was engaged in activity reasonably necessary to achieve either objective, the employer will be liable, even where the employee acts contrary to express instructions. It is also clear that it is not every act committed by an employee during the time of his employment which is for his own benefit or the achievement of his own goals which falls outside the course and scope of his employment. A master is not responsible for the private and personal acts of his servants unconnected with the latter's employment, even if done during the time of his employment and with the permission of the employer. The

The mere fact that e-hailing companies distance themselves from providers through their business models, corporate structure, or self-proclaimed role does not necessarily place them beyond the reach of vicarious liability. Further, vicarious liability principles exist to make ridesharing companies accountable for the acts of independent contractors. The relationship between the TNC and the providers must be analysed. If the transportation service providers are employees, vicarious liability may be appropriate under the *respondeat superior*.

If the driver is an independent contractor, vicarious liability may still attach if the driver is performing a non-delegable duty. It is possible Uber could be liable for delictual acts of even independent contractors. Equally, an Uber driver may have apparent authority, which can form the basis for vicarious liability under agency principles. It is a fact that Uber drivers are connected to customers exclusively through Uber platform and may have Uber logos on the vehicle. Like cycle couriers in *Vabu* and *CitySprint*, an Uber driver is presented to the public as an "emanation" of Uber. By scrutinising the manner in which CitySprint inducts cycles couriers, the ET in *Citysprint* noted that "the instructions are consistent with the website which cannot be dismissed as "advertising puff" when it says that "our couriers" provide a 'secure, dedicated' service and are "fully trained" because this is a key part of the sales pitch."[1392]

Similarly, in unguarded moments during *Aslam* litigation, Uber made references to "'Uber drivers' and 'our drivers', to 'Ubers' (i.e. Uber vehicles), to 'Uber [having] more and more passengers'".[1393] The fact that passengers specifically request an "Uber" car and driver through Uber's exclusive app, in which Uber promotes its own safety and reliability,[1394] this may provide sufficient basis for vicarious liability even if *respondeat superior* is found to be inapplicable.

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act causing damage must have been done by the servant in his capacity qua servant and not as an independent individual."

[1392] *CitySprin*t para 23.

[1393] *Aslam* para 67. A Twitter feed issued under the name of Uber UK reads:
"Everyone's Private Driver. Braving British weather to bring a reliable ride to your doorstep at the touch of a button."

[1394] In *Aslam* para 67 the ET cited a Twitter feed issued under the name of Uber UK which reads:
"Everyone's Private Driver. Braving British weather to bring a reliable ride to your doorstep at the touch of a button."

On the flipside, since the TNCs and transportation service providers are engaged in a joint enterprise, joint enterprise liability may prove crucial in determining vicarious liability. TNCs and transportation service providers share a common commercial objective: Uber/Lyft match transportation service providers with customers and share the profits. Even if the ridesharing company purports to only facilitate the connection, it nonetheless may be working in furtherance of a commercial goal shared with the partner-driver. As Uber cases illustrate that the Uber driver who accepts a fare is engaging in a joint enterprise with Uber, the company that provided leads and facilitated the connection and profited from it. Expressed in Uber's lexicon, "'providing job opportunities' to people who had not considered driving work and potentially generating 'tens of thousands of jobs in the UK.'"[1395] Thus, if the driver negligently causes the passenger or a third party harm, Uber and the driver are both liable as joint venturers. Vicarious liability will attach to Uber even if it prevails in its position that its drivers are merely independent contractors.

6.8 Conclusion

The chapter has demonstrated that uberised economy has disrupted and ushering in profound changes to pre-existing labour law landscape. Delict/tort law is no exception. Apart from reflecting on labour's million dollar question, the dominant thrust of the analysis was to interrogate the extent to which the current delict/tort law principles and rules are ready to handle the peculiar issues arising out of the uberised economy, especially ridesharing services. The law of vicarious liability imposes on the employer the obligation to shoulder in monetary terms the consequences of the wrongdoing of its employee to the injured third party.

The application of strict liability is predicated upon the existence of employer-employee relationship. Naturally, the acute problem of ascertaining what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing cannot be avoided. Indeed, the distinction between employee and independent contractor generates the most litigation. The quartet of Uber/Lyft cases

[1395] *Aslam* para 68.

show that ridesharing companies take pains to disclaim employer status in their dealings with drivers. They have strongly asserted that drivers are independent transportation service providers. The Uber/Lyft quandary is a clear, perhaps even an extreme example of the murkiness of deciphering who is employee or independent driver partner in complicated service arrangements between workers and employing entities.

Vabu and other venerable precedents dealing with transportation industry provide a vantage ground for forging new tools and finding innovative remedies to address seemingly unique issues the TNCs raise. It is submitted that by adapting vicarious liability principles and jurisprudence, clarity and certainty can be achieved.

CHAPTER 7

MAPPING OUT THE FINE MARGINS OF SELF-EMPLOYMENT: FINDING THE MISSING PIECE OF THE PUZZLE

7.1 Introduction

The hardest problem has been saved for last. Since the advent of the Labour Relations Act in 1995 (LRA), the binary divide between employment and self-employment has become more contested and fragile, as the incentives and opportunities multiplied for employing enterprises to re-fashion employment contracts as contracts for services, and to classify their workers as being "self-employed". The question is, how to locate the missing piece of the puzzle in both the three-tiered *State Information Technology Agency (SITA)* test for identifying the existence of employment relationship and the statutory definition of an "employee" in section 213 of the LRA?

The key point emerging from chapters three and four is that the existing body of work concerning the beguilingly simple but intractable question who is a true employee in modern work environment has not shifted from the inhibiting duality of employee-independent contractor distinction. Yet, the enormous shifts in the world of work are different, and new tools and innovative remedies need to be carved out. This may partly explain the partial success of the presumption of employment provision introduced in 2002.[1396] In short, the extreme preoccupation with dichotomies between employees/independent contractors is hardly the sure and serviceable guide to addressing pervasive and elusive troika of problems, i.e., disguised employment, bogus self-employment and precarious self-employment.

If we are candid about the predominant attitude found in the South African legal thought, it was and it is still bathed in the binary distinction between employees and independent contractors in labour law,[1397] and there are no voices calling for the fundamental reorientation that now seems very much on the agenda across

[1396] Theron "Who's in and who's out"and "The erosion of workers' rights and the presumption as to who is an employee".

[1397] The following sources indicate the variety and depth of the dichotomist view of employees versus self-employed independent workers to labour law's traditional dilemma. See generally, Mureinik 1980 *SALJ* 246; Brassey 1990 11 *ILJ* 899; Christianson 2001 *CLL* 21; Manamela 2002 *SAMLJ* 107; Benjamin 2004 25 *ILJ* 787; Mills 2004 25 *ILJ* 1203; Van Niekerk 2005 *CLL* 11 and 2005 26 *ILJ* 1909; Bosch 2006 *ILJ* 1342; Bosch & Christie 2007 28 *ILJ* 804; Le Roux 2007 *SALJ* 469 and 2009 30 *ILJ* 49.

jurisdictions.[1398] Particularly, this is so in light of the impeccable contributions of recent vintage which have consigned themselves to ever more refined embroidery upon the well-worn contract of employment fabric.[1399] Eloquent and distinguished voices have alerted us to the problems presented by descent into precarity,[1400] the need to re-examine prevailing assumptions, and the need for fresh law reform alternatives, sometimes informed by comparativist perspectives.[1401] The scholarship on triangular employment relationship is terribly important to affected employees, unions, employers, and their advocates, but the nearly exclusive preoccupation of much mainstream scholarship must ultimately limit and marginalise its contribution to any process of legislative overhaul and reconstitution of the system.

The fact that the literature on employment precariousness in contemporary South African labour market takes place only within a tightly confined universe of discourse, has meant that labour law scholars have missed a significant lacuna in the

[1398] This has spawned the boundaries scholarship, see Davidov & Langille (eds) *Boundaries and Frontiers of Labour Law* (2006); Arup *et al* (eds) *Labour Law and Labour Market Regulation* (2006); Conaghan *et al Labour Law in an Era of Globalization Transformative Practices and Possibilities* (2002) 177; Deakin & Wilkinson *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (2005); Barnard *et al* (eds), *The Future of Labour Law: Liber Amicorum Bob Hepple QC* (2004); Riley "Regulating the engagement of non-employed labour: A view from the Antipodes" in Brodie *et al* (eds), *The Future Regulation of Work: New Concepts, New Paradigms*, (2016) 61 and "Regulatory responses to the blurring boundary between employment and self-employment: A view from the Antipodes" in Kiss (eds.) *Recent Developments in Labour Law* (2013) 131; Davidov "The three axes of employment relationships: A characterisation of workers in need of protection" 2002 *UTLJ* 357.

[1399] The following sources indicate the variety and depth of the emerging "critical" approach to the legal institution of contract of employment. Note, however, these authors disagree strongly amongst themselves on a variety of issue. See Le Roux *The Regulation of Work: Whither the Contract of Employment? An analysis of the Sustainability of the Contract of Employment to Regulate the Different Forms of Labour Market Participation by Individual Workers* (Unpublished PhD Thesis, UCT 2008); Van Jaarsveld *The Interplay of Common Law and Statutory Law in Contemporary South African Labour Law* (Unpublished LLD Thesis, Unisa 2007); Vettori MS *Alternative Means to Regulate the Employment Relationship in the Changing World of Work* (Unpublished LLD Thesis, UP 2005). For related perspectives, see Du Toit "Oil on troubled waters? The slippery interface between the contract of employment and statutory labour law" 2008 *SALJ* 95, 109-110; Van Staden and Smit "The regulation of the employment relationship and the re-emergence of the contract of employment" 2010 *TSAR* 702; Radley & Smit "The contract of employment in labour law: Obstacle or panacea" 2010 *Obiter* 247; Le Roux "The Foundation of the contract of employment in South Africa" 2010 39 *ILJ* 139.

[1400] Freedland *The Contract of Employment and the Paradoxes of Precarity* Legal Research Paper Series Paper No 37/2016 June 2016, 2 observes that "with increasing acceleration in the last ten years, the law and practice of the contract of employment have been dissolving themselves from a state in which a stable contract of employment represented the essential norm into a complex of precarious types of precarious types of employment relation. ("*Paradoxes of Precarity*").
See generally, Brassey 2012 33 *ILJ* 1; Benjamin 2010 31 *ILJ* 845; Cheadle 2006 27 *ILJ* 663; Theron 2008 29 *ILJ* 1; Thompson 2003 24 *ILJ* 1793.

[1401] See Fourie 2008 *PER/PELJ* 23; Van Eck 2012 *IJCLLIR* 29; Botes 2015 *SALJ* 100.

LRA arising from a blurring of the boundaries between subordinate employment and self-employment in many economic sectors. The broader challenge for labour regulation is how to extend protection to persons who have some of the trappings of the independent contractor, but, in reality, are in a position of economic dependence, more like that of an employee. In other words, tackling and arresting descent into precarity.

It has been suggested that many of these quasi-independent entrepreneurs doubly disrupt the labour market.

> "On the one hand, he competes with organized employees for available work; on the other hand, his attempts to organize for collective action, lacking statutory sanction, are often characterized by economic force and legal reprisals. Any rationalization of this labour market disorder must begin with abandonment of the traditional legal distinction between employees and independent contractors. Indeed, such a step would be warranted solely on the ground that the legal tests are uncertain."[1402]

By decoding the margins of self-employment, this chapter reflects on bending and borrowing with a view to the adoption of the dependent contractor category. It seeks to fill a gap and to ensure that the intermediate category is not overlooked as one of the important regulatory options for fixing South Africa's labour laws.

7.2 Comparative Examination of the Hybrid Category

Before instinctively throwing a hybrid category for workers who inhabit the grey zone between independent self-employment and precarious self-employment for South Africa, it is imperative to map out the margins and assess the experiences of comparative jurisdictions in their implementation of the intermediate category. Interestingly, the seismic shifts wrought by digital platform work, and the legal wrangling over driver-partner misclassification in the Uber/Lyft disputes have brought to the pole position proposals for a "third" or "hybrid" category to be created in the United States, situated between the categories of "employee" and "independent contractor". Proponents advocate that an intermediate category is necessary for the

[1402] *H. G. Francis & Sons* para 18. The use of worker co-operatives in the garment industry have undermined centralised collective bargaining. *Glamour Fashions Workers Primary Co-operative Ltd I* and *Glamour Fashions Workers Primary Co-operative II*. In *Magoso/ st Key; 2nd Excellent Services* 2018 9 BALR 927 (MIBC) a temporary employment service styled itself as a "worker co-operative".

uberised economy.[1403] Rather than create a special category only for the gig economy, some prominent labour scholars have argued that any proposal for a new category would ideally be formulated to ameliorate conditions for other precarious work and fissured workplaces.[1404] It bears mentioning that the hybrid category between employee and independent contractor is not *per se* a novel innovation. The "dependent contractors" or "independent workers" proposals for establishing an intermediate category have sparked debate and controversy.

Situating the "dependent contractor" category within a historical and global context, will allow South Africa to learn from countries that already experimented with an intermediate category, capitalizing on those elements of the third category that were successful and avoid the aspects of those systems that worked poorly. Canada, Italy, and Spain provide contrasting signposts for the intermediate category.

7.3 The Genesis of the Canadian Progressive Trend: Professor Harry Arthurs on Dependent Contractors

Canadian law is no different from other jurisdictions in using the conceptual focus on who is an employee as a gateway to coverage, premised on the employee-independent contractor dichotomy.[1405] Although the origins of the intermediate category are somewhat apocryphal,[1406] when Canada was contemplating a third category in the 1960s, they referenced Sweden.[1407] The genesis and entrée into the Canadian labour law lexicon and provincial labour codes of the concept "dependent contractor" is the

[1403] Harris & Krueger *A Proposal for Modernizing Labour Laws for Twenty-First-Century: The "Independent Worker"* (2015) 5. http://www.hamiltnproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_kueger_harris.pdf ("*The 'Independent Worker'*") (accessed 10-08-2016).

[1404] Cherry & Aloisi "'Dependent contractors' in the gig economy: A comparative approach" 2017 *Am. LR* 635, 638, esp. note 5 ("Dependent contractors). See also Spencer "Oregon's independent contractor statute: A legislative placebo for employers" 1995 *Willamette LR* 647.

[1405] Fudge *et al* "Employee or independent contractor? Charting the legal significance of the distinction in Canada" 2003 *Can Lab. & Emp. LJ* 193.

[1406] Cherry & Aloisi "Dependent contractors" 638, esp. note 5.

[1407] Arthurs relied on the work of Adelcreutz "The definition an employee" in Schmidt (ed) *The Law of Labour Relations in Sweden* (1962) 54. Contemporary Sweden's legal landscape is described in Kallstrom "Employment and Contract Work"1999 *Comp. L. Pol'y J.* 157.

brainchild of Harry Arthurs.[1408] Even a fiercest critic of the dependent contractor category, who regarded it as superfluous, gratefully credited Professor Arthur for inaugurating sweeping, radical changes in the Canadian labour law setting.[1409] The impact of Arthur's theory was such that the concept "dependent contractor" became entrenched within Canadian law during the 1970s.[1410] In effect, Arthur's pioneering work was the catalyst for far-reaching law reform and an extension of employment laws to a hitherto subordinate group that had few protections.[1411] In *Fownes Construction*[1412] the court noted that Arthur's contribution truly "had an impact on the real world."[1413] To the same effect, commentators have observed that the introduction of the intermediate category has been "beneficial for a significant number of workers formerly excluded from the ambit of collective laws."[1414]

Arthur seized on the idea of an intermediate category of "dependent contractors" as a reaction to a trend he was witnessing increasingly in the labour market that created injustice for certain groups of Canadian workers. The central substantive themes and concerns of "Legal problems of countervailing power" was the small tradespeople, artisans, plumbers, craftsmen, and the like who were increasingly structuring themselves as separate business entities.[1415] Yet, despite setting up shop as separate companies, and thus falling outside the scope of "employees," these

[1408] Arthurs "Legal problems of countervailing power". Bendel "The dependent contractor: An unnecessary and flawed development in Canadian labour law" 1982 *UTLJ* 374, 376:

> "Although the notion of the dependent contractor did not surface in Canada until 1965, concern for his status had become part of the conventional wisdom on labour relations by the early 1970s. Between 972 and 977 even jurisdiction in Canada adopted to grant dependent contractors employee status under their labour relations legislation."

Hereinafter "An unnecessary and flawed development".

[1409] Bendel "An unnecessary and flawed development" 378:

> "[I]t seems safe to assume that all these amendments were inspired, in part at least, by the recommendations of Professor Arthurs and the task force to the effect that labour laws should be extended to persons who are not regarded as employees… but who shared the employees' economic dependence on the persons for whom they worked."

[1410] Langille & Davidov "Beyond employees" 25.

[1411] *Privy Council Office, Canadian Industrial Relations: The Report of the Task Force on Labour* Relations 1969) 30, n.19; *Commissioner Maxwell Cohen, Report of the Royal Commission on Labour Legislation in Newfoundland and Labrador* (1972) 243-246.

[1412] *Fownes Construction Co. v Teamsters Local Union 213*1974 *CarswellBC* 641 (Can. BC Labour Relations Board) (WL).

[1413] *Fownes Construction* para 12.

[1414] Langille & Davidov "Beyond employees" 25.

[1415] Arthurs "Legal problems of countervailing power" 89.

tradespeople had no other employees but the worker-owner. A salient feature of these commercial arrangements was that these tradespeople would work effectively full-time for one company that paid them retainer for all of their services and time. Moreover, these putative independent businesses were often almost wholly dependent on the patronage of the larger company. Simply put, these ostensible business owners had little in the way of control and would often stand or fall on the continued business from the larger company.

An inevitable consequence of commercial dealings between these micro business people and the dominant entities was that the former was placed outside the purview of traditional labour relationship. The economic reality was such that micro businesspeople were economically dependent upon a large company in virtually the same subordinate position as an employee. Accordingly, the two situations were so analogous, it followed that employee-like protections should apply." Insofar as dependent contractors share a particular labour market with employees… they should be eligible for unionisation."[1416] To be sure, this group should be included within the definition of employees and that employee protections should be extended to them.[1417]

Most Canadian jurisdiction adopted "dependent contractor" provisions to include small business operators within the definition of "employee" for collective bargaining purposes. For example, a critical distinction between the Alberta Labour Relations Act 1980 [ALRA] and the Ontario Labour Relations Act 1975 [OLRA] is that the Ontario Act, unlike the Alberta's gives separate and distinct recognition to a hybrid person falling somewhere between the traditional employee and entrepreneur or independent contractor. When the Ontario legislature amended the Act in 1975,[1418] it added a definition of "dependent contractor", section 1(1)(ga) and its only definition of

[1416] Arthurs "Legal problems of countervailing power" 114.

[1417] As Arthurs "Legal problems of countervailing power" 114 aptly put:

> "They are often economically vulnerable as individuals because of the dominance of a monopoly buyer or seller of their goods or services, or because of disorganized market conditions. If viewed as 'independent contractors' rather than 'employees' they lack the legal status which is a prerequisite to the right to bargain collectively under labour relations legislation. As businessmen, they cannot legally employ collective tactics to buy or otherwise stabilise conditions because of the combines legislation. They are prisoners of the regime of competition."

[1418] The Labour Relations Amendment Act 1975, S.O 1975, c 37, s 1(1).

"employee" provided that a dependent contractor was an employee for the purposes of section 1(1)(gB) of the Act. The appearance of the intermediate category stands as a major advance on the Canadian labour law landscape and exceptional historic achievement.

Before attempting analysis of the enlightened dependent contractor jurisprudence fashioned by Canadian Labour Boards, it is pertinent to provide thumb struck account of the Italian and Spanish experiences with the hybrid category. This provides a vantage position to appreciate the extent to which the dependent contractor category offers exciting prospects for addressing disguised employment as well as novel issues arising from Uberisation of work.

7.4 The Italian Experience: From *Lavotore Para-subordinazione* to *lavoro a progetto*

While the emergence of dependent contractor category in Canada is generally considered a model for tackling precarious self-employment, the Italian experimentation with its own version of intermediate category, the so-called *lavotore para-subordinazione* had the opposite effect. Rather than the *lavotore para-subordinazione* addressing the problems of precarity, the introduction of the third category amplified precarious self-employment with employers moving employees into "bogus" discounted status in the quasi-subordinate category.

What is remarkable about the Italian Law 5533/1973[1419] introducing the hybrid category is that it was not a reaction against disguised employment relationships.[1420] The *lavotore para-subordinazione* were distinguished as workers "when the provision of the service presents itself as characterised, in practice, by a predominantly personal activity of continuous and coordinated collaboration."[1421] This intermediate category embodied

[1419] *Legge* 11 *agosto* 1973, n 533, *Disciplina delle controversie individuali di lavoro e delle controversie in material di preidenza e di assistenza obbligatorie*. (GU 13 *settembre* 1973, n. 237).

[1420] Razzolini "The need to go beyond the contract: 'Economic' and 'bureaucratic' dependence in personal work relations' 2010 *Comp. Lab. L & Pol'y J*. 270, 296.

[1421] Freedland & Kountaris *The Legal Construction of Personal Work Relations* 122, n 61:

> "The emergence of the notion of *parasubordinati* in the Italian legal domain is traditionally linked to Law 533/1973,… which described that the rules of procedure for labour litigation also apply to the 'relationship of agency, of commercial representation and other relations of collaboration materialising in a continuous and co-ordinated provision, predominantly personal, even if not a of subordinate character."

four "concurrent" factors (1) collaboration, (2) continuity and length of the relationship, (3) functional coordination with the principal, and (4) a predominantly personal service. In the Italian parlance, these quasi-subordinate workers were commonly called "co.co.co" abbreviation for "continuous and co-ordinated collaborators."[1422]

The 1973 legislation was partly responsible for a relaxation of the rigid employee/independent contractor dichotomy. Needless to say, *lavotore para-subordinazione* had unintended consequences. What aggravated precarious self-employment and undermined the hybrid category was the tendency of business to hire workers as quasi-subordinate workers who would have previously been classified as employees.[1423] The net effect was that the intermediate category was used to conceal *bona fide* employment relationships in order to reduce costs and evade the protections workers were entitled to under article 2094 of the Civil Code.[1424] In short, quasi-subordinate workers were seen as a "low-cost" alternative to stable employment relationships, especially because they were not afforded certain employment protections fulltime employees enjoy.

The primary goal of the Legislative Decree No. 276/2003 (the so-called Biagi Reform) was to reduce the number of precarious forms of employment leading to illicit work and evasion of social insurance contributions.[1425] To minimise the prevalent practice of businesses incorrectly classifying employees as quasi-subordinate workers, the legislature required the collaboration between the business and employee to be linked to at least one "project". A new definition arose for quasi-subordinate workers *lavoro a progetto* (i.e. project work, also known as "co.co.po").[1426] If there was not actual project, i.e. the work was continuous and managed by the business, the worker could be

[1422] Freedland & Kountaris *The Legal Construction of Personal Work Relations* 72.
[1423] The black of art of transforming employees into independent contractors by the magic of contractual language is illustrated by the employer Federation of Employers of South Africa (COFESA). COFESA "advises employers that they can avoid labour legislation merely by stipulating in contracts that workers are independent contractors without any fundamental change in the employment relationship". See too *Dyokhwe*. For further reflection, see see Cohen "Debunking the legal fiction" and "Identifying the true parties to an employment relationship". See also Bogg "Sham employment in the Supreme Court".
[1424] Cherry & Aloisi "Dependent contractors" 661.
[1425] Perulli Commission *on Employment and Social Affairs, Study on Economically Dependent Work/Parasubordinate (Quasi-subordinate Work* 3, 5, 8 (2003), http://www.europarl.euroa.eu/hearings/20030619/empl/study_en.pdf (accessed 11-03-2018).
[1426] Freedland & Kountaris *The Legal Construction of Personal Work Relations* 77.

reclassified into a standard employment contract and the employer would be liable for back pay. Nonetheless, the Biagi law proved ineffective in overcoming the weakness and limitations of the intermediate category.

The depth and seriousness of the crisis concerning bogus self-employment and dependent self-employment prompted the Italian legislature to enact Law No. 92/2012 (the so-called Monti-Fornero Reform) to counteract the misuse of the "*lavoro a progetto*" definition by making employee status the default.[1427] Thus, in the absence of a project, the worker was to be considered an employee, backdated to the beginning of the relationship. The Monti-Fornero Reform made it clear that using the quasi-subordinate category was disfavoured and discouraged. The 2015 Jobs Act signalled the demise of the project work that had its origins in the 2003 Biagi law. The move was intended to reduce the use of atypical contracts and to establish as the default the "employee" classification. Despite the fact that the quasi-subordinate category still survives, it is now limited in its scope as well as its protections, further underlining the shift of workers into the employee category.[1428]

What can be distilled from the Italian experimentation with the quasi-subordinate category is that the quest to extend legal protection to vulnerable workers instead of burying disguised employment it may have the opposite effect of preserving false self-employment or reproducing precariousness. Businesses used the Italian intermediate category as a discounted alternative to what should be typical employment relationship. In fact, the quasi-subordinate category created an escape route that actually resulted in less protection for workers as an unintended consequence. In sum, the hybrid category carries an inherent risk of fuelling the employers' efforts at contriving artificial arrangements aimed at circumventing regulatory initiatives to extend legal protection. The likely outcome is indecisive and mercurial of modification of the intermediate category.

[1427] Bias "The effect of the global crisis on the labour market: Report on Italy" 2014 *Comp. Lab. L & Pol'y J.* 371, 372-373.
[1428] Cherry & Aloisi "Dependent contractors" 66, n. 179.

7.5 The Spain Case of *Trabajado Autonomo Economicamente Dependente (TRADE)*

In Spain and many other European jurisdictions, the independent contractor category was deployed to hide *bona fide* employment relationships. [1429] It is widely acknowledged that holding out employees as independent contractors is a distinctive feature of the building and construction sector of the economy.[1430] Leaving aside the building and construction sector, a "new generation" began to dominate the employment scene because recruiting the self-employed was more convenient than hiring employees. Self-employed workers enabled businesses to mobilize and de-mobilize their work forces to ensure a certain degree of flexibility and fluidity.[1431]

Like its Italian counterpart, the Spain's overhaul of its labour laws by extending protection to independent contractors who were economically dependent was not a response to problems of disguised employment but a way to offer a special legal arrangement for authentic self-employed workers.[1432] The passage of *Estatuto del trabajo autonomo* ("LETA," or the Statute for Self-employed Workers) in 2007 accorded an array of benefits to self-employed workers. These included benefits on termination, maternity and paternity, leave, temporary sickness and beneficial social security programme for special groups (disabled, artisans or young entrepreneurs). LETA was a catalyst for a third category of workers - *Trabajado Autonomo Economicamente Dependente* (TRADE) or economic dependent self-employed workers. This is a descendent of the Italian quasi-subordinate category.

TRADE workers are afforded some legal protections, such as minimum wage, annual leave, entitlement in case of wrongful termination, leave for family or health reason, and collective bargaining. There is no question that TRADE workers enjoy a set of rights "beyond the statement of basic rights and duties of self-employed workers – vaguely reminiscent of those employees, albeit without equivalent guarantees or legal

[1429] Di Stefano "A tale of oversimplification and deregulation: The mainstream approach to labour market segmentation and the recent responses to the crisis in European countries" 2014 *ILK (UK)* 253, 264.
[1430] European Parliament (*Social Protection Rights of Economically Dependent Self-Employed Works*.
[1431] See generally, *Symposium: The Fissured Workplace* 2015 *Comp. Lab. L. & Pol'y J.* 3-222.
[1432] Pereiro "The status of self-employed workers in Spain" 2008 *ILR* 91, 94.

status [of employees]."[1433] The Maginot line between employees and the TRADE categories lies in the notion of "alienness" or *ajenidad*. Whereas the employee does not own the means of production and the productive tools and infrastructure, the TRADE owns his or her tools and is equipped with all the trappings of genuine self-employment.[1434] The adoption of the TRADE essentially ended the traditional "binary divide."

The Spanish case is an example of an emerging trend motivated by the desire to protect workers in the "grey zone" or at the margin of the self-employment category. The metric for determining whether a worker is a TRADE rests on a threshold of economic dependency measuredat seventy-five percent. Four factors are decisive in distinguishing TRADE workers from employees: (1) the amount of independent wok or reliance on the principal's directives; (2) the worker undertakes an obligation of personal service, without using subcontractors; (3) the worker bears the entrepreneurial risk; and (4) actual ownership of the tools and instrumentalities of production.[1435] To differentiate TRADE from independent contractors or self-employed workers, three factors are decisive: (1) a dependence on the principal for at least seventy-five percent of the worker's income, (2) not hiring subcontractors, and (3) the performance of an economic or professional activity directly and predominantly *vis-a-vis* one single principal. The key element of the TRADE test is the percentage of income derived from work-related, economic, or professional activities from a single principal.

The burdensome procedural requirements to become classified as TRADE workers resulted in a low number of workers taking up the intermediate category. In short, Spain is illustrative of a legal system that introduced a third category only to see it restricted to a small percentage of self-employed workers.

Discussion of the European developments is worthwhile in the sense that it permits us to distil some crucial lessons from these experiences. We have seen

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[1433] Pereiro "The status of self-employed workers in Spain" 93.

[1434] Perulli *Un Jobs Act per il lavoro autonomous: verso una nuova disciplina della dipendenza economica?* (Ctr. For the Study of Eur. Labour Law "Massimo D'Antona," Working Paper No. 235, 2015), http://csdle.lex.unit.t/Archive/WP/WP%20CSDLE%2-DANTONA/WP%20CSDLE%20MDANTONA-IT/20150114-124113_n235-2015it.pdf.pdf, 12-13 (accessed 20-03-2017).

[1435] *Estatuto del Trabajador Autonomo* art. 11 (B.O.E. 2007, 20) (Spain).

contrasting outcomes, showing us mistakes as well as successes. To bend and borrow from other jurisdictions which have moved away from a narrow pre-occupation with the binary distinction between employees and independent contractor, thereby possibly inaugurating a dependent category into South African labour law domain which necessitates working backwards to determine rights for the third category. To begin with, it is pertinent to ask which of the rights and responsibilities that employees enjoy would not be appropriate for workers in the intermediate category? In particular, Italian and Spanish experiences give sustenance to the assumption that the kinds of rights and responsibilities attached to the intermediate category are just as important, if not more so, than the creation of the category itself. In concrete terms:

> "The rights available could be very few, mirroring independent contractor status, or, as in Spain, the rights could closely resemble those of employees. Either way, there are serious risks to face. Construct the third category with too few rights, as in the Italian case, and it will run the risk of arbitrage, with businesses forcing genuine employees into the third category to try to lower costs. But make the third category either too generous or too burdensome to opt into, as has been the case with the TRADE in Spain, and very few will bother using the category."[1436]

This brings us to the critical issues of exploring the outer limits of the LRA, especially recasting South Africa's experience of grappling with the opacities of form engendered by disguised employment and precarious self-employment in the light of a quite different portrait yielded by Canada's tough dependent contractor jurisprudence.

7.6 The Ontario's Dependent Contractor Jurisprudence

Canada's dependent contractor jurisprudence pivots around the Ontario Labour Relations Act (OLRA).[1437] It is apposite to set out key provisions of the OLRA that bears on the intermediate category. The statute defines "employee" to include a "dependent contractor" and a dependent contractor to be:

> "a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material, or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor."

[1436] Cherry & Aloisi "Dependent contractors" 677.
[1437] 14. Ontario Labour Relations Act, SO. 1995, c 1, sch. A, s 1 (Can.) ("OLR").

The shift in emphasis is readily apparent from a reading of the definition of dependent contractor. Clearly a person need not be employed under a contract of employment to be classified as a dependent contractor, and provision of tools, vehicles, equipment, and machinery is no longer a major consideration. Likewise, contractual arrangements and the ownership of tools are no longer essential considerations.[1438] The emphasis, instead, is placed upon economic and business factors. Both the type of economic dependence that exists, and the kind of commercial relationship entered into, determine whether a person more closely resembles an employee than an independent contractor.

The statutory definition recognises that persons in an economic position closely analogous to that of the employee should also enjoy the benefits of collective bargaining. The determination of who is a dependent contractor is a comparative exercise that requires reference to much broader range of labour relations considerations. There are two purposes served by the redefinition of the limits of the OLRA. In *Abdo Contracting Ltd* [1439] the Board explained:

> "First, it recognizes that, as a matter of fairness, persons in economic positions that are closely analogous should be given the same legislative treatment. A second purpose, and one no less important, is to protect existing collective bargaining rights from being eroded by arrangements that differ only in form, but not in substance, from the employment relationship. These two considerations provide the justification for the shift of emphasis."[1440]

The Labour Boards have wrestled with the question not whether a person falling within the borderline area of the economic spectrum is an employee or an independent contractor, but whether that person is a dependent contractor. The dilemmas, ambiguities and interpretive issues raised by the case law concerned a threshold of economic dependency. What matters is that economic dependence must be such that it puts the person in roughly the same economic position as an employee who face the perils of the labour market. This is particularly prevalent in the construction and logging sectors which are very craft or trade oriented. In circumstances where it is alleged that persons who considered themselves to be self-employed were "independent contractors", but in reality were "labour only" subcontractors paid on a piece work basis

[1438] *Superior Sand, Gravel & Supplies Ltd* 1978 OLRB Rep. February 119, 126.
[1439] 1977 OLRB Rep. App. 197.
[1440] *Abdo Contracting Ltd* 202-203.

to install someone else's materials on someone else's job site(s). They have been found to be dependent contractors.[1441]

The Canada Labour Relations Board in *Midland Express Ltd*[1442] faced squarely the problem of determining a threshold of economic dependency that was in issue, saying:

> "Surely the test of control to be applied now to the dependency is of an economic nature. Are the persons involved obliged to sell their services in a market in which they are economically dependent on a single or a restricted few purchasers? Is their freedom to contract with any degree of independence so thwarted that they are in fact in a status equivalent to that of individual employees? One can envisage situations in which a person who would be completely independent from any employer-employee relationship in the common law contractual sense and yet would be absolutely dependent in such an economic sense."[1443]

In order for a person to be considered a dependent contractor, that person must not only be economically dependent upon another person, but also must be 'under an obligation to perform duties for that person' roughly analogous to that of an employee.[1444] The Board in *Tremways Drivers Association*[1445] understandably saw the importance of looking beyond the factor of economic dependence to the form of the business relationship to determine if it is roughly analogous to that of employer and employee. Such an examination, however, need not confine itself to the narrow contractual obligation to perform duties for the respondent. The nature of the business relationship carries a special weight.

The respondent company in *Tremways Drivers Association* controlled the labour process, i.e. the source of and assignment of the work. The disputed persons and their tractors were integrated into the respondent's business. The owner-operators used the respondent's PCV licences, the painting of the tractors were in company colours and the markings on the tractors identified them as part of the respondent's operation. The nature of the relationship insofar as it pertained to the requirement to perform as directed was evidenced by the decision of the company to ask for the return of the PCV

[1441] See e.g. *Mr Seamless Eavestroughing Thunder Bay Ltd* 1974 OLRB Rep. Dec. 875; *Mo-Mek Systems Ltd* 1974 OLRB Rep. Oct. 642; *Toronto Drywall Services* 1976 OLRB Rep. Oct. 645, *Supreme Carpentry Inc.* 1989 OLRB Rep. Nov. 1181.

[1442] 74 CLLC ¶ 16,104.

[1443] *Midland Express Ltd* 844.

[1444] *IDM Refinishing* 2003 OLRB Rep. Nov/Dec 1041, 1047.

[1445] *1983-82-R Tremways Drivers Association v Tremways (1982) Ltd* 1983 CanLII (ON LRB).

licences from the three drivers who refused to undertake the deliveries assigned to them. The inescapable conclusion that can be reached was that the persons whose status was in dispute were not only in a position of economic dependence upon the respondent but also, having regard to the nature of the business relationship, under an obligation to perform duties for the respondent. In these circumstances, the relationship between these persons and the respondent was one more closely resembling the relationship between employees and an employer than between independent businesses.

Niagara Veteran Taxi[1446] encapsulates issues of enormous import to the contemporary labour market. It provides a glimpse into the extent to which the intermediate category can provide a tailored made solution to precarious self-employment inherent in the transport industry such as those evident in the case of truck owners, and ridesharing owner-partners. The initial and principal question the Board had to determine was whether an organisation comprising taxi-owner operators was an organisation of employees as envisaged in the definition of "union" in section 1(1)(n) of the Alberta Labour Relations Act. The applicant organisation maintained that the persons in question, taxi owner-operators, were dependent contractors within the meaning of section 1(1)(ga) of the Act and, therefore, employees for the purposes of the Act while the respondent argued that they were independent contractors.

The *Niagara Veteran Taxi* Board had to decide the interlinked questions concerning whether the four owner-operators were dependent contractors. The primary question that arose was whether they perform work or services for NVT for compensation or reward. There was also the key question concerning whether they were in a position of economic dependence. The further question was whether they were under obligation to perform duties for NVT so that they are in a relationship with NVT more closely resembling that of an employee than an independent contractor.

At all material times the owner-operators performed services for NVT. They service NVT charge account runs and other calls for the taxi transportation which are radio dispatched to the owner-operators by NVT. The critical question, however, was whether they performed these services for compensation or reward within the meaning

[1446] *Niagara Falls Co-operative Taxi Owners Association v Niagara Veteran Taxi* 1981 CanLII 958 (ON LRB).

of section 1(1)(ga) of the Act. With the charge account runs, the owner operators receive payment directly from NVT. In turn, NVT receives its payment from customer carrying the charge account. Aside from the charge account runs, the owner-operators were compensated directly by the passenger rather than NVT.

In its finding that the owner-operators were dependent contractors, the Ontario Board found support for its conclusion from the Supreme Court of Canada's decision in *Yellow Cab Ltd*.[1447] In *Yellow Cab Ltd,* it was held that where no wages flowed from the employer to the drivers, the relationship of employer/employee did not exist within the meaning of the statute. The relevant provisions of the OLRA are fundamentally different. "Employer" is not defined in the Labour Relations Act of Ontario. In contrast to the ALRA, the Ontario Act does not suggest that a necessary element of being an employer within the meaning of the Act, is the payment of wages directly from the employer to the employee.[1448] As well, again in contrast to the ALRA, the OLRA does not state or suggest that to be an employee within the meaning of the statute, a person must be in receipt of wages directly from the employer.

The Board determined that irrespective of the trappings of an independent contractor, the evidence established that NVT exerts such a high level of control over the owner-operators such that they in fact more closely resemble the relationship of an employee than an independent contractor. It hardly needs to be said that there is a strong correlation between the high level of control exerted by NVT over the owner-operators and tight-fisted control exercised by Uber/Lyft through constant surveillance over the partner drivers. As alreadyexplained, e-hailing companies have essentially deputized customers to manage the workforce and make detailed reports on how service is provided.[1449] The combination of high dependence and high precarity which the transportation network providers accord to the partner-drivers render them analogous to para-subordinate employees and dependent contractors.

7.6.1 Trilateral Employment Relationship

[1447] *Yellow Cab Ltd v Board of Industrial Relations & Alberta Union of Provincial Employees* 80 CLL 14,066 (SCC).
[1448] *Niagara Falls Co-operative Taxi Owners Association* para 15.
[1449] See e.g. *O'Connor* 1151-52; *Cotter* 1073-74.

Taxi owner-operators are in a typical triangular relationship with the company they work for and the passenger they service is validated by the fact that the primary source of their income happens to be paid to them directly by passengers rather than a taxi company. However, the payment arrangement does not itself alter the essential nature of the business relationship between the owner-operator and the taxi company. This, of course, brings back to the table the neglected but crucial issue concerning worker-employer-customer triangle.[1450] To put it another way, precariousness borne by "multiple work relationship" whereby employing and working functions are distributed among several people or entities. This is said to be exemplified by the role of tips for example in the service sector. *A fortiori*, tips constitute an interesting case of paying structure that directly impacts the precariousness of workers because it enhances the involvement of customers in the relationship. The Supreme Court of Canada in *Yellow Cab Ltd* considered the effect of this form of indirect compensation (that is, compensation flowing to the taxi driver from the passenger rather than from the taxi company). The Supreme Court of Canada reversed both the decision of the Alberta Board of Industrial Relations and the confirming decision of the Alberta Court of Appeal on the ground that the Board had erred in law by adopting common law principles defining "employee" which were at variance with the language of the Alberta Labour Act, 1973 SA. C. 33. The Supreme Court concluded that the taxi drivers in question were not employees of the Yellow Cab Ltd because they did not receive wages directly from the taxi company.

Yellow Cab Ltd stands for the proposition that where no wages flowed from the employer to the drivers, the relationship of employer/employee did not exist within the meaning of the statute. The overall tenor of *Yellow Cab Ltd is* consonant with the English Court of Appeal decision in *Quashie*.[1451] That the source of payment for a lap dancer was derived from tips, the so-called "heavenly money" given by patrons rather than the club proved an insuperable obstacle in *Quashie*. The Court of Appeal was reluctant to find an employment relationship where the alleged employer was not directly responsible for payment.

[1450] Albin "A worker-employer-customer triangle".
[1451] 2012 EWCA Civ1735.

In evaluating the Alberta Labour Act (ALRA) as a whole, the Supreme Court commenced that, as revealed in section 35 of that statute, the scheme of the Act is based on wages flowing directly from an employer to an employee. The court explained its own view of section 35 of the Act as follows:

> "[T]he scheme of the Act, which is repeatedly indicated in various sections referred to by the appellant, is predicated on the 'wages' therein referred to being wages which flow directly from an employer to an employee. This is made manifest for example by s 35 of the Act which provides:
> 35(1) A period of employment for computation of wages earned shall not be longer than one calendar month or such other period as the Board may fix.
> (2) Each employer shall pay to each employee within 10 days after the expiration of each period of employment established which the employee has been employed all wages earned by the employee within that period.
> (3) Where the employment of an employee is terminated by the employer, all wages earned by the employee shall be paid to him by his employer upon the termination of the employment."

Focusing on these three factors, the scheme of the ALRA, the definition of "employer" which includes the responsibility for paying wages to an employee and the definition of "employee" which stipulated the receipt of or entitlement to wages, the Supreme Court concluded that under the Alberta statute wages had to be paid directly from the employer to the employee for an employer/employee relationship to exist.

The Board has thrice looked to a three-sided relationship between owner/operator, broker and quarry owner. The rationale was explicated by the Board in *Indusmin Ltd*[1452] as follows:

> "The Board finds that the broker driver, assuming him to be an employee, holds a contractual relationship with the broker with respect to his terms and conditions of employment. The amount of his remuneration is negotiated with the broker, the nature and frequency of assignments are determined by the broker, the quality of his work performance is measured by the broker and the source of his income is controlled by the broker. His only contact with Indusmin is a functional one. That contact is dependent upon the decision of the broker's dispatcher to assign him to Indusmin. And in this regard Indusmin looks to the broker for proper discharge of the driver's duties. The Board, therefore, finds 'the broker driver' to be an employee (assuming but without fining that this is the case) of the broker and not the respondent." [1453]

In *Adbo Contracting Company Ltd* case, the panel found that a number of owner/operators were dependent contractors of a broker and therefore protected by the Act. The panel found that the owner/operator relied almost exclusively upon the broker

[1452] 1977 OLR Rep. Sept. 522.
[1453] *Indusmin Ltd* para 14.

to supply them with work; that they were instructed by the broker the evening before the job as to where and when to report (although on-the-job direction came from the contractor and not the broker), that the broker obtained the work from a number of customers on the basis of his ability to quote a price and provide service and that the broker negotiated a lower rate with the owner/operators.

A. Cupido Haulage Ltd[1454] is another case where truck owner-operators were in a triangular relationship with a broker, A. Cupido Haulage Ltd, and the quarry owners, Canada Crushed Stone. In this situation the owner-operators' compensation was paid by the broker. Notwithstanding the fact that they received their compensation from the broker, the Board held that the owner operators were economically dependent on Canada Crushed Stone.

7.6.2 The Question of Dependent Contractor Employers: The "One Helper" Rule of Thumb

If one of the individuals who are put forward as dependent contractors is in fact an employer, that person cannot at the same time be an employee within the meaning of the Act. The difficult task for the Board in any given situation is how to demarcate the line so as to exclude from the operation of the Act those contractors who, although economically dependent, are themselves employers deriving income from the labour of others. Or to put the point another way, it must be established that the nature of their business is such that within the meaning of the statute they more closely resemble independent contractors than employees in their relationship with the employer. Take for example, the use of drivers by owner-operators is also an important factor in evaluating the total character of the relationship to determine whether it more closely resembles the relationship of an employee than an independent contractor.[1455] The exclusion of these dependent contractor employers is consonant with the statutory

[1454] 1980 OLRB Rep. May 679.

[1455] See e.g. *Canada Crushed Stone* 1977 OLRB Rep. Dec. 806 ("*Canada Crushed Stone*"); *Comfort Services Ltd* 1978 OLRB Re. Oct 905 ("*Comfort Services*") and *Dominion Dairies Ltd* 1978 OLRB Rep. Dec. 1083 ("*Dominion Dairies*"). See also [1455] Stanworth & Stanworth "The self-employed without employees – autonomous or atypical?" 1995 *IRJ* 221.

definition and also maintains the clear division between employers and employees created by the overall scheme of the OLRA.

Whether the arrangement between the alleged employer and the persons who are said to be dependent contractors is one "more closely resembling the relationship of an employee than that of an independent contractor" involves more than just examining the factors of dependence and an obligation to perform when dealing with a group of people who work together. The Board was also required to determine whether the alleged dependent contractor is an employer in the sense that the person in issue is deriving earning not just from her or his own labour, but is receiving income from the work others perform on his or her behalf.[1456] These are not easy questions to answer.

With that background, one turns to analyse some of the classic Canadian authorities on status disputes involving dependent contractor employers. In the lead case[1457] concerning the impact of a "dependent contractor" hiring a helper, the Board was required to decide whether an owner and operator of ten trucks who employed drivers to operate the trucks was a "dependent contractor". The Board noted that the issue of economic dependence was not the only indicia of dependence, in some cases, the employment of others is as decisive a factor in defining the relationship. The Board posed the question whether the employment of others is a factor which in and of itself colours the character of the business so as to remove its owner beyond the scope of the dependent contractor provision. Essentially, the position in *Canada Crushed Stone* is that dependent contractor-employers are not dependent contractor within the meaning of section 1(1)(ga) of the Act. Addressing this point the Board commented:

> "Having decided that the line should be drawn to exclude dependent contractor-employers from the meaning of 'dependent contractor' as defined in section 1(1)(ga) of the Act, the Board must emphasize that its decision in this regard is intended *to exclude only dependent contractors who are employers in substance as well as form. It is this type of dependent contractor who closely resembles an independent contractor than an employee. A dependent contractor with the authority to hire, fire, discipline, and set the terms and conditions of employment in respect of others is not a dependent contractor entitled to the benefits and protections* of the *The Labour Relations Act*. If, however, it is found that a dependent contractor does not possess this type of authority, then, notwithstanding

[1456] *Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters & Joiners of America v Alpha Wood Moulding Co*. 1992 CanLII 6364 (ON LRB) paras 11-15
[1457] *Canada Crushed Stone*.

the fact that he may be the nominal employer of others, he may still be entitled to bargain collectively under *The Labour Relations Act.*"[1458]

In the case at hand, the Board excluded from the definition of "dependent contractor" one person who owned and operated a company which had ten trucks and employed seven persons to operate the equipment. The owner hired his own employees, set their terms and conditions of employment and assigned work. In the same case the Board further excluded two other persons it determined were employers in form as well as in substance. They too had authority to hire, fire, discipline and set the terms and conditions of employment.

The approach enunciated in *Canada Crushed Stone* has been elaborated and refined over time. However, the *Canada Crushed Stone* approach is tempered by the "one helper" rule of thumb. Simply put, the use of a helper or "fill-in worker" to lighten the load of a person alleged to be a dependent contractor has never been considered by itself, to be an entrepreneurial endeavour which would create a situation more closely resembling an independent contractor than an employee or would preclude involvement in collective bargaining.[1459] To be sure, a dependent contractor relationship has been found to exist even where there were two helpers.[1460]

Regardless of different factual underpinning, the question which the panel must answer remains the same: By using a helper, has the person engaged in an entrepreneurial activity, such that it more closely resembles independent contractor rather than dependent contractor? For instance, in *EM Carpentry (1982) Ltd*[1461] the Board found that a pieceworker with more than one employee is an employer and independent contractor. In that case the parties had agreed that pieceworkers, would be considered as "dependent contractor" and consequently their employees would be on the list in respect to the carpentry contractor. In same breadth, in *Jackman Construction Ltd,*[1462] a four person drywall taping crew were all found to be dependent contractors in similar circumstances. *EM Carpentry (1982) Ltd* and *Jackman Construction Ltd* can be juxtaposed

[1458] *Canada Crushed Stone* para 23 [emphasis added].
[1459] *Hamilton Yellow Cab Company Ltd* 1987 OLRB Rep. Nov. 1373; *Windsor Airline Limousine Services Ltd* 1981 OLRB Rep. March 398.
[1460] See *Gold Star Development Inc.* 2012 CanLII 3514 (ON LRB).
[1461] 1989 OLRB Rep. Aug. 829.
[1462] 2013 CanLII 9931 (ON LRB).

with cases such as *Camarites Construction Inc.*,[1463] where the Board found that the engagement of helpers by certain pieceworkers, even though the number of helpers was as low as one from time to time, was part of a general entrepreneurial activity aimed at making a profit from the work of helper.

In *Comfort Guard Services* and *Dominion Dairies* the Board gave further consideration to the status of persons who in the performance of their own work used the labour of others. In *Comfort Guard Services* the Board stated that the occasional use of a single helper to lighten the load of the person alleged to be a dependent contractor could not be fairly described as an entrepreneurial endeavour which would create a situation more closely resembling an independent contractor than an employee. Likewise in *Dominion Dairies,* the Board drew a distinction between persons hired to lighten the load of the alleged dependent contractor and persons hired to increase their output. In that case, all of the contract drivers who delivered the respondent's dairy products employed the use of helpers on their route. The Board was satisfied that the contractor-drivers, who make use of a single helper, whether occasionally or regularly, do not cease to be dependent contractors by virtue of that fact. In sum, the use of a helper did of itself deprive an individual on his status as an employee under the Act.[1464]

More important for present purposes is the reassertion in *Erindale Painting & Decorating Inc.*[1465] case of the fact that a person who derives an income or profit from the labour of others (as opposed to some division of revenue bases on the value of the work performed by those of others) is an employer within the meaning of the Act. In simple language, the person responsible for the work done by the alleged dependent contractors is in fact an employer. The Board noted that even though the applicant was economically dependent upon and was under an obligation to perform work for the responding party through Charry Painting, his relationship with the responding party was not one "more closely resembling the relationship of an employee than that of an independent contractor" principally because Mr. Charry was an employer who created the opportunity to earn a profit from (or risk a loss on) the labour performed by Messrs.

[1463] 1999 OLRD No. 1276.
[1464] See also *Automatic Fuels Ltd* 1966 OLRB Rep. Apr. 22.
[1465] *International Union of Painters & Allied Trades, Local Union 1891 v Erindale Painting & Decorating Inc* 2014 CanLII 76993 (ON LRB).

Molina and Tovar.[1466] While Molina and Tovar were clearly employees, they were not employees of the responding party, Erindale Painting & Decorating Inc. In the result, the Board found that Messrs. Charry, Molina and Tovar and Ms. Leon were not employees of the responding party for purposes of the Act.

Unlike the circumstances described by the Board in *Habib Homes*[1467] and *The Ironstone Building Company Inc.*,[1468] the responding party did not require Mr. Charry to have any particular number of painters working on his crew and, perhaps more importantly, Mr. Charry acknowledged in his evidence that the responding party did not fix specific deadlines by which the work he had been assigned was to be completed. In *Habib Homes* the Board made the following pertinent comments:

> "Carl Gatt hired a helper to assist him in his work. His reasons were not profit oriented: they were simply company and safety. It is also apparent that Habib Homes might not have engaged him on his own without the reassuring presence of a second person in the crew. I accept that he could have hired others and sought greater profit from their labours, but the thought had obviously never occurred to him."[1469]

It was recognised in *The Ironstone Building Company Inc.* that because Ironstone was in a rush to complete the work, it asked Sheridan and his tapping partner to bring more workers. In coming to the determination that the four person crew that were the subject of the application were together dependent contractors (or employees) the Board wrote:

> "The circumstances here are very much akin to those the Board has dealt with in this industry as described in the cases relied on by the union. In fact, if anything, the circumstances before me are more like an employee/employer relationship than many of the decided cases since the only reason there are four workers at all is because the company ensured that Mr. Sheridan have more workers on the job. This is not a situation where a contractor could simply do the job as he saw fit."[1470]

Unlike the situation in *The Ironstone Building Company Inc.* the responding party advised Mr. Charry which homes were to be painted. Mr. Charry determined how that work would be done by his crew. That is, he did the jobs he had been assigned by the responding party "as he saw fit".

[1466] *Erindale Painting & Decorating Inc.* para 65.
[1467] 2012 CanLII 25678 (ON LRB).
[1468] 2014 CanLII 15068 (ON LRB).
[1469] *Habib Homes* para 17.
[1470] *The Ironstone Building Company Inc* para 27.

7.6.3 The Question of the Appropriate Bargaining Unit for Dependent Contractors

Once the status dispute concerning alleged dependent contractors is settled, the murkier task for the Board is to map out the ambit of the bargaining rights and the appropriate bargaining unit for dependent contractors. The central questions posed by certifying a bargaining unit or constraints upon the discretion of the Board is conferred by section 6(5) of the OLRB which says emphatically that:

> "A bargaining unit consisting solely of dependent contractors shall be deemed by the Board to be a unit of employees appropriate for collective bargaining but the Board may include dependent contractors in a bargaining unit with other employees if the Board is satisfied that a majority of such dependent contractors wish to be included in such bargaining unit."

Section 6(5) recognises that dependent contractors may not share a community of interests with "typical employees". Provided that dependent contractors may be included in a bargaining unit with other employees only if satisfied that a majority of the dependent contractors affected wish to be included in such a bargaining unit.[1471] In sum, section 6(5) focuses on the wishes of the dependent contractors and allows for a mixed unit only where the majority of the affected dependent contractors wish to bargain as part of a mixed unit. It should be apparent that the problem of accommodating inherent conflict between the two groups surfaces where dependent contractors must bargain within an established bargaining structure. The Board in *Tremways Drivers Association*[1472] made this abundantly clear.

> "Where dependent contractors with substantial investment in equipment or vehicles and concerned with maximizing the return on investment (hallmarks of the dependent contractor) are placed in a bargaining unit with 'traditional employees' there will be a marked divergence in the collective bargaining interests of the two groups of employees and, where questions arise with respect to the assignment of work between the two groups an inherent strain will develop between them.…This divergence in interest would invariably result in mutually exclusive bargaining units on an application of the Board's normal community of interest criteria. However, the Legislature, although recognizing the conflict of interest when it enacted section 6(5), envisaged that dependent contractors and other employees could bargain together where a majority of the dependent contractors desire to do so and the Board finds the mixed unit to be appropriate. The difficulty, therefore, in the face of the obvious inapplicability of the standard community of interest criteria, is to determine the basis upon which to exercise discretion under section 6(1) to determine the appropriate unit."[1473]

[1471] See *Re Alltour Marketing Support Services Ltd* 1982 OLRB Rep. Oct. 1383.
[1472] *1983-82-R Tremways Drivers Association v Tremways* Ltd 1983 CanLII 982 (ON LRB).
[1473] *Tremways Drivers Association* para 16.

If the Board exercises its discretion under section 6(1) to find an appropriate bargaining unit, it should test the wishes of the "traditional employees" who stand to be affected. In other words, the wishes of "traditional employees" should not be swept into a mixed unit against their will but should put their minds to the question and make a majority decision in this regard. Accordingly, the Board will have to conduct a vote under section 6(1) to determine whether or not a majority of the "traditional employees" wish to bargain as part of a mixed unit. How the duty of fair representation[1474] will apply becomes a significant factor in the exercise of the Board's discretion under section 6(1) to find the mixed unit to be appropriate. This is so where, in addition to a majority of dependent contractors, a majority of the other employees also desire to bargain within a mixed unit.

The decision in *Tremways Drivers Association* is an illustration where the Board exercised discretion under section 6(1) of the Act to direct the taking of two representation votes.[1475] In the first instance, the dependent contractor truck drivers employed by the respondent were to be asked whether or not they wished to be included in a bargaining unit with other employees. In the second place, the preconditions to the taking of such a vote among the non-dependent contractor employees, having been satisfied, the single employee truck driver is to be asked whether or not he wished to be included in a bargaining unit with the dependent contractor truck drivers employed by the respondent. *Re Alltour Marketing Support Services Ltd* concerned an application by professional engineers for a "pure" unit, i.e., a bargaining unit consisting of professional engineers. The Board was satisfied that it is in accordance with the employees' wishes that a single bargaining was appropriate for collective bargaining.

[1474] The seminal cases of *Steele v Louisville & Nash. R.R.* 323 US 192 (1944) and *Vaca v Sipes* 386 US 171 (1967) have spawn sophisticated literature on the trade union duty of fair representation. The sources consulted for the brief sketch include: Wellington "Union democracy and fair representation: Federal responsibility in a federal system" 1958 *Yale LJ* 1327; Murphy "The duty of fair representation under Taft-Hartley" 1965 *Mo LR* 373; Zwarts "The duty of fair representation: Individual rights in the collective bargaining process, or squaring the circle" 1982 *McGill LJ* 60; Holzhauer "The contractual duty of competent representation" 1987 *Chicago-Kent LR* 255; Madjieska "The Supreme Court and the duty of fair representation" 1991 *Ohio St J Disp Resol* 1; Bonventre "The duty of fair representation under the Taylor Law: Supreme Court development, New York State adoption and a call for independence" 1992 *Fordham Urb LJ* 1.

[1475] *Tremways Drivers Association* para 18.

7.7 Finding a Missing Piece of the Puzzle

This is not the place to recite the enormously complex questions that were the focal point of the discussion in chapter 3. It suffices to highlight major points that emerged from the disquisition into the shaded boundary between employment and self-employment. The crucial elements of the analysis concerned the legal uncertainty of dependent self-employment. A dependent self-employed worker is formally independent, yet he or she is economically dependent on the single client employer. This is precisely the grey zone inhabited by these workers: "those who are both economically in employment and personally dependent on the employee status, while those who are only to some degree economically dependent are closer to the borderline of independent self-employment". Self-employment varies from disguised employment and franchisees through skilled crafts people and independent professional to the owners of incorporated businesses.

The progressive dependent contractor jurisprudence provides an opportunity to re-examine South Africa's black box of self-employment and precarious self-employment through the lens of Canada's exposition on the intermediate category. As already noted, the dependent contractor provisions of Ontario have been subject of pivotal judgements. However, the aspects of dependent contractor decisional trends excite seminal attention. If one re-imagines and invokes Ontario's dependant contractor provisions to the South African context, there is bound to be a different outcome to the familiar legal wrangling concerning putative independent contractors. The familiar status disputes concerning freelancer opportunism, and to the extreme end of the ledger empowered entrepreneurial owner-drivers come into the frame.

Re-examining selected South African case law concerning the fragile boundary between disguised employment, genuine entrepreneurial self-employment and precarious self-employment through the prism of the Canadian experience has two-fold purposes. First, to demonstrate that the intermediate category is viable but an often overlooked option for tackling disguised employment. The second and critical aspect relates to the missing piece of the puzzle in the three-fold *SITA* test for identifying

employment relationship[1476] and section 213 definition of an "employee". The missing piece of the puzzle remains unattended since Prof Benjamin's perceptive article and endorsed by judicial practitioners of labour law[1477] as a sure guide for identifying the existence of relationship. Benjamin put the point succinctly in relation to the determination whether a person is another's employee or not, when he stressed the importance of distinguishing personal dependence from economic dependence:

> "*A genuinely self-employed person is not economically dependent on their employer because he or she retains the capacity to contract with others. Economic dependence therefore relates to the entrepreneurial position in the marketplace.* An indicator that a person is not dependent economically is that he or she is entitled to offer skills or services to persons other than his or her employer. The fact that a person is required to only provide services for a single 'client' is a very strong indication of economic dependence. *Likewise, depending upon an employer for the supply of work is a significant indicator of economic dependence*."[1478]

More specifically, the *lacuna* arising from the three-fold *SITA* test for identifying the existence of employment relationship concerns the absence of the hybrid category from the LRA. Although the approved test for identifying the existence of employment relationship embodies the common characteristics that constitute the "more visible benchmarks" used by the Ontario Board to draw the line between independent contractors and dependent contractors with accuracy, it remains a blunt instrument for tackling the opacities of form in modern labour market.

The drawback with the three-part *SITA* test is that its authentic core speaks to the narrow confines of the binary distinction between employees and independent contractor. The assumption that there are only two such categories is however a "false duality"; distinction made unrealistic by the shifting frontiers of work.[1479] To that extent, the absence of an intermediate category demonstrates that the relevant provisions of section 213 dealing with the definition of an "employee" operates out of step with modern developments in other jurisdictions.

[1476] Davis JA's exposition of the three-fold test in *SITA* para 2 directs that when a court determines the question of an employment relationship, it must work with three primary criteria: (1) an employer's right to supervision and control; (2) whether the employee forms an integral part of the organisation with the employer; and (3) the extent to which the employee was economically dependent upon the employer.

[1477] Zondo JP (as he was then) in *Denel* para 19; Davis JA in *SITA* paras 10-12; Molemela AJA in *Shell SA Energy (Pty) Ltd v NBCCI* 2013 34 *ILJ* 1490 (LAC) para 22; Landman JA *Vermooten v DPE* 2017 38 *ILJ* 607 (LAC) para 7.

[1478] Benjamin "Accident of history" 803 [emphasis added].

[1479] Prassl "Employee shareholder" 326; Arthurs "Legal problems of countervailing power".

Interestingly, despite the paltriness of its employment and labour law coverage,[1480] the UK is a step ahead. The English employment law has reacted to the increasing heterogeneity of employment through a proliferation of additional categories, particularly the worker concept in the sense of section 230(3) of Employment Rights Act 1996:[1481] an intermediate category introduced in order to broaden the scope of labour standards. Deakin and Morris draw attention to the fact that the legal nature of self-employment has become more pronounced as a result of increasing use of the "worker" concept.[1482] The "worker" concept is critical to the extension of some basic employment

[1480] Indeed, the OECD has repeatedly noted the UK is already "one of most lightly-regulated labour markets in the world": Swinson MP, *Employment Law 2013: Progress on Reform* (BIS, March 2013) Foreword as cited by Hepple "Back to the future: Employment a law under the Coalition Government" 2013 42 *ILJ (UK)* 203, 204. Another standout feature is the dubious "mutuality of obligations" test developed in the context of intermittent work was confirmed by the House of Lords in *Carmichael v National Power* 1999 1 WLR 2041, which in turn, focused on written documentation to determine "mutuality" or otherwise. According Countouris "Uses and misuses of 'mutuality of obligations' and the autonomy of labour law" in Bogg *et al The Autonomy of Labour* Law (2014) 169, 183 "South African labour law is blissfully oblivious to our English law vagaries of 'mutuality of obligations'".
A further marker precarity is emergence into a centrally prominent position of the so-called "zero-hours contract" in the words of Freedland *Paradoxes of Precarity* 1 "a paradoxical development in the sense that, in many of its forms, this kind of employment relation should not be regarded as an employment relation should not be regarded as an employment contract at all." The author points out that "zero-hours contract" arrangements have dubious claim to be regarded as legitimate form of employment contract:

> "The real problem for workers about zero-hours contracts remains completely untounched; it is that the protections which labour law places upon their security of income and security of employment can all be emptied of content by their employers simply by invoking the unfettered freedom which a so-called 'zero-hour contact' confers to offer the worker no hours of remunerated employment. If the workers for Uber can win their way through obtaining employee status, they may nevertheless find that, in the United Kingdom labour law context, the gains are all too limited of their existing contracts for services are simply in effect replaced by zero-hours contracts under which they can in effect be starved of remunerative employment at the will and discretion of an elusive employer.' *Paradoxes of Precarity* 17-18.

See further, Adams *et al The "Zero-Hours Contracts": Regulating Casual Work, or Legitimating Precarity?* Working Paper Draft Summer 2014

[1481] Workers are the defined as those working under (a) under a contract of employment or (b) any other contract […] whereby the individual undertakes to do or perform personally any or work of services for another party to the contract […].

[1482] Deakin & Morris *Labour Law* 6th ed (2012) 145.

rights to some type of self-employed and particularly the freelance type operators[1483] who work for a number of different employers like the vision mixer in *Hall v Lorimer*.[1484]

To recapitulate: Canadian jurisprudence demonstrates that it can be quite difficult to distinguish between "dependent" and "independent" contractors. Certain common characteristics indicative of a dependent contractor relationship emerge from a reading of cases. These common characteristics constitute the "more visible benchmarks" used by the panel to draw the imaginary line with precision. In determining whether owner/operator who do not employ others on a regular basis more closely resemble independent contractors or employees, the panel has looked to the economic dependence. To put it bluntly, earning a substantial portion of income on a regular basis from source within the control of the client employer. In such a situation a putative entrepreneur is in a position of economic dependence more like an employee than an independent contractor.[1485] Equally, the transitory nature of the relationship between the alleged independent contractor and the client company does mean that that individual was any less a dependent contractor.[1486] Another factor considered by the panel concerns the manner in which the amount of payment is determined. Where the rates for work performed are determined without consultation or with minimal consultation by the quarry, the owner-operator is in a similar position to an unorganised employee.[1487] In addition, the panel considers control of the labour process. If the method of work and the procedures under which it is performed are controlled by the quarry, the owner-operator is in a position analogous to a subordinate employee than an independent entrepreneur.[1488] To sum up, the panel has looked to these visible

[1483] For a nuanced exposition, see Davidov "Who is a worker?; Leighton & Wynn "Classifying employment relationship" 37-39; Prassl "Employee shareholder 'status'"325-327; "Members, partners, employees, workers? Partnership law and employment stats revisited: *Clyde & Co LLP v Bates van Winkelhof*" 2014 *ILJ (UK)* 495, 502-503; and "Pimlico plumbers, Uber drivers, cycle couriers"; Butlin "The missed opportunity" 492; Davies "The employment status of clergy revisited" 561-562; Berry "When is a partner?" 329-332. See also Le Roux "The worker" and "Diversification".

[1484] *Hall (HM Inspector of Taxes) v Lorimer* 1994 IRLR 171.

[1485] See generally, *Consolidated Sand & Gravel* 1978 OLRB Rep. Mar. 264; *Sherman Sand & Gravel* 1978 OLRB Rep. May 459; *Flinkote Co. of Canada* 1978 OLRB Rep. Sept. 822; *Giordano Sand & Gravel* 1978 OLRB Rep. Nov. 989; *HG Francis & Sons Ltd* ; *Abdo Contracting Ltd*; *A. Cupido Haulage Ltd.*

[1486] See e.g. *Carpenters' District Council of Ontario, United Brotherhood of Carpenters & Joiners of America v Mattock Construction Inc*. 2016 CanLII 60980 (ON LRB).

[1487] See e.g. *Indusmin Ltd* 1977 OLR Rep. Sept. 522; *Dufferin Aggregates* 1978 OLRB Rep. Mar. 278.

[1488] See e.g. *Women's College Hospital* 1977 OLRB Rep. Feb. 65; *Weyerhaeuser v Industrial Wood & Allied Workers* 1997 CanLII 1360 (BC SC).

benchmarks, weighed the evidence with regard to each, considered whatever other relevant factors exist and made a comparative assessment as to whether the owner/operator more closely resembles an employee or an entrepreneur.

The essential question is: what would be the outcome in domestic cases concerning putative independent contractors who were lured by fiscal considerations to forgo employee status but subsequently sought to take advantage of the law of unfair dismissal jurisdiction; if the "more visible benchmarks" applied by the Ontario Labour Relations Boards were to be applied? A familiar tale that comes to mind involve a deception contrived by two willing parties who collude in constructing a false relationship. If the more visible benchmark were to be applied for instance to the circumstance in *Yssel*, it will be seen that all IT personnel who were induced by Yssel to move to Highveld Personnel (Pty) Ltd, the labour broker would be classified as "dependent contractors". Irrespective of their decision to waive employee status and elect to render services as consultants under the umbrella companies and a labour broker, in pith and substance, their status was roughly analogous to that of employees than independent contractors. It is readily apparent from the type of economic dependence and business relationship that existed between Volvo and IT consultants on the one hand, and Volvo and Yssel-Highveld on the other, that the IT consultants have few indicia of independent contractor status. They did not advertise or demonstrate any other real entrepreneurial activity. They were selling their labour to Volvo via intermediaries, namely, Yssel/Highveld.

Needless to say, Highveld and Yssel fall on the other side of the dependent contractor ledger. As we have seen earlier, if one of the parties who are put forward as dependent contractors is in fact an employer, that person cannot at the same time be an employee within the meaning of the OLRA. Ample authority[1489] makes it clear that the critical task for the Board is to determine whether the alleged dependent contractor is an employer in the sense that the person in issue is deriving earning not just from her or his own labour, but is receiving income from the work others perform on his or her behalf. In *Yssel* there is a qualitative difference between the short-changed dependent IT

[1489] *Alpha Wood Moulding Co*. paras 11-15.

contractors and Yssel/Highveld who derived income from the labour of dependent IT consultants. It will be recalled that Yssel devised a stratagem to enrich himself at the expense of his colleagues. Without the knowledge of Volvo, and to the personnel concerned, a large part of each monthly payment that was being made by IT personnel was ending up in the pocket of Yssel. What Yssel had not disclosed to Volvo, nor to the personnel concerned, was that he had agreed with Ms Pieterse that he would be paid what he called a "commission" if he arranged for the personnel to transfer to Highveld. He had also agreed with her that the matter of the commission should not be discussed with the personnel or with Volvo.

In the present matter the line can be drawn so as to exclude from the intermediate category both Yssel and Highveld even though economically dependent, are themselves on employers deriving their income from the labour others. The amounts that were received by Yssel were substantial. Forensic investigation revealed that from August 2004 to January 2006 Volvo paid R1 967 900 to Highveld for the services of the personnel (excluding Yssel) of which they received R1 087 650. From the balance of R889 250 Highveld had deducted its own commissions of R114 143 and the balance of R775 107 had been paid to Yssel. In fact, had the hybrid category been in place the difficult and complex aspects of *Yssel* could have been resolved without resort to company law. It must be noted that the nature of Yssel/Highveld business was such that within the ambit of the dependant contractor provisions they more closely resemble independent contractors than employees in their relationship with Volvo. The exclusion of Yssel and Highveld would accord with the statutory definition and uphold the clear division between employers and employees created by the overall scheme of the OLRA. In fact, Yssel and the labour broker are dependent contractor employers since they derived income or profit from the labour of others.

What about the run of the mill cases concerning putative independent contractors? In simple language, the crop of cases where ex-employees had established a personal service companies in order to earn a higher income and secure a tax advantage; but when commercial service relationship is terminated, they then purportedly revert to their former status as employee in order to prosecute a claim for unfair dismissal. In conventional parlance, the problem of "self-employed" persons who

had forgone their status as employees seeking to have the proverbial penny and the bun. Taking a leaf from Standing's taxonomy, the breed of cases range from the elite stratum consisting of "highly mobile … citizens, who escape from all regulatory systems and have no desire (or need) to have the security that could be offered by welfare states."[1490] And there is the category of "proficians" personified by persons who have a degree of detachment from traditional labour market relations but who are capable of maintaining economic independence through their reliance on personal bundles of marketable skills.[1491]

If one takes a second bite at *Denel* and *Vermooten*, one is reacquainted with situations where belated efforts to "reclaim" employee status was once again classic examples of opportunism, rather a sincere attempt to establish the true nature of a relationship where that was indeterminate. If the visible benchmarks used by the Board were to be invoked to the circumstances in *Denel* and *Vermooten*, the answer will be straightforward. Even if there are no qualms about the need for adjudicators to respect the contractual arrangements freely constructed by parties who are equipollent, the economic dependence on the single client is closely analogous to that of employees than that of independent contractors. Ms Gerber in *Denel* and her counterpart, Dr Vermooten, are no true entrepreneurs but rather dependent contractors. If there was a dependent contractor category in the LRA, where the commercial service arrangement with their respective client was terminated, the alleged "independent contractors" would have been afforded greater legal protection under labour law rather than the civil law.

The circumstances in *Kambule*[1492] and *Mvoko*[1493] were, of course, markedly different from those in *Denel* and *Vermooten*. However, the former is parallel to the latter insofar as independent contractor opportunism is concerned. The message that the courts have sent concerning freelancer migraine since *McKenzie*[1494] is clear. In a typical

[1490] Standing *Global Labour Flexibility: Seeking Distributive Justice* (1999) 279. See for e.g. *Gama*; *DA v Minister of Public Enterprises* 2018 ZAGPPHC 1; *Gbenga-Oluwatoye*; *Golding*; *Shell SA Energy (Pty) Ltd v NCCI* 2013 34 *ILJ* 1490 (LAC).

[1491] Standing *Seeking Distributive Justice* 280. See generally, See, for example, *Vermooten*; *Denel*; *Madingoane v Fibrous Plant* 2004 25 *ILJ* 347 (LC); *Swissport SA*; *Bezer*; *Briggs*; *Apsey*; *Callanan*.

[1492] *Kambule*.

[1493] *Mvoko I* and *Mvoko II*.

[1494] *McKenzie*.

scenario where two commercially astute parties, namely, the broadcaster and the freelancers have structured their arrangements in the way they think best, and provided that their agreement is lawful, there is no reason why they should not be held to their bargain when their consciously constructed and carefully crafted commercial arrangements go sour.[1495] If the dependent contractor benchmarks were to be retrospectively applied to freelancers' cases since *McKenzie*, the consistent answer would be that the radio/broadcasting personalities who considered themselves to be self-employed were in truth "dependent contractors".

If we recast a critical eye on *Kambule* and *Mvoko* through the visible benchmarks, new insights emerge. At first glance, "Phat Joe", the radio personality in *Kambule* presents clear a portrait of a dependent contractor given the nature of the economic dependence on the client radio station and the nature of the business relationship between the parties. Unlike the companion freelancer cases such as *McKenzie*, *Padayachi*, *Burke*, *Minter-Brown* and *Mvoko*; *Kambule* stands on a different footing. We can recall that "Phat Joe" maintained a business profile as an entrepreneur in his own right. He was solely reliant on the remuneration received from the station, but on the other hand portrayed to SARS that it did not exceed 80% of the income of his CC. "Phat Joe" utilised an umbrella company and a personal service company. He was the CEO of Phat Joe Holdings (Pty) Ltd and sole member of Njabula Communitech CC and invoices were issued by the CC for the programme services provided by him. The CC also employed three other persons, which the station claimed did not work for it.

Although the Labour Court correctly found that "Phat Joe" was an independent contractor, it submitted that he was a dependent contractor employer in view of his economic dependence on the station. He derived his income or profit from the labour of three helpers engaged by his personal service company. The Board's jurisprudence is replete of situations which analyses the labour relations impact of a "dependent contractor" hiring a helper. It has been noted that the issue of economic dependence was not the only indicia of dependence, in some cases, the employment of others is a decisive factor in defining the relationship. In other words, a dependent

[1495] See, for example *Minter-Brown*; *Padayachi*; *Burke*; *Tuck v SABC* 1985 6 *ILJ* 570 (IC).

contractor like "Phat Joe" more closely resembles an independent contractor than an employee. A dependent contractor with the authority to hire, fire, discipline and set the terms and conditions of employment in respect of others is not a dependent contractor entitled to benefits of the labour statute even the one with the hybrid category. It is important to keep in mind that the exclusion of dependent contractor such as "Phat Joe" is consonant with statutory definition and also maintains the Chinese wall between employers and employees created by the statute. Snyman J in *Burke* said it all:

> "The LRA was never intended to banish genuine independent service agreement concluded with individual service providers to the scrap heap of history, in favour of a default employment relationship. What the LRA was intended to do was to provide protection to unsophisticated and disenfranchised persons, in an environment where jobs are scarce and unemployment is rife, which person would do and sign anything just to get a job."[1496]

"Phat Joe's" reassertion of his employee status presents a familiar tale of freelancer opportunism. In short, even if the intermediate category existed in the amended LRA 1995, he is unlikely to find "refuge" as a dependent contractor.

Returning to the *Mvoko* litigation, the importance of the existence of dependent contractor category would have enabled the terminated independent contractor to utilise the purpose-built labour dispute resolution institution created by the LRA 1995. The genesis of Mr Mvoko's travails and the "SABC Eight"[1497] related to contravention of the public broadcaster's protest policy. The High Court declared the policy unlawful.[1498] From 2002 to 2006, Mr Mvoko was employed by the SABC as its Group Political Editor. From 2011 he was an independent contractor with the SABC until his suspension and unlawful termination of service for seeking to hold the SABC to its constitutional and statutory mandates. Notwithstanding the earmarks of an independent contractor, the evidence established that the public broadcaster exerted such a high level of control over the "self-employed" Group Editor whose role was more akin to that of an employee than an independent contractor. The nature of the control SABC management exerted over Mr Mvoko is reflected in the warnings, cancellation and suspension he incurred for not adhering to the "no-protest" policy:

[1496] *Burke* para 35.
[1497] *Solidarity v SABC* 2016 37 *ILJ* 2888 (LC).
[1498] *HSF v SABC (Soc) Ltd* 2016 ZAGPPHC 606.

> "Management views your conduct in a very serious light and contemplates terminating the agreement. However, you are requested to submit written representations as to why the agreement should not be terminated and should you wish to do so, same have to be submitted to writer hereof on or before close of business on Monday 11 July 2016 (16:00). Furthermore, Management has resolved not to schedule you to render your services as the Independent Contractor until this matter is resolved."[1499]

Warning of this nature reflects a permanent and continuing relationship controlled by a party resembling the typical employer in an employer/employee relationship. How would Mr Mvoko's status be viewed in the light of the statutory criteria for dependent contractors? It is clear that the income of the self-employed Group Editor was directly and substantially dependent upon the work he performed for the public broadcaster. Unlike our "Phat Joe" in *Kambule*, in *Mvoko* there was virtually no evidence of business development, self-promotion, or entrepreneurial initiative. The only inevitable conclusion is that the relationship between the Group Editor and the SABC more closely resembles the relationship of an employer-employee than that of an independent contractor. Mr Mvoko was very closely tied to the SABC, which totally governed the rhythm of his work patterns. Accordingly, Group Editor would be classified as a "dependent contractor" within the meaning of section 1(1)(h)of the OLRA.

If there is still a lingering doubt about the efficacy of the hybrid category in filling the gaps in the three-tiered *SITA* test and section 213 of the LRA 1995, this, then, is the time to re- examine *Phaka* through the prism of dependent contractor jurisprudence. It may be helpful to remind ourselves what *Phaka* brought to the fore. In essence, the larger question the Labour Court was asked to answer was whether empowered entrepreneurial owner-drivers running independent enterprises or were scavengers in precarious self-employment? This in turns raised fascinating questions about the fabled entrepreneurial opportunity. Another way of phrasing the intricate questions is to ask the following: Did the owner-drivers own the means of production? Did the labour-capital arrangements as it appeared in the emergent forms of work in *Phaka* constitute legitimate "independent entrepreneurialism"?

Despite the fact that the delivery owner-drivers had minimal entrepreneurial opportunity, finding that they were "independent contractors", Murphy AJA created

[1499] *Mvoko II* para 16. See also paras 19 and 33.

the illusion that they were running micro-enterprises. The company's and judge Murphy's central argument was that the owner drivers' positions afforded them entrepreneurial opportunity to grow their micro businesses. The argument presented on behalf of the company was that some owner-drivers have been able to acquire more than one vehicle, employ drivers to perform the services they had contracted to provide under the contract, and in some cases ceased to perform the services themselves. On the contrary, the record revealed that the much-vaunted entrepreneurial opportunity turned out to be a mirage for many empowered owner-drivers. What the company, the arbitrator, the LC, and the LAC conceived as an independent business does not entail a unique business identity in product, supplier or financial markets; nor does it entail the opportunity to grow or expand customer base or to refine or develop new products.

There are many Canadian cousins[1500] to *Phaka* in the transportation industry, but *HG Francis & Sons Ltd*[1501] can be considered a first cousin. The case of *HG Francis & Sons Ltd*, for example, concerned the owner/operators who looked to the courier company for the bulk of their work. In determining whether the owner/operators were independent contractor or dependent contractor, the Ontario Labour Relations Board went further by separating dependent contracting from dependent contractors. The Board found that the income of all of the contractors was directly and substantially dependent upon the work which they perform for Francis and its customers. There was virtually no evidence of business developments, self-promotion, or entrepreneurial initiative.[1502] The evidence disclosed little inclination or ability on the part of the contractors to expand their business horizons. They did not compete for customers in the market. If new customers come into the picture they were likely to become tied to Francis as they were themselves. The fact that they derive a benefit from attracting new

[1500] See e.g. *Ontario Taxi Workers' Union v Hamilton Cab* 2011 CanLII 1282 (ON LRB); *Timberwest Forest Co. v United Steelworkers of America, Local No.* 1-80 2006 CanLII 1888 (BC LRB); *Skeena Taxi Ltd v The Pulp, Paper & Woodworkers of Canada Local No. 4* 2005 CanLII 13890 (BC LRB); *Maple Leaf Taxi Co.* 1982 CanLII 1021 (OB LRB); *Windsor Airline Limousine Services Ltd* 1981 OLRB Rep. March 398; *Blue Line Taxi Co. Ltd* 1979 OLRB Rep. November 1056.

[1501] *HG Francis & Sons Ltd* para 21.

[1502] *HG Francis & Sons Ltd* para 21.

customers to Francis is no more determinative of independent contractor status than it would be for commission salesmen.[1503]

It should be borne in mind that *Phaka* owner-drivers did not advertise or otherwise solicit clients on their own, and were generally available during working hours of the company. They were acting more like employee truck drivers than independent contractors. By vindicating the empowerment scheme, Judge Murphy deemed "contracting out of individual drivers" for the owner-drivers is a job that involves scavenging for crumbs. The paradox empowerment is that rather than ushering the fabled entrepreneurial opportunity empowerment it has heralded a descent into precarity.[1504] Ownership of capital assets and contractual arrangements aside, measured against the standard of a "typical" industrial employment relationship, the empowered owner-drivers look very much like employees. Each signed a standard contract. The owner-drivers received firm-specific training and learned firm specific protocols, and they were subject to supervisory control. They were subject to a system of performance appraisal, reprimand and cancellation.[1505] The relationship between owner drivers and the company bore all the essential hallmarks of employment relationship. The degree of economic dependence on the courier company meant that they were not in a position to expand their business so as to extricate themselves from their dependence on UTI. If visible benchmarks for determining dependent contractors were to be applied, the majority of empowered owner drivers would fall within the ambit of the relevant dependent contractor provision.

The contention that some owner drivers emerged as success stories of the employee empowerment scheme is equally persuasive in categorising these micro-entrepreneurs as dependent contractor employers. The use of drivers by owner-operators is important in drawing an inference that the total character of the relationship more closely resembles the relationship of a dependent contractor employer than of a

[1503] *HG Francis & Sons Ltd* para 21.

[1504] SABC *Special Assignment Programme* "Scheme or scam" 02 Sept 2018; Van Rensburg "Drivers to sue ABI for R6.3bn" *City Press* 2015-11-01. https://city-press.news24.com/Business/Drivers-to-sue-ABI-for-R63bn-20151101 (20-08-2018). See generally, Dubal "Wage slave or entrepreneur? Contesting the dualism of legal worker identities" 2017 *Cal. LR* 65.

[1505] *Phaka* para 13.

dependent contractor. In the instant case, the point was made that some owner-drivers have been able to acquire more than one vehicle, employ drivers to perform the services they had contracted to provide under the contract, and in some cases cease to perform the services themselves. It is trite that dependent contractor-employers are not dependent contractors within the purview of section 1(1)(ga) of the OLRA.

It is to be remembered that the Board in *Canada Crushed Stone* excluded from the definition of "dependent contractors" one person who owned and operated a company which had ten trucks and employed seven persons to operate the equipment. The owner hired employees, set their terms and conditions of employment and assigned work. In the same case, the Board further excluded two other persons it determined were employers in form as well as substance. They too had authority to hire, fire, discipline and set terms and conditions of employment. The few owner drivers who managed to buy more than one vehicle and employ drivers can be considered genuine micro-entrepreneurs, and dependent contractor-employers who are masters of their business that profits in a substantial way from the labour of others.

As a final reflection on *Phaka* and *Canada Crushed Stone*, a clear example of "empowered self-employed owner-driver entrepreneurs" and dependent contractor employers emerges from a strike dispute involving *SA Breweries*.[1506] There the SAB approached the High Court for an urgent interdict to prevent the striking employees of truck owners contracted by it to deliver its beers to retail outlets from damaging or destroying its products. The court found that the dispute did not concern a labour strike as envisaged in section 68(1) of the LRA 1995 over which the Labour Court had exclusive jurisdiction. The court considered whether SAB was entitled to interfere in a labour dispute between members of the union and their "dependent contractor employers" if such a dispute resulted in a violent strike or protest which adversely affected the business operations of SAB. It noted the relevant provisions of the 1996 Constitution, especially section 23(2)(b) read with section 17, which provide for peaceful strike or protest action. This is to safeguard the right to be free from all forms of violence from either a public or private source as provided for in section 12(1)(c). In short, the High

[1506] *SA Breweries (Pty) Ltd v PTAWU* 2017 38 *ILJ* 2463 (GJ).

Court interdicted the strike employees from damaging or destroying the products of the applicant.

7.8 Dependent Contractor Category as a Tailored Solution to the Opacities of Form Arising From Uberisation of Work

As previously noted, the emergence of Uberised way of conducting business has given rise to two fundamental questions in the labour market. The first question concerns the legal question whether the traditional legal concept of "employee" is still valid in connection with the digitalised mode of labouring. The second question concerns policy, the issue whether there is any need to extend the scope of labour law protection, separating subordinate work from such protection. To resolve these questions, what also has to be considered is whether the protection required by new workers is the same (or different) to the standard protection accorded to subordinated work.[1507] The need for judicial innovation[1508] and a new type of legal protection has been underlined by many commentators.[1509]

The Uber/Lyft driver-partners disputes have led to corresponding calls to create an intermediate category status for workers engaged in "on-demand work via app" and e-hailing drivers. It has been argued that a third category would address many of the unfolding disputes over misclassification plaguing the on-demand sector. Instead of wrangling over whether a particular worker or group of workers deserves employee status, workers in the Uberised economy would automatically be sorted into the hybrid category "dependent contractor" category.[1510] Others have approached the concept with

[1507] Todoli-Signes "The 'gig economy': employee, self-employed or the need for a special employment regulation" 2017 *Transfer XX(X)* 1, 5.
[1508] Admittedly, this was said by District Court of California in *Cotter* 1081to be tantamount to being "*handed a square peg and asked to choose between two round holes*" since the "*test the California courts have developed over the 20th Century for classifying works isn't very helpful in addressing the 21st Century problem*".
[1509] See generally, Aloisi "Commoditized workers: Case study research on labour law issues arising from a set of 'On-demand/gig economy' platforms' 2016 *Comp. Lab. L. & Pol'y J* 1; Brescia "regulating the sharing economy: New and old insights into an oversight regime for the peer-to-peer economy" 2014 *Nebraska LR* 8; Fesltiner "Working the crowd: Employment and labour law in the crowdsourcing industry" 2011 *Berkeley J. Emp. & Lab. L.* 143; Davidov *A Purposive Approach to Labour Law* 2016 Oxford Monographs on Labour Law.
[1510] Davidov *et al The Subject of Labour Law: "Employees" and Other Workers* 16 (Hebrew Univ. of Jerusalem Legal Studies Research Paper, No. 15-15, 2013). http://srn.com/abstract=2561752 (accessed15-11-2018).

some scepticism. It has been pointed out that a "dependence" test will not cover many of the workers that a third category is designed to protect.[1511]

One of the key proposals to emerge advocates for the creation of "independent worker" category who would gain right to organise and bargain collectively under the National Labour Relations Act[1512] and would also gain anti-discrimination protection under Title VII.[1513] Stemler[1514] advocates the creation of an intermediate category between employee and independent contractor. This approach accords well with the Canadian dependent contractor framework. Stemler elucidates:

> "Instead of classifying Uber drivers and other supply-side users in the sharing economy as either employees or independent contractors, regulators should create a new classification. This new classification has been identified as 'dependent contractor,' or for the purposes of this Article 'microbusiness' – workers who fall between clear-cut employees and traditional independent contractors. This new classification would enable regulators to think differently about how to fill regulatory gaps."[1515]

If there is to can be a third category similar to Canada's dependent contractor category, that expands the scope of employment relationship, this will ameliorate conditions for forms of precarious work in the Uberised service arrangements.

7.9 Conclusion

The serious re-appraisal of South Africa's black box of precarious self-employment through the prism of Canadian dependent contractor jurisprudence has brought to the surface the constraining features of the dichotomist view of employees versus self-employed independent workers. This is predicated on a "false unity" of the two concepts, leading to a "false duality". Precisely this issue underlies, and confounds, any attempt to place the intermediate category as the centrepiece of addressing the opacities of form engendered by self-employment. The reluctance within the academia to challenge or move away from the binaries on employer-employee has impaired and rendered infirm many of the regulatory options for fixing South Africa's labour laws.

[1511] Sachs "A new category of worker for the On-demand economy?" ON Labour (June 22 2015), http://onlabor.org/2015/06/22/a-new-category-of-worker-for-the-on-demand-economy (accessed 15-11-2018).

[1512] 29 USC $$ 151-169 (2012).

[1513] Harris & Krueger: *The "Independent Worker"* (2015) 5.

[1514] Stemler "Betwixt and between: Regulating the shared economy" 2016 *Fordham Urban LJ* 31.

[1515] Stemler "Betwixt and between: Regulating the shared economy" 61-62.

Succumbing to the rhetoric of entrepreneurship and much-vaunted empowerment, many of the "entrepreneurs" are in reality scavengers for crumbs in the labour market. Regardless of the trappings of an independent contractor, the evidence has established that client companies exert such a high level of control over owner-operators that they in fact more closely resemble employees than independent contractors. The paradigmatic form of self-employment and micro enterprises illustrated in *Phaka*, exemplified in the bicycle courier and e-hailing driver-partner cases is perfectly compatible with great deal of subordination. The reality is that self-employed workers in these service arrangements often continued to exhibit the social subordination and economic dependence typical of ordinary employees. It is readily discernible that they too are in need of those employment protection rights from which they are often excluded by virtue of having ceased to qualify as employees.

Repeatedly, this chapter has suggested that the Canadian intermediate category provides the relevant model for grappling with the interlinked problems of disguised employment and precarious self-employment. Although dissatisfied with the current state of labour law in South Africa many find foreign models of labour regulation marginally attractive. Moreover, the danger in such comparison is the "grass-is-always-greener" fallacy: one can easily extol foreign systems and see only their benefits and costs. It is generally accepted that the discerning question is whether labour laws might satisfactorily be "transplanted" from one jurisdiction to another.[1516]

Still, the preceding discussion has evaluated some of the risks and related considerations that should be weighed in making any suggestion about adoption of the

[1516] See in particular Kahn-Freund "On uses and misuses of comparative law" 1974 *MLR* 1. For different approach see Teubner "Legal irritants: Good faith in British law or how unifying law ends up in new divergences" 1998 *MLR* 11. Hepple "Can collective labour law transplants work? The South African example" 1999 20 *ILJ* 1, 2-3 postulated model for success embodies four conditions:

> "(1) a social consensus between business and labour; (2) an organic relationship between a specific social need and the form of regulation adopted; (3) an international and open-minded legal culture; and (4) the form of labour law adopted must contribute to improved national economic performance."

See also Fenwick "Labour law in Namibia: Towards an 'indigenous solution'?" 2006 *SALJ* 665, 679-680; Kalula "Beyond Borrowing and Bending"; Hepple "Some comparative reflections" (1980) *Bulletin of Comparative Labour Relations* 231. On broader implications of comparativism, see Ackermann "Constitutional comparativism in South Africa" 2006 *SALJ* 497; Van der Vyver "Comparative law in constitution litigation" 1994 *SALJ* 19.

intermediate category. If anything, the Italian and Spanish experiences with the hybrid category, do not foreclose the adoption of a superior dependent contractor model in the South African context. Indeed, if the dependent contractor category is introduced, it is easy to make optimistic predictions, because our legislature will be proceeding from a vantage position. It can wisely avoid the pitfalls of the European experimentation, while reaping a rich harvest from one of the Commonwealth's enlightened jurisdictions.

CHAPTER 8

SUMMARY, RECOMMENDATIONS AND CONCLUSIONS

8.1 Introduction

In this chapter, the extent to which unmasking the true employee in contemporary South Africa's labour law has remained a perennial headache of the subject is summarised. It is also here that proposals for fixing South Africa's black box of precarious self-employment by amending section 213 of the LRA dealing with the definition as well as finding the missing piece of the puzzle in the three-fold *SITA* test for identifying the existence of employment relationships are put forward. In addition, certain conclusions are drawn.

8.2 A Summary of the Perennial Migraine of Who is an Employee?

Chapter one took up the broad issue of the shifting frontiers of work, globalisation and problems of precarity within an employment relationship as a key topic, different facets which recur throughout subsequent chapters. First of all, at meta-level, there is the issue of globalisation and its impact on the world of work. In entrenching labour market segmentation, globalisation has deepened and expanded precarious forms of work while diminishing job security. Secondly, at the mid-level, there are two sets of strands. The disruption to the normative patterns of labour law is also linked to the deployment of new technologies. In particular, the emergence of "virtual work"[1517] with its added complexities. The other mid-level strands concerns displacement of standard forms of employment by non-standard forms of employment.

Standard forms employment is described as a subordinated waged employment in an establishment owned by the employer which is full-time, stable and open-ended. From a regulatory point of view, this translates into a worker who is recognised by the law as an employee in a binary relationship with an employer under a contract of employment. Non-standard forms of employment generally are located at

[1517] Cherry "A taxonomy of virtual work" 2011 *Ga. LR* 951 uses the term "virtual work" broadly not only to encompass virtual worlds but also to refer to work taking place online, including the type of micro-labour crowdwork performed on Amazon's Mechanical Turk).

the margins of labour law. Simply put, the allegedly precarious nature of non-standard forms of employment places many vulnerable workers beyond the protective ambit of labour and social security legislation.

Thirdly, there is a normative dimension, turning a spotlight on the moral *raison d'etre* for labour law in the twenty first century. The essential point emerging from soul searching is that labour regulation should aspire to strong protections so as to mitigate the problems presented by heightened employment precariousness and vulnerability if reconceptualization is not to prove a blind alley. What has emerged and attested in the various pages of specialist labour law journals is a more introspective and critical review of the scope of labour law,[1518] its regulative nature and its impact.[1519] This process has led to some extent to the decentring of labour law while simultaneously calling into question its traditional and avowed vocation of protecting workers within an inherently asymmetric contractual relation with the employer.

From a survey done in chapter 2, it appears that the statutory inroads have not wholeheartedly dislodged the legal institution of the common law contract as the bedrock of the employment relationship. An exposition on labour's perennial headache of unmasking who is a true employee in contemporary work environment illuminate the importance of understanding the normative basis for determining the scope of labour protection. The hallmarks of a true employee are shaded in modern work environment given that the actual differences between the categories of "employee" and "independent contractor" are diminishing. It might be added to this that the long-diagnosed crisis in the fundamental concepts of labour law[1520] has therefore become "if anything more serious, so far as employment contracts are concerned".[1521]

[1518] For a general overview see, Bogg *et al* "Introduction: Exploring autonomy" in Bogg *et al* (eds) *Autonomy of Labour Law* (2015) 1; Barnard *et al* (eds), *The Future of Labour Law: Liber Amicorum Bob Hepple QC* (2004); Arup "Labour law as regulation".

[1519] For an overview of range of sources exploring this theme, see generally, Klare "Countervailing workers' power as a regulatory strategy"; Collins "Regulating the employment relation for competitiveness"; Deakin "Labour law as market regulation"; Ewing "The death of labour".

[1520] Freedland & Kountouris *The Legal Construction of Personal Work Relations* 26; Deakin & Morris *Labour Law* 145. See further Prassl "Autonomous concepts in labour law? The complexities of the employing enterprise revisited" in Bogg *et al* (eds) *Autonomy of Labour Law* (2015) 151; Le Roux "The worker" and "Diversification"; Hyde "Employment law after the death of employment"9; Barmes "The continuing conceptual crisis"; Davies & Freedland "Changing perspectives upon the employment relationship in British labour law".

[1521] Freedland & Kountouris *The Legal Construction of Personal Work Relations* 26.

The most pressing challenges to the scope of employment protective legislation is the increase in the number of people whose legal and contractual status is that of self-employment but whose actual work status is very far from that of independent entrepreneur. While the shift from status to contract was a feature from ancient to modern law,[1522] the rising significance of immigration status was a riposte to that account.[1523] It is undoubtedly clear from *Discovery* and *Ndikumdavyi* that, currently immigration law tend to create temporary, precarious status, which have profound impact on work relations. Reflection on sex work illuminated the endpoint of gendered precarity. The trilogy of *Phillipa*, *Kylie* and *Quashie* invited the consideration of discourses of emotional labour and the multiple work relations in the form of worker-employer-customer triangle. Accordingly, the need to extend effective legal and social protection to all categories of workers irrespective of whether they are in organised sector or wage employment, but also to homeworkers and the self-employed remains the bedrock of international conventions regarding employment.[1524]

The unmistakable message emerging from chapter 3 is that the key question is not simply distinguishing between the individual worker and the true entrepreneur. The long-standing and deeply embedded distinction between employment and independent contracting (self-employment) is challenged by the reality of contemporary work environment which does not readily conform to such binary categories. In effect the definitional quandaries of who is an employee and who is an independent contractor shift, blur and obfuscate the porous parameters of disguised employment, genuine entrepreneurial self-employment and dependent self-employment. Not surprisingly, given the potential for self-employment to be a low-cost alternative to direct employment, much energy has gone to attempts to shore up and expand the reach of legal protection. Superficially the debate boils down to one side working to drag "sham contractors" back into the employment framework by better defining employees, while

[1522] Maine *Ancient Law.*
[1523] Costello "Migrants and forced labour: A labour law response" in Bogg *et al* (eds) *Autonomy of Labour Law* (2015) 189, 190.
[1524] See ILO *Income Security and Social Protection in a Changing World* Geneva: World Labour Report (2000); *Meeting of Experts on Workers in Situations Needing Protection (The Employment Relationship: Scope)* Basic Technical Document. Geneva: International Office (2000); *Decent Work in the Informal Economy* Geneva: International Labour Office (2002). See also Sen "Work and rights" 2000 *ILR* 119.

most resistance comes in the form of protectors of the rights of the self-employed to be "free". In reality the debate is far more nuanced and the practice of self-employment is far more heterogeneous, but the policy conversations still substantially respond to the same principal conceptual dichotomy – is the contract one of *employment* or one of *commerce*?

The inescapable inference from case law is that a significant number of self-employed are in analogous position of economic dependence as subordinate employees in that many of them work on their clients' premises or on premises supplied by clients and are dependent on former employers as clients. Somewhere in between genuinely subordinated workers and genuinely independent entrepreneurs, a third category is emerging – that of workers who are legally independent (i.e. self-employed) but economically dependent.[1525] Even though most independent contractors are under the control of, nor economically dependent upon, a particular client, most lack many, if not all, of the distinguishing features of entrepreneurship – ownership, autonomy, or control over production. There exists an economic spectrum - coloured at one end by the true entrepreneur and at the other end by the individual worker. At the shaded area toward the middle of the economic spectrum, critical questions about self-employment arise.

Chapter 4 looked at the significant and neglected component of labour law's traditional dilemma, that of identifying the real employer.[1526] The stage at which employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection. It is impossible to overstate the importance of identifying the real employer or employing entities where the employment relationship has been obfuscated by opacities of form designed to non-suiting the employees' unfair dismissal claims.

[1525] Harris & Krueger "The 'independent worker'" *The Hamilton Project Discussion* (2015) write:

> "[C]ourts do not have sufficient authority to ensure a fully sufficient authority to ensure a fully efficient authority to ensure a fully efficient solution to the problems created by the emergence of independent workers … a category of workers whose work relationship 'can be fleeting, occasional, or constant, at the discretion of the independent worker' and who differ from employees for the crucial reasons that "they do not make themselves economically dependent on a single employer, they do not have an indefinite relationships with any employer, and they do not relinquish control over their work hours or the opportunity for profit or loss."

[1526] See also Maloka "Penetrating the opacities of form: Unmasking the real employer remains labour law's perennial problem" 2018 *Speculum Juris* 105.

Labour law's near-exclusive preoccupation with the notion of the employee has played a significant role in shaping the unitary notion of the employer. The unitary notion of the employer, constituted as a single counterparty to the contract of employment in all circumstances[1527] is rooted in the language and concepts surrounding the master. Another contributing factor to the historical assumption that the employer must be a singular entity, substantially identical across all different domains of employment law derives from the perception of companies as anthropomorphic individual units of separate legal personality.[1528]

It is now increasingly clear that the legal meaning of the employer is not coterminous with the sociological or economic idea of the "enterprise" or "organisation", nor with the workplace, that is, the physical place on which work is carried out. The tendency towards fragmentation implies that the identification of the employer may be decided partly by considerations of organisational and workplace boundaries. In short, the organisational form that an enterprise takes has a profound impact upon equity in employment conditions.

Chapter 5 confronted the enormously complex and novel issues arising from "Work on demand via app" and the "Uberisation of work". The onset of the 'on-demand/platform economy' also benignly described as "gig economy", "uberised economy" or "sharing economy" presents a global puzzle as regards the development of appropriate forms of work regulation. The labour law's perennial headache of "who is an employee" resurfaces with yet another reincarnation.

The chapter demonstrated that the on-demand economy is a double-edged sword. An oft-touted feature of the platform economy is the worker's increased control over her work schedule. Platform economy service providers determine for themselves when they will work through the platform and for how long. The downside of this flexibility that enables a worker to control her work schedule is a more tenuous

[1527] Prassl "The notion of the employer" 2013 *LQR* 380.
[1528] Prassl "Autonomous concepts in labour law? The complexities of the employing enterprise revisited" in Bogg *et al* (eds) *Autonomy of Labour Law* (2015) 151, 153.

relationship between the firm and worker, and a lack of certain significant employment related benefits.[1529]

The problems of insecurity for individuals, as in the case of economically dependent self-employment have been well appraised for years:[1530] what Uber/Lyft litigation illustrates is that the new "uberised" workforce have forgone the benefits secured by their ancestors' industrial efforts, such as minimum rates of pay, and minimum shifts times, and a measure of employment security, which are entitlements reserved to direct employees, working under a "contract of service".[1531] Virtual platforms and apps pave the way to a severe commodification of work. This reveals that the Uberised economy is not a separate silo of the economy and that it is a part of the broader trends such as casualisation and informalisation of work and the proliferation of non-standard forms of employment. In short, uncertainty and precariousness are the inseparable henchmen of the uberised economy.

Chapter 6 evaluated and revisited the binary distinction between employees and independent contractors through the prism of vicarious liability. It is hard to disagree with the observations of Lord Phillips and Lady Hale that the "law of vicarious liability is on the move"[1532] and "it has not yet come to stop."[1533] The novel liability problems emerging from the uberised economy attest to this. The technological innovations in vehicular transportation have far-reaching implications. These transformations also raise numerous liability questions.[1534] Specifically, the emergence

[1529] New Reporter "Uber, Taxify drivers protest against 'slaery' work conditions" *The Citizen* – available at: https://citizen.co.zaa/news/south-africa/2035092/uber-taxify-driver-rotest-against-slavery-work-conditions (accessed 12-11-2018).
[1530] Supiot "The transformation of work and the future of labour law in Europe" 1999 *ILR* 31.
[1531] Riley "Regulating work in the 'gig economy'" 2, available at http://ssrn.com/abstract=294631 (accessed 13-11-2017).
[1532] Per Lord Phillips in *Various Claimants v Catholic Church* 2012 UKSC 56 para 19.
[1533] Per Lady Hale in *Cox v Ministry of Justice* 2016 UKSC 10 para 1. See also Tutin "Vicarious liability: An ever-expanding concept? (2016) 45 *ILJ (UK)* 556.
[1534] See "Pedestrian dies after being knocked by Uber self-driving car" *Associated Press* 19/03/2018 available at https://m.news24.com/World/News/pedestrian-dies-after-being-knocked-by-uber-self-driving-car-20180319; "Fatal Uber crash could set back self-driving cars for years" *Bloomberg* 20 March 2018 available at https://mybraodband.co.za/new/motoring/252929-fatal-uber-crash-could-set-back-slef-driving-cars-for-year.html; "Our self-driving car would not have killed pedestrian like Uber – Google" Bloomberg 25 March 2018 available at https://mybraodband.co.za/news/motoring/253497-our-self-driving-car-would-not-have-killed-pedestrian-like-uber-google.html (accessed 30-03-2018).

of self-driving vehicles and transportation network companies create uncertainty for the application of tort law's negligence standard.[1535]

Self-driving technology is not an independent innovation; rather, it is uniquely intertwined with changes created by transportation network companies. The technological innovations in vehicular transportation have far-reaching implications. It is clear that the popularity of transportation network companies (TNCs) functioning as ride-hailing and ride-sharing services such as Uber/Lyft have altered traditional conceptions of personal transportation.

The law of vicarious liability imposes on the employer the obligation to shoulder in monetary terms the consequences of the wrongdoing of its employee to the injured third party. The application of strict liability is predicated upon the existence of employer-employee relationship. Naturally, the acute problem of ascertaining what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing cannot be avoided. Indeed, the distinction between an employee and an independent contractor generates the most litigation. The TNCs have argued that they were in a separate line of business than the drivers. Or, to put it another way, they were software companies that operate a mobile application-based platforms facilitating transactions between third parties offering rides and individuals seeking rides. The driver-partners were not employees of TNCs but independent micro entrepreneurs.

What the present chapter might have achieved, is to demonstrate that *Vabu* and other venerable precedents dealing with the transportation industry provide a vantage ground for forging new tools and finding innovative remedies to address the seemingly unique issues the TNCs raise. It is submitted that by adapting the vicarious liability principles and jurisprudence, clarity and certainty can be achieved.

The analysis carried out in chapter 7 of re-examining South Africa's black box of precarious self-employment through the lens of Canadian dependent contractor jurisprudence has brought to the surface the constraining features of the dichotomist

[1535] See Wolpert "Carpooling liability?"; Boeglin "The costs of self-driving cars"; Marchant & Lindor "The coming collision between autonomous vehicles and the liability system". See also Dawson "Who is responsible when you shop until you drop?" 751–52.

view of employees versus self-employed independent workers. This is premised on a "false unity" of the two concepts, leading to a "false duality". Precisely this issue underlies, and confounds, any attempt to place the intermediate category as the centrepiece of addressing the opacities of form engendered by self-employment. It is important unequivocally to note that the reluctance within the academia to challenge or move away from the binaries on employer-employee has impaired and rendered infirm many of the regulatory options for fixing South Africa's labour laws.

In interrogating comparative experience with the hybrid category, it is clear that the Canadian intermediate category provides the relevant model for grappling with the interlinked problems of disguised employment and precarious self-employment. If anything, the Italian and Spanish experiences with the hybrid category do not foreclose the adoption of a superior dependant contractor model in the South African context. Indeed, if the dependant contractor category is introduced, it is easy to make optimistic predictions, because our legislature will be proceeding from a vantage position. It can wisely avoid the pitfalls of the European experimentation, while reaping a tangible benefit from one of the Commonwealth's enlightened jurisdiction

8.3 Proposals for Reform: Introduction of Intermediate Category

Clearly, fixation with dichotomies between employees/independent contractors is constraining regulatory options for addressing pervasive and elusive troika of problems, i.e., disguised employment, bogus self-employment and precarious self-employment. At present, the difficulty of using the categories "employee" and "independent contractor" persists in a world in which the actual differences between these groups are diminishing. The problem of traversing the zone of ambiguity between genuine self-employment and dependent self-employment is compounded by the rhetoric of entrepreneurship. The essential point is that a genuinely self-employed person is not economically dependent on the employer because he or she retains the capacity to contract with others. The profile of many self-employed persons rather than exhibiting entrepreneurial independence, their position in the marketplace is analogous to that of economically and subordinated employees. *Phaka* has shown that the much vaunted empowerment and entrepreneurship inevitably lead to a descent into precarity.

Undeniably, *Phaka* is a stark example of empowered entrepreneurial owner-drivers running independent enterprises but who in reality are scavengers in the market.

Better answers await better questions? What then is the answer to the opacities of form caused by disguised employment, compelled self-employment and precarious self-employment? If the problems are deep-seated, long-term and even escalating, especially in compelled and dependent self-employment, what might be done? Reforms to non-standard forms of employment focusing in the main on the tighter regulation of temporary employment service are substantial, but limited.[1536] In short, they provide a partial answer to the overload problems of precarity and employment vulnerability.

Unlike, the hotly contested 2014 amendments to the LRA concerning labour brokers,[1537] the simplest, narrowest, yet sweeping reform would be to introduce a dependent contractor category into the LRA. If accepted, the intermediate category represents the soundest policy prescription to effectively tackle the opacities of form engendered by the triple problems, namely; disguised employment, bogus self-employment and precarious self-employment.[1538] In practical terms, slight amendment to section 213 of the LRA dealing with the definitions of "employee". To recapitulate, section 213 defines an employee as

> "(*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

[1536] In this respect Constitutional Court's finding in *Assign Services (Pty) Ltd v NUMSA* 2018 39 *ILJ* 1911 (CC) represents a welcome breeze in tackling pervasive precariousness inherent in tripartite employment relationship.

[1537] See generally, Grogan 2014 *EL* 3 and 2015 *EL* 4; Cohen 2014 35 *ILJ* 2607; Brassey 2012 33 *ILJ* 1; Benjamin 2010 31 *ILJ* 845; Fourie 2008 *PER/PELJ* 23; Van Eck 2010 *PER/PELJ* 107; 2012 *IJCLLIR* 29; 2013 *De Jure* 600 and 2014 *IJCLLIR* 49; Botes 2013 *PER/PELJ* 506; Forere 2016 *SA Merc LJ* 375.

[1538] ILO Recommendation 198 concerning the employment relationship, 2006 (adopted 15 June 2006), albeit not of the binding force of a Convention, enjoins member states to:

> "combat disguised employment relationships in the context of, for example, other relationships that may include the use of other forms of contractual arrangements that hide the true legal status, noting that a disguised employment relationship occurs when the employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee, and that situations can arise where contractual arrangements have the effect of depriving workers of the protection they are due."

In addition ILO R198 para 9 recommends that an employment relationship should be determined –

> "primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterised in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties."

> (*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."

The proposed amendment to the definition of employee in section 213 will redefine "employee" to include a "dependent contractor" and a dependent contractor to be:

> "a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material, or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he or she is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor."

What gains could be realised simply by introducing a dependent contractor provision in section 213? The three critical advantages of the hybrid category come into sharp focus. First, at a stroke, the adoption of the dependent contractor category solves the broader challenge for labour regulation of how to extend protection to persons who have some of the trappings of the independent contractor, but, in reality, are in a position of economic dependence, more like that of an employee. In focusing on South Africa's black box of self-employment, we encountered a long list of self-employed persons economically dependent on the single client employer, and whose service arrangements more closely resemble the relationship between employees and an employer than between independent businesses.[1539] The basic lesson seems manifest: the conception of self-employment that links being self-employed inextricably with entrepreneurship, ownership, and autonomy has more to do with ideology than reality.[1540]

The importance of the second reason, however, overshadows the first one. The dependent contractor category represents a missing piece of the puzzle in the judicially endorsed three-tiered *SITA* test for identifying the existence of employment relationship. To be certain, the lacuna in the three-fold *SITA* test has so far escaped scholarly, judicial and legislative attention. Prof Benjamin has drawn attention to the importance of distinguishing between personal dependence from economic dependence.[1541] This observation has obvious contemporary relevance. To understand this contention, one

[1539] For example of compelled self-employment, see *Melmons Cabinet CC*; *Dyokhwe*; *Madlanya*; *Shezi; Mac-Rites*. See also *Fair Work Ombudsman*.
[1540] Fudge *et al Marginalizing Workers* 5-16.
[1541] Benjamin "Accident of history" 803 [emphasis added].

must begin with the simple truth that a *bona fide* self-employed person is not economically dependent on their employer because he or she retains the capacity to contract with others. Economic dependence therefore relates to the entrepreneurial position in the marketplace. Moreover, a pointer that a person is not dependent economically is that he or she is entitled to offer skills or services to persons other than his or her employer. Conversely, the fact that a person is required to only provide services for a single 'client' is a very strong indication of economic dependence.

To a large extent the three-fold *SITA* test postulated by Benjamin accords well with the "more visible benchmarks" used by the Ontario Board to draw the line between independent contractors and dependent contractors with precision. Although the three-part *SITA* test gives due regard to economic dependence, it is impaired by the fact that it is premised on the narrow confines of the binary distinction between employees and independent contractors. This leads the three-fold *SITA* test to be an imprecise tool in tackling the fine margins of self-employment.

If, as just proposed, we bend and borrow the dependent contractor category from Ontario's Labour Relations Act, then, the end results in the run of the mill cases concerning putative independent contractors would be different. To recap, we have evaluated the standard cases where ex-employees had established a personal service companies in order to earn a higher income and secure a tax advantage; but when commercial service relationship ruptures, they then purportedly revert to their former status as employee in order to prosecute a claim for unfair dismissal. If the visible benchmarks used by the Ontario Labour Relations were to be invoked to the circumstances in *Denel* and *Vermooten*, a different portrait will emerge. Even if there are no qualms about the need for adjudicators to respect the contractual arrangements freely constructed by parties who are in equal bargaining position, the factor of economic dependence on the single client may tilt the scale in favour of a finding that the status of the alleged entrepreneurial contractor is analogous to that of employees than that of independent contractors. The reality is that neither Ms Gerber in *Denel* nor her counterpart, Dr Vermooten, were genuine entrepreneurs but rather dependent contractors. If there was a dependent contractor category in the LRA, where the commercial service arrangement with their respective client was terminated, the alleged

"independent contractors" would have been afforded greater legal protection under the labour law rather than the civil law. Certainly, the intermediate category is critical to the extension of some basic employment rights to some type of self-employed and particularly the freelance type operators[1542] and owner-driver operators.[1543]

In response to a call for adoption of the dependent contractor category, proponents of the binary approach will predictably claim that the intermediate category is bound to conflate and collapse the essential distinction between employees and independent contractors. Phrased more generally, why should two commercially astute and consenting entrepreneurs not be entitled to structure their arrangements in the way they think best, and provided that their agreement is lawful, why should they not be held to their bargain when their consciously constructed and carefully crafted commercial arrangements go sour? A related argument reformulates this question by reminding us that the LRA was never intended to drive out genuine independent service agreements concluded with individual service providers to the scrap heap of history, in favour of a default employment relationship. Put more simply, what the LRA was intended to do was to provide protection to unsophisticated and vulnerable persons, in an environment where employment is a scarce commodity and unemployment is rife, in which a desperate person would do and sign anything just to get a job.

One predictable reply to the foregoing arguments is that they assume that if an individual who is put forward as a dependent contractor regardless of the fact that he or she is a genuine entrepreneur and employer of others, such a person will still be considered an employee. There is a delicate line here. The Ontario's arbitral jurisprudence demonstrates that the enormously complex task for the Board in any given situation is how to demarcate the line so as to exclude from the operation of the Act those contractors who, although economically dependent, are themselves employers deriving income from the labour of others. Still, it must be established that the nature of

[1542] Textbook examples include: *McKenzie*; *Kambule*; *Padayachi*; *Burke*; *Minter-Brown*. Another prevalent form of opportunism concerns the use of personal service companies in order to secure a tax advantage, but upon termination of service the individual seeks to reassert employee status in order to prosecute a claim for unfair dismissal as an employee. See for e.g. *Apsey*; *Callan*; *Hunt*; *Briggs*; *Bezer*.
[1543] See e.g. *Phaka*; *Morekure*, *Uber SA*.

their business is such that within the meaning of the statute they more closely resemble independent contractors than employees in their relationship with the client/employer.

The ownership of more than one vehicle coupled with the use of drivers by owner-operators is illustrative of economic independence and genuine entrepreneurship. By all accounts, the few successful "empowered self-employed owner-driver entrepreneurs" who employ drivers to perform the services they had contracted to provide under the contract in both *Phaka* and *SA Breweries*, fell to be classified as dependent contractor-employers. The exercise of managerial prerogative to hire and fire, and ownership of capital assets convert the alleged dependent contractor into a dependent contractor-employer. Another good illustration is "Phat Joe" the freelancing radio personality in *Kambule*. At first glance, he seems to be a dependent contractor, however, a closer scrutiny reveals that his position was akin to that of a genuine independent contractor than an employee. A dependent contractor with the authority to hire, fire, discipline and set the terms and conditions of employment in respect of others is not a dependent contractor entitled to benefits of the labour statute even the one with the hybrid category. In short, "Phat Joe" is a dependent contractor employer.

It bears repeating that the exclusion of dependent contractor employers is consistent with statutory definition and also maintains the Chinese wall between employers and employees created by the statute. The fundamental point is that dependent contractor-employers are not dependent contractors within the purview of section 1(1)*(ga)* of the OLRA.[1544] From this, it follows that a reformulated definition of an employee embodied in section 213 incorporating a dependent contractor provision, while mapping the fine margins of self-employment will still uphold the Maginot Line between employers and employees.

Finally, the third advantage of adoption of the dependent contractor category – important, to be sure, to litigators and courts in specific cases – but still central to dispute resolution is outflanking *Driveline* orthodoxy. It is a common ground (and clear beyond argument) that, referral of a dismissal dispute to conciliation is a precondition

[1544] See e.g. *Canada Crushed Stone*; *Comfort Services Ltd* and *Dominion Dairies Ltd*.

to the Labour Court's jurisdiction. The fuller implications of this prescription is that non-compliance with conciliation formalities, including referral for conciliation, is a jurisdictional bar to the Labour Court's hearing the unfair dismissal claim. The root source of this requirement is the South African labour-law history for nearly a century.[1545]

To understand the rigours of *Driveline* fundamentalism, it is necessary to remind ourselves what *Drivelin*e stands for. As has been seen, the core premise advanced by the *Driveline* majority is that the wording of section 191(5) imposes the referral of a dismissal to conciliation as a precondition before such a dispute can either be arbitrated or be referred to the Labour Court for adjudication.[1546] Essentially, the Labour Court does not even have a discretion to adjudicate a dismissal dispute that has not been referred to conciliation.[1547]

It may well be that, in majority of cases the *Driveline* principle does not inhibit speedy resolution of labour disputes. But an overly formalistic approach to compliance with the prescripts of section 191 of the LRA has evinced the constraining effect of *Driveline*. The apex court has frequently "cautioned against a narrowly textual and legalistic approach".[1548] Equally important, the LRA provides that it must be interpreted "in compliance with the Constitution"[1549] and in such a way as "to give effect to its primary objects" which include giving effect to and regulating "the fundamental rights conferred by section 23 of the Constitution"[1550] and "to promote the effective resolution of labour disputes".[1551] By employing a narrowly textual or legalistic approach of the Labour Court, the Labour Appeal Court and the Constitutional Court, it is submitted that it cannot be considered to have achieved these objects, especially as such an approach would not have led to the promotion of the effective resolution of the true labour dispute in certain cases.

[1545] *NUMSA v Intervalve* paras See 116-129.
[1546] *Driveline* para 73.
[1547] *NUMSA v Intervalve* para 32.
[1548] *September v CMI Business Enterprise CC* 2018 39 *ILJ* 987 (CC) para 45; *NUMSA v Intervalve* para 177; *Chirwa* para 110; *ACDP v Electoral Commission* 2006 (3) SA 305 (CC) at paras 24-5; *AllPay* para 30.
[1549] S 3(b) of the LRA.
[1550] S 1(a) of the LRA
[1551] S 1(d)(iv) of the LRA.

The problem with *Driveline* orthodoxy is its insidious effect of rewarding an employer who obfuscates working arrangements, thereby saddling dismissed employees and their trade union with an undue burden of having to establish who their true employer is. It is worth going back to *NUMSA v Intervalve* trilogy where the majority's overly restrictive construction of section 191 had the effect of non-suiting the employees unfair dismissal claim. In contrast to the majority opinions, the dissenting opinions of Nkabinde and Froneman JJ concluded that had the LAC and the majority interpreted the LRA in a purposive manner and paid due consideration to the facts and the fundamental rights at play, they would have concluded that there was substantial compliance with the relevant provisions of the Act. The interpretation of section 191 of the LRA espoused in the lead judgment is discordant with the stated objects of the LRA which include the promotion of the effective resolution of labour disputes and the right of access to courts in section 34 of the Constitution. It also has the effect of creating unfairness in labour relations and limiting access to courts.

In *Uber SA*, in a similar vein, Van Niekerk J's rigid adherence to *Driveline* unwittingly rewarded the employer for complicating the working relationship. Like in *NUMSA v Intervalve* trilogy, in the present case there was justifiable confusion on the part of applicant drivers as to their "real employer", either against Uber BV or its local marketing subsidiary, Uber SA. It is important to appreciate that in a given situation there is no contractual relationship between Uber's local marketing agent and drivers.[1552] Even more difficult issues in respect of the jurisdictional quandaries implicating conflict of laws arise from the fact that the alleged employer, Uber BV the entity that owns the Uber app is a Dutch corporation based in the Netherlands.[1553] Ultimately, the litigating

[1552] For e.g. "On-boarding" for recruitment and/or induction and 'deactivation' for dismissal. In *Ngalonkulu/Uber* 2018 9 BALR 1020 (CCMA) Uber driver's account was "de-activated" for alleged fraud. The arbitrator found that a dismissal has been proved. See also Huert "Uber deactivated a driver for tweeting a negative story about Uber" Forbes 2014. Available at: http://www.forbes.com/sites/ellenhuet/2014/10/16/uber-driver-deactivated-over--tweet/#545e7b8a36c8 (accessed January 2018).

[1553] The jurisdictional complexities arises from the fact the service agreement between the drivers and UBV provides that the laws of the Netherlands apply and disputes may be resolved by submission of the dispute to the International Chamber of Commerce for Mediation and Arbitration. See *Morekure* paras 4, 9, 13; 24, 26 and 56-57; *Aslam* paras 3 and 103-112.

driver-partners were denuded of their unfair dismissal claims simply because they did not cite the real employer at conciliation.

The in-depth analysis of the difficult questions concerning transportation network providers proves that litigating against Uber BV or its local subsidiaries inevitably takes one into a "forensic minefield."[1554] A litigant would have to differentiate between discrete legal entities connected to the app in order to discover the real employing entity of either partner-drivers or drivers only. It is precisely because, Uber/Lyft disputes bring to the surface a myriad of novel and complex issues concerning the invisible hand of the algorithm,[1555] "pure fiction",[1556] twisted

[1554] *Driveline* para 8 minority alluding to the formalism which prevailed under the old Industrial Court. This apparent from the review of jurisdictional ruling by CCMA commissioner in *Uber SA* paras 44, 50, 59 and 97.

[1555] Ziewitz "Governing algorithms myth, mess, and methods".

[1556] The ET in *Aslam* para 91 concluded that any supposed driver/passenger contractor was a "pure fiction" bearing no relation to the dealings and relationships between the parties. It noted:

> "Since it is essential to that case that there is no contract for the provision of transportation services between the driver and any Uber entity, the Partner Terms and the New Terms require the driver to agree that a contract for such services (whether a 'worker' contract or otherwise) exists between him and the passenger, and the Rider Terms contain a corresponding provision. Uber's case is that the *driver enters into a binding agreement with a person whose identity he does not know (and will never know) and who does not know and will never know his identity, to undertake a journey to a destination not told to him until the journey begins, by a route prescribed by a stranger to the contract (UBV) from which he is not free to depart (at least not without risk), for a fee which (a) is set by the stranger, and (b) is not known by the passenger (who is only told the total to be paid), (c) is calculated by the stranger (as a percentage of the total sum) and (d) is paid to the stranger.* Uber's case has to be that if the organisation became insolvent, the drivers would have enforceable rights directly against the passengers. And if the contracts were 'worker' contracts, the passengers would be exposed to potential liability as the driver's employer … *The absurdity of these propositions speaks for itself. Not surprisingly, it was not suggested that in practice drivers and passengers agree terms. Of course they do not since (apart from any other reason) by the time any driver meets his passenger the deal has already been struck (between ULL and the passenger).* …" [emphasis added].

language,[1557] the problem of dense legal documents couched in impenetrable prose,[1558] and even a brand new lexicon.[1559]

It is submitted that the acceptance of the dependent contractor category provides a workable solution to mitigate the rigours of *Driveline* orthodoxy. A better way of tackling jurisdictional quandary as well as the elusive task of identifying the real employer in *Uber SA* would have been to treat the driver-partners as a dependent entrepreneurs. In this way, it would be easier to recognise the dual employer-client, Uber BV and its local marketing subsidiary regardless of the artificial arrangement contrived to complicate service arrangements. Indeed, as has been noted, the opacities of form inherent in Uberised service arrangements between different app-based entities and drivers are contrived to obfuscate and complicate the relationship. If we revisit, *Aslam* and *Morekure*, the identity of the employer was hazy. From Cape Town to London, what the drivers knew is that they were working for Uber. In sum, the introduction of the dependent contractor category offer better legal protection for workers engaged in "on-demand work via app" and e-hailing drivers.

8.4 Conclusion

The preceding discussion of the project of unmasking the true employee in contemporary work environment reveals the dilemmas and complexities embedded in the beguiling simple but intractable question: who is an employee? The contours of the legal definition of employee are difficult to draw. While the project of identifying a true employee through the lens or prism of the legal institution of contract of employment or

[1557] For e.g. calling the driver ("an independent company in the business of providing Transportation Services") "Customer" (in the New Terms). This of choice of terminology has the embarrassing consequence of forcing Uber to argue that, if it is a party to any contract for the provision by the driver of driving services, it is one under which it is a client or customer of "Customer". *Aslam* paras 37 and 87 footnote 37. Another example concern the right (in UBV) to levy the cancellation fee. Presumably Uber would have to say that sum was also payable under a private (unwritten) contract made between the driver and the passenger, two individuals who not only did not know each other's identities but had never met or even communicated remotely. *Aslam* para 90 footnote 45.

[1558] See e.g. *Uber BV* para 73, *Aslam* paras 28-33 and 37-38. This is an illustration of the phenomenon of which Elias J warned in the case of *Kalwak* para 25 of "armies of lawyers" contriving documents in their clients' interests which simply misrepresent the true rights and obligations on both sides.

[1559] For e.g. "On-boarding" for recruitment and/or induction and 'deactivation' for dismissal. In *Ngalonkulu/Uber* 2018 9 BALR 1020 (CCMA) Uber driver's account was "de-activated" for alleged fraud. The arbitrator found that a dismissal has been proved.

the provisions of section 200A of the LRA does not seem impossible, it is certainly complex and contestable at every point. The shifting frontiers of work compounded by the larger trends linked to globalisation have served to ensure that the distinction between independent contractors and employees remains unsettled. To that extent, adjudicators across jurisdictions have struggled with the issue of how to distinguish between"employees" and "independent contractors" or worse navigate the zone of ambiguity between genuine self-employment and dependent self-employment.

Grappling with the opacities of form created by the fragmentation of work and vertical disintegration of production laid bare the extent to which the concept of employer plays a central role in defining the parameters of labour protection. *A fortiori*, the question of who is an employer is the different side of the same labour law's million dollar coin. To answer the question how has South Africa come to grips with the decentring of labour law resulting from the complexities of the employing entity, more than a list is required. In particular, close examination of the judicial approach to penetrating the opacities of form designed to complicate the employment relationship with the effect of non-suiting the employees' unfair dismissal claims, thus impeding effective resolution of labour disputes is warranted. With respect, it is submitted that the overly restrictive and formalistic approach to compliance with section 191 of the LRA premised on *Driveline* orthodoxy exemplified by the *NUMSA v Intervalve* majority in the Constitutional Court stands to be rejected. Moreover, it has the effect of depriving employees of their unfair dismissal claims against employing entities. It is submitted that a purposive approach to statutory compliance articulated in the dissenting opinions is to be preferred as it accords well with the goals of labour regulation in terms of promoting effective dispute resolution, protecting fundamental rights and promoting countervailing power.

Whilst not ruling out substantial changes wrought by the 2014 amendments to non-standard forms of employment, however, they have proved inadequate in addressing entrenched problems of precarity presented by the tenuous boundary between disguised employment, genuine entrepreneurial self-employment and dependent self-employment.

The intervening years since the advent of the LRA has been marked by the rise of non-standard forms of employment and the concomitant proliferation in highly variegated and often artificial service arrangements or contractual relations between workers and employing entities. Rather than hiring workers as employees, employers acquire personnel in the form of subcontracting, employee leasing and franchising. In essence, the interlinked problems of disguised employment, compelled self-employment and precarious self-employment have signalled a descent into precarity, all of which should sound a clanging alarm bell in respect of employment protection.

The route beckoning us out of the dilemma of disguised employment, bogus self-employment and precarious self-employment is clear. Paradoxically, this takes us out of the normal comfort zone of mainstream labour law scholarship.[1560] The phrase "dependent contractor" is up until the present not recognised in South African labour law.[1561] It is unsurprising that the labour law community is blissfully oblivious that the adoption of the intermediate category in Canada has been beneficial for a significant number of workers formerly excluded from the ambit of labour legislation. Authoritative Canadian voice is emphatic that the implementation of the dependent contractor category "had an impact on the real world."[1562]

The Ontario experience has shown that the advantages of dependent contractor category lie in the way that legal protection is no longer confined by the legal categories of employee or independent contractor. The terrain of contemporary labour market is characterised, if anything, by supposed independent contractors whose status does not rest on economic independence, and thus lack the hallmarks of genuine entrepreneurship. Much of the working relationships inspired partly by compelled self-employment and the rhetoric of entrepreneurship such as dependent entrepreneurs like empowered owner-truck operators, e-hailing driver-partners, freelancers and those who render services under the umbrella of personal service companies can be included within the protective ambit of labour law.

[1560] See generally, Van Eck 2013 *De Jure* 600; Cheadle 2006 27 *ILJ* 663, Kalula "Beyond borrowing and bending".

[1561] Theron "Who's in and who's out" 28 esp footnote 7.

[1562] *Fownes Construction* para 12.

Sustained re-appraisal of South Africa's Black box self-employment through the lens of the Canada's Ontario dependent contractor experience does not furnish much basis for doubting that the hybrid category entirely befits the challenge of tackling the problems of precarity. The endorsement of the dependent contractor category is consonant with the normative concerns of labour law. The practical purpose of labour is to redress the inequality of bargaining power inherent in the subordinate employment relationship which are more amplified under the guise of entrepreneurial service arrangements between allegedly independent contractors and client entities. Apart from the significance of the proposal for introduction of the dependant contractor category in the LRA, it is hoped that this thesis will help lift the labour law reforms debate out of the rut in which it is now stuck and elevate that debate to a new and more fruitful plane.

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