

https://dspace.org/

Reconceptualising Social Protection for Gig Workers in the Informal Economy in South Africa

Mathumbu, Amukelani Appreciate

2025
University of the Witwatersrand, Johannesburg
https://hdl.handle.net/10539/50130
Mathumbu, Amukelani Appreciate . (2025). Reconceptualising Social Protection for Gig Workers in the Informal Economy in South Africa [Master's dissertation, University of the Witwatersrand, Johannesburg]. WIReDSpace. https://hdl.handle.net/10539/50130

Downloaded from a DSpace repository. https://dspace.org/

Reconceptualising Social Protection for Gig Workers in the Informal Economy in South Africa

by

1110080
Amukelani Appreciate Mathumbu

Submitted in partial fulfilment of the requirements for the degree of
Master of Laws by Coursework and Research Report
at the University of the Witwatersrand, Johannesburg

Supervisor: Marthinus Jacobus van Staden

Date: September 2025

DECLARATION

I, 1110080, declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

I have submitted my final Research Report through TurnItIn and have attached the report to my submission.

Word Count: 9708

ACKNOWLEDGEMENT

‘My soldiers do not buckle or yield when faced with the cruelty of this world. My soldiers push forward! My soldiers scream out! My soldiers RAGE!’

-Commander Erwin Smit, Attack on Titan, June 2017.

I dedicate this paper:

To my parents, David and Demakatso Mathumbu for their unwavering support and love throughout. Thank you for the sacrifices in order for me and my siblings to pursue our dreams to the fullest.

To my siblings (Pet, Priscah, David Jr, Kulani and Tlangelani), who are basically my deputy parents, for being my inspirations and motivation. I wake up every day and strive to be like you. Strong, resilient and self-made;

To my husband, Romeo Khoza, who has seen the tears, the highs and the lows, I thank you for the heavy lifting in all aspects throughout this journey; and

To my supervisor, Professor Marthinus van Staden for your invaluable guidance and exceptional leadership.

To you all, I say...

‘I did not falter when faced with the difficultly and cruelty of this journey.

I did not yield. I pushed forward.

Because of you, I raged to the end.’

ABSTRACT

This research report, titled ‘Reconceptualising Social Protection for Gig Workers in the Informal Economy in South Africa’, critically examines the predicament of gig drivers who are predominantly classified as independent contractors. This classification systematically excludes them from fundamental labour laws and social protection schemes in South Africa, leading to significant vulnerability and precarity within the informal economy. The study employs doctrinal legal research to meticulously analyse South Africa’s existing legal framework, including constitutional provisions, key labour and social protection legislation such as the Labour Relations Act (LRA), Basic Conditions of Employment Act (BCEA), Unemployment Insurance Act (UIA), and Compensation for Occupational Injuries and Diseases Act (COIDA), as well as judicial precedents. It also incorporates comparative insights from international standards. The research reveals that the narrow definition of ‘employee’ within these national laws consistently denies gig drivers access to essential protections, including collective bargaining rights, dispute resolution mechanisms, unemployment benefits, and occupational injury compensation. This restrictive framework is found to be misaligned with Section 27 of the South African Constitution, which guarantees social security for ‘everyone’, and contradicts international labour standards like the ILO's Decent Work Agenda. The study also notes a judicial reluctance to apply the ‘reality of the relationship’ test effectively in classifying gig work.

The report concludes with a series of comprehensive recommendations for legal and policy reforms. These include the urgent need to update the social protection framework to appropriately classify gig drivers, moving beyond restrictive traditional definitions that are ill-suited to the evolving labour landscape. It advocates for adopting a ‘reality of the work relationship’ approach or introducing a distinct ‘worker’ category to extend protections based on economic dependence, irrespective of contractual status. Furthermore, the research proposes the development of new, tailor-made legislative frameworks for the gig economy, drawing significant inspiration from international instruments such as the ILO’s Social Protection Floors Recommendation (No. 202) and the EU’s Directive on Improving Working Conditions in Platform Work. Specific legislative measures recommended include implementing a rebuttable presumption of employment and strengthening mechanisms for algorithmic transparency, fairness, and accountability in platform work, ensuring human oversight for critical decisions. Ultimately, these reforms are presented as crucial for aligning

South Africa’s legal framework with its transformative constitutional vision of social justice, dignity, and inclusivity for all workers in the modern labour landscape.

Key words: **Gig economy, informal economy gig drivers, labour and social protection, and social security.**

Table of Contents

1. INTRODUCTION 8

1.1. BACKGROUND 8

1.2. RESEARCH QUESTIONS 11

1.3. RESEARCH METHODOLOGY 12

1.4. RESEARCH OUTLINE 12

2. UNDERSTANDING THE GIG ECONOMY 14

2.1. INTRODUCTION 14

2.2. EVOLUTION OF THE GIG ECONOMY 14

2.3. EMPLOYEE, INDEPENDENT CONTRACTOR OR CONTRIBUTOR: WHAT IS YOUR IDENTITY? 17

2.3.1. Collective and Organisational Rights and the Gig Worker Paradox 20

2.3.2. Structures for dispute resolution 21

2.4. SYNTHESIS AND DISCUSSION 22

3. SOUTH AFRICA'S SOCIAL PROTECTION FRAMEWORK 24

3.1. INTRODUCTION 24

3.2. WHAT IS SOCIAL PROTECTION? 24

3.3. SOCIAL PROTECTION LAWS: FRAMEWORK AND POLICY IMPLICATIONS… 26

3.3.1. The term 'everyone' 26

3.3.2. *'the right to have access to'* 26

3.3.3. Social security 27

3.3.3.1. Unemployment insurance fund 28

3.3.3.2. Compensation for occupational illness and diseases fund 28

3.3.4. State obligation 30

3.4. CRITICAL REVIEW OF THE SOCIAL PROTECTION FRAMEWORK AND CONCLUSION 31

4. THE INTERPLAY OF DOMESTIC AND INTERNATIONAL LAW IN ADDRESSING GIG WORKER PROTECTIONS 33

4.1. INTRODUCTION 33

4.2. BACKGROUND 33

4.3. SOCIAL PROTECTION FLOORS RECOMMENDATION, 2012 (NO. 202) 35

4.4. EU'S DIRECTIVE ON IMPROVING WORKING CONDITIONS IN PLATFORM WORK 36

4.4.1. Employment misclassification 36

4.4.2. Governanceframeworks 37

4.4.3. Collective labour rights 38

4.4.4. Work-related safety protections 38

4.5. SYNTHESIS AND DISCUSSION 39

5. RECOMMENDATIONS 41

5.1. INTRODUCTION 41

5.2. LEGAL AND POLICY REFORM OF EMPLOYMENT STATUS 41

5.3. DEVELOPMENT OF LEGISLATIVE FRAMEWORKS 42

6. CONCLUSION 44

1. INTRODUCTION

1.1. BACKGROUND

South Africa's socioeconomic landscape remains characterised by enduring severe unemployment, entrenched inequality, and widespread poverty - challenges that reflect fundamental structural imbalances rather than temporary economic fluctuations.[1] These systemic disparities stem from centuries of institutionalised racial discrimination through colonialism, segregation policies, and apartheid-era oppression.[2] While democratic reforms since 1994 have sought to redress these historical injustices, measurable progress has been limited, with income inequality metrics showing stagnation or regression.[3] Current policy frameworks appear disproportionately beneficial to the privileged, inadvertently perpetuating the disparities they were designed to eliminate.[4] This contradiction highlights how deeply embedded these inequities are within the nation's economic architecture and social organisation.[5]

In this challenging landscape, the informal economy plays a pivotal role in structuring global labour dynamics, encompassing a heterogeneous range of activities that often exist beyond or are inadequately regulated by formal legal and institutional frameworks.[6] This expansive sector incorporates diverse actors from self-employed individuals to domestic workers and waste pickers.[7] Yet, with the advent of the Fourth Industrial Revolution (4IR) and the accelerating digitisation of labour, informality has further evolved to integrate decentralised and flexible modes of production.[8] One notable manifestation of this shift is the rise of the gig economy—a labour market defined by the predominance of short-term contracts and freelance work, mediated through digital platforms.[9] The gig economy spans application-based services (ride-hailing platforms like Uber and e-commerce delivery systems like

[1] LM Katiyatiya 'Part A: socio-economic inequality in South Africa and the continual plight for social protection in the future world' (2020) 24 *Journal of Poverty* 203 at 203-204.
[2] Ibid at 204.
[3] Ibid.
[4] Ibid.
[5] Ibid.
[6] J Jairous, M Mikko Perkiö, A Metteri & S Atkins 'The informal sector and social protection' in N Ellison & T Haux (eds) *Handbook on Society and Social Policy* (2020) 389 at 390.
[7] Ibid.
[8] N Ncamane 'Digital platform workers and the conundrum of the definition of an 'employee' in the era of the fourth industrial revolution' (2024) 35 *South African Mercantile Law Journal* 1 at 2.
[9] K Kavese, A Mbali, & I Anyikwa *The Gig Economy, Digital Labour Platforms, and Independent Employment in the Eastern Cape* (2022) 6-7.

Takealot) and crowd-work platforms (SweepSouth), which connect workers, employers, and service seekers transnationally.[10] These gig platforms match gig drivers with service demand and exert considerable influence over labour conditions, dictating the how, where, and when of work execution.[11] By leveraging disparate skill sets, optimising communication, and standardising task allocation, these platforms function as centralised coordinators of a fragmented workforce, redefining contemporary employment relations.[12]

Amid persistently high unemployment rates in South Africa, the emergence of the gig economy represents a new dimension within this informal landscape, which serves as a partial remedy for joblessness and economically vulnerable individuals.[13] These new labour models, characterised by flexibility, digitisation and worker autonomy, simultaneously offer employers access to a cost-efficient workforce.[14] This transition towards digitalised work, driven by broader trends in globalisation and automation, was significantly accelerated by the COVID-19 pandemic, which catalysed the adoption of non-traditional employment structures, exposing worker protection gaps in South Africa.[15] During lockdowns, the gig economy became indispensable for service seekers requiring access to essential goods and services, particularly as formal employment contracted sharply.[16] The surge in demand led to a corresponding influx of gig drivers, many of whom had been displaced from traditional jobs. Even after the pandemic restrictions eased, the convenience and efficiency of gig platforms sustained service seekers' reliance on them, further entrenching the gig economy's expansion.[17]

In South Africa, approximately 30% of all employment falls within the gig economy,[18] with roughly 3.9 million gig drivers.[19] This underscores the crucial contribution of the gig economy

[10] WN Mutengwe, A Mazenda & S Moreblessing 'Uber's digital labour platform and labour relations in South Africa' (2023) 42 *Development Policy Review* 1 at 2.
[11] Ibid at 2.
[12] M Graham & MA Anwar 'Between a rock and a hard place: Freedom, flexibility, precarity and vulnerability in the gig economy in Africa' (2019) 25(2) *Competition & Change* 237 at 240.
[13] Ibid.
[14] Ncamane op cit note 8 at 13.
[15] Mutengwe et al op cit note 10 at 2.
[16] Ncamane op cit note 8 at 13.
[17] Ibid.
[18] Statista 'Number of people employed in the informal sector in South Africa from 2010 to 2023' available at https://www.statista.com/statistics/1296024/number-of-informal-sector-employees-in-southafrica/ accessed on 14 July 2025.
[19] M Hassan 'Navigating South Africa's employment landscape: Jobtech's transformative role' *Jobtech Alliance* 01 February 2024 available at https://jobtechalliance.com/navigating-south-africas-employment-landscape-jobtechs-transformative-role/ accessed 15 May 2025.

in providing jobs and sustaining livelihoods nationwide.[20] However, despite the gig economy's vital economic role, its workers are classified as independent contractors rather than formal employees or contributors, thus excluding them from fundamental social protections.[21] This designation is rooted in the narrow definition of 'employee', within the country's legal framework including the Labour Relations Act 66 of 1995 (LRA), Basic Conditions of Employment Act 75 of 1997 (BCEA), Employment Equity Act 55 of 1998 (EEA), as well as the Social Assistance Act 13 of 2004 (SAA) and the Unemployment Insurance Act 63 of 2001 (UIA). As a result, many gig drivers operate in precarious conditions, exacerbated by weak or non-existent regulatory enforcement.[22] Furthermore, their status as independent contractors prevents them from effectively exercising their constitutional labour rights, such as freedom of association, forming or joining trade unions, engaging in collective bargaining, or even accessing dispute resolution institutions.[23] The question is what social protection entails and who is entitled to such protection.

Social protection is acknowledged as a fundamental right within the South African Constitution and other domestic instruments.[24] This right is further recognised by the International Labor Organization (ILO) as an inalienable human right encompassing unemployment benefits, workplace injury compensation, healthcare coverage, and provisions for maternity, disability, and retirement.[25] While the precise definition of this concept remains elusive, scholars describe social protection as a comprehensive concept aimed at safeguarding individuals against life's risks and poverty, underpinned by human rights.[26] Social protection is generally viewed as a broad concept extending beyond traditional social security, capable of including labour protections which ensure the rights, welfare, and working conditions of employees. These protections are increasingly recognised as an integral and indispensable component of a holistic social protection system, especially as the nature of

[20] D Fourie 'The individual in the gig society: is the gig economy exploitative of the informal economy, or a means of empowerment?' (2024) 55 *Acta Academica: Critical Views on Society, Culture, and Politics* 155 at 156.
[21] K Naidoo 'Innovation, digital platform technologies and employment: an overview of key issues and emerging trends in South Africa' (SCIS Working Paper, University of the Witwatersrand, 2020) 16.
[22] Ibid.
[23] Mutengwe et al op cit note 10 at 3.
[24] Section 27(1) of the Constitution of the Republic of South Africa, 1996 ('the Constitution').
[25] CI Tshoose 'Appraisal of selected themes on the impact of international standards on labour and social security law in South Africa' (2022) 25 *PER* 1 at 15.
[26] ILO *The ILO DW for SDGs' Notes Series: Social Protection* (2017) 2; ILO *World Labour Report: Income Security and Social Protection in a Changing World* (2000) 29 & ILO *Principles of Social Security* (1998) 8.

work evolves to include new forms of employment in the gig economy.[27] Beyond labour protections forming a part of the broader social protection, these two concepts are interconnected in that benefits are attributed to formal employment.[28] Therefore, to qualify for social protection benefits, a worker has to be deemed an 'employee' under national legislation.[29] This notion of attributing social protection to traditional employment arrangements presents significant limitations, as it fails to adequately accommodate new forms of work, structurally marginalising substantial work segments of the workforce and rendering them vulnerable populations ripe for exploitation.[30] As a result, many face high poverty rates, precarious working conditions, and increased vulnerability.[31] This prevailing legal framework fundamentally contradicts the spirit of Section 23 of the Constitution and the ILO's decent work agenda.[32]

1.2. RESEARCH QUESTIONS

The transformative shifts in work arrangements, especially within the gig economy, have rendered conventional legal classifications and institutional frameworks inadequate, exposing critical protection gaps. These gaps necessitate dynamic policy interventions to safeguard all workers, irrespective of employment type. Consequently, South Africa urgently requires a paradigm shift in social protection that transcends formal employment ties and embraces universal, rights-based principles to mitigate precarity across diverse work forms. Therefore, the question raised in this research report is how social protection systems in South Africa can be reconceptualised and effectively adapted to provide comprehensive and equitable coverage for gig drivers, considering their unique employment status within the informal economy and the existing constitutional and international labour standards. The research will also include brief recommendations.

---

[27] LG Mpedi 'Social protection for workers posted to and from South Africa: A critical assessment' (2021) 30 *Obiter* 774 at 775.

[28] See N Smit & LG Mpedi 'Social protection for developing countries: Can social insurance be more relevant for those working in the informal economy?' (2010) *LDD* 1.

[29] Ibid.

[30] DM Smit & G Stopforth 'An overview of categories of vulnerability among on-demand workers in the gig economy (Part 2)' (2023) 27 *LDD* 149 at 164.

[31] LM Katiyatiya & N Lubisi 'The current social protection discourse, gig economy within the advent of COVID-19: some emerging legal arguments' (2014) 66 *Labour History* 64 at 65-6.

[32] ILO *Realizing decent work in the platform economy - International Labour Conference 113th Session* (2025) 1 at 103-7.

1.3. RESEARCH METHODOLOGY

This study utilises doctrinal legal research (DLR) to systematically analyse South Africa's legal framework governing gig drivers' social protection. The doctrinal method is particularly suited to this inquiry as it facilitates a comprehensive analysis, interpretation, and critical evaluation of legal principles derived from authoritative sources within the field.[33] In reference to gig drivers, the methodology enables rigorous examination of constitutional provisions, labour and social protection legislation,[34] including judicial precedents, while incorporating comparative insights from international standards.[35] While inherently qualitative and interpretative, offering robust analysis of normative principles, DLR faces inherent constraints.[36] Its traditional emphasis on doctrinal coherence may obscure practical implementation gaps, particularly regarding the inadequacy of the rigid employee-contractor dichotomy for hybrid gig work.[37] The approach's text-centric focus could also limit innovative solutions for emerging new forms of work. However, to mitigate these limitations, the study adopts an interpretive framework, integrating socio-legal perspectives with doctrinal analysis. This blended methodology maintains academic rigour while addressing real-world complexities, aiming to develop transformative legal approaches aligned with constitutional social justice imperatives.

1.4. RESEARCH OUTLINE

Building on the introduction, part two provides a deeper conceptual and legal understanding of the gig economy within South Africa's informal sector. This part elaborates on how the gig economy offers opportunities while exacerbating labour market disparities, leading to multidimensional precarity. This part meticulously explores the legal definitions of 'employee' and 'independent contractor' and examines key judicial precedents solidifying the 'what' and 'how' of the exclusionary mechanism.

Following the identification of gig worker exclusion in part two, part three specifically details the existing social protection landscape in South Africa. It discusses the implications,

[33] PI Bhat 'Doctrinal legal research as a means of synthesizing facts, thoughts, and legal principles' (2020) 1 *Idea and Methods of Legal Research* 143 at 145.
[34] See D Coetsee & P Buys 'A doctrinal research perspective of master's degree students in accounting' (2018) 32 *South African Journal of Higher Education* 71.
[35] Ibid at 74.
[36] Bhat op cite note 33 at 162-3.
[37] Ibid.

including the distinction between Social Assistance and Social Insurance. This part evaluates and establishes the gaps in South Africa's framework.

Part four is a comparative study that expands the scope to international law for lessons on approaching the gig economy issue. This part focuses on two pivotal international instruments: the ILO's Social Protection Floors Recommendation, 2012 (No. 202), which advocates for universal access to essential social protection for all, and the EU's Directive on Improving Working Conditions in Platform Work, which offers concrete regulatory responses including a rebuttable presumption of employment, algorithmic management governance, and collective labour rights.

Part five will consolidate the study's key recommendations, integrating proposed reforms from the preceding parts into a cohesive framework for enhancing social protections in South Africa's gig economy.

2. UNDERSTANDING THE GIG ECONOMY

2.1. INTRODUCTION

Regarding Section 23 of the Constitution, everyone has the right to fair labour practices, underscoring labour law's traditional purpose of protecting workers through employment relationships by ensuring labour and social safeguards. [38] Legislative frameworks set minimum employment standards and regulate collective bargaining.[39] Yet, as this discussion will demonstrates, South Africa's regulatory structures also contribute to the vulnerabilities experienced by gig drivers.[40] This part explores the gig economy's position within South Africa's informal sector and its legal implications. It defines the gig economy's conceptual foundations and historical ties to informal work arrangements, then critiques how South African labour law (LRA, BCEA, UIA, and COIDA) excludes gig drivers through rigid employment definitions.The analysis demonstrates how these laws systematically deny gig drivers access to social protections. A close reading of key judicial precedent further highlight judiciary's difficulty to classify gig work while disregarding the 'reality of the relationship' test as a crucial interpretive tool. Ultimately, it reveals the harms of misclassification and sets the foundation for understanding gig drivers' vulnerability in South Africa's labour market.

2.2. EVOLUTION OF THE GIG ECONOMY

The emergence of the gig economy represents one of the most significant labour market transformations of the 21st century, fundamentally reshaping how work is organised and compensated.[41] This shift can be traced directly to the technological advancements of the 4IR, which has enabled new forms of decentralised, digitally mediated employment.[42] Gig platforms such as Uber exemplify this model, leveraging real-time connectivity, algorithmic management, and globalised labour pools to create new flexible work arrangements.[43] The gig economy's rise reflects the broader 4IR phenomena, including the integration of mobile internet and artificial intelligence technologies that collectively facilitate the matching of labour

[38] Smit & Stopforth op cit note 30 at 153.
[39] Ibid.
[40] V Mantouvalou 'Legal construction and structures of exploitation' in Collins H, Lester G & Mantouvalou V (eds) *Philosophical foundations of labour law* (2018) 188 at 190; Smit & Stopforth note 30 at 156.
[41] LM Katiyatiya & N Lubisi 'Part B: The Role of Substantive Equality in Shaping Transformative Social Protection in South Africa into the Digital Platform Work' (2020) 25 *Journal of Poverty* 23 at 24.
[42] Ibid.
[43] Ibid at 25.

supply with demand on an unprecedented scale.[44] These technologies blur the boundaries between human and machine capabilities, enabling automation at an unprecedented scale.[45] For instance, AI-driven platforms now manage vast networks of freelance workers, while internet-based communication platforms track and optimise gig-based services such as food delivery or ride-hailing.[46] This technological ecosystem has made the gig economy possible and accelerated its expansion, disrupting traditional industries and labour norms.[47]

However, the 4IR did not emerge in isolation. Instead, it represents the latest phase in a long historical progression of industrial transformations.[48] The First Industrial Revolution, beginning in the late 18th century, introduced mechanised production through steam power and factory systems, displacing agrarian economies and giving rise to wage labour.[49] The Second Industrial Revolution, spanning the late 19th and early 20th centuries, was defined by electrification, mass production, and the rise of corporate capitalism, which further standardised work and expanded global trade.[50] By the late 20th century, the Third Industrial Revolution, driven by digital computing and telecommunications, began automating routine tasks and laying the groundwork for today's information and telecommunications-based economy.[51] Each of these revolutions reconfigured labour markets in distinct ways. Still, the 4IR has decoupled work from fixed locations and schedules, replacing long-term employment with project-based, on-demand labour. While the 4IR has paved the way for innovative new work models, thus offering workers greater flexibility and access to global opportunities through gig platforms, this transformation raises critical questions about worker protections, economic stability, and the future of traditional employment structures. [52]

The gig economy in South Africa presents a paradoxical mix of economic opportunity and systemic inequality.[53] While offering flexible income streams in the country's context of high unemployment, its growth through gig platforms has exacerbated existing labour market

[44] Ibid.
[45] Ncamane op cit note 8 at 4.
[46] Ibid.
[47] Katiyatiya & N Lubisi op cit note 41 at 25.
[48] Ibid.
[49] Ncamane op cit note 8 at 4.
[50] Ibid.
[51] Ibid.
[52] Katiyatiya & N Lubisi op cit note 41 at 25.
[53] R Heeks, M Graham, P Mungai, JP Van Belle & J Woodcock 'Systematic evaluation of gig work against decent work standards: The development and application of the fairwork framework' (2021) 37 *The Information Society* 267 at 268.

disparities along spatial, racial, and gender lines.[54] Workers face multidimensional precarity, including subminimum wages, unpaid labour, excessive working hours, and exposure to physical and psychological risks.[55] Moreover, the opaque algorithmic management of platforms further entrenches power asymmetries through arbitrary account deactivations without due process.[56] This creates fundamental tension. Although providing crucial livelihood opportunities, the sector institutionalises chronic insecurity that reinforces socioeconomic marginalisation.[57] Consequently, the gig economy represents a labour market innovation and a contemporary manifestation of structural inequality.[58] Fourie describes this dark side of the gig economy as the 'exploitative extension of the informal economy' in that individuals are encouraged to engage in the exploitative economy under the guise of self-employment and empowerment.[59]

In South Africa, eligibility for worker protections is intrinsically linked to whether a worker is classified as an employee, independent contractor or contributor in national labour legislation.[60] In this regard, gig drivers are excluded from the definition of 'employee' in our labour and social protection legislative framework.[61] This legal loophole effectively extends the precarity historically found in the informal economy, creating a 'gig underclass' that lacks worker protections typically guaranteed for formal employees.[62] The following section will discuss the classification of gig drivers under the country's legal framework, which is essential in understanding the structural exclusion of gig drivers from worker protection laws and systems.

[54] Ibid.
[55] Ibid.
[56] Ibid.
[57] C Behrendt, QA Nguyen & U Rani 'Social protection systems and the future of work: Ensuring social security for digital platform workers' (2019) 72 *International Social Security Review* 17 at 27.
[58] Fourie op cit note 20 at 157-8.
[59] Ibid.
[60] Smit & Stopforth op cit note 30 at 152-3.
[61] B Dubbelman 'E-hailing and the crisis of work: A contextual investigation into the working conditions of e-hailing drivers in South Africa' (MA: Development studies research report, University of the Witwatersrand, 2021) 14.
[62] Fourie op cit note 20 at 155.

2.3. EMPLOYEE, INDEPENDENT CONTRACTOR OR CONTRIBUTOR: WHAT IS YOUR IDENTITY?

Employment is central to human identity, granting individuals dignity, social standing, and purpose.[63] The constitutional court in *Affordable Medicines Trust v Minister of Health* stated that 'there is a relationship between work and the human personality as a whole'.[64] Therefore, accurately determining the employment status of gig drivers is crucial as it directly impacts their constitutional right to dignity, fair labour practices and social security.[65] The LRA defines an employee as 'any worker, excluding independent contractors engaged by an employer or the State, who receives or is entitled to receive payment'.[66] This definition extends to all individuals who participate in or support an employer's business activities.[67] However, due to the nature and distinctive characteristics of gig work, gig drivers are excluded from the definition of employee, rendering them ineligible for statutory worker protections that apply to formal employment arrangements.[68] This definition fails to resolve the fundamental ambiguities that enable exploitative practices that allow employers to circumvent labour regulations, evade accountability, and systematically classify workers as independent contractors.[69] For instance, gig platforms classify as internet service providers rather than transport companies.[70] This allows gig platforms and drivers to operate under a partnership model, with drivers providing transportation services as 'independent contractors' rather than traditional employees.[71]

To counter such evasions in the form of bogus contracts and ambiguous business models, the LRA was amended to include the Section 200A rebuttable presumption of employment clause. Similarly, Section 83A of the BCEA establishes a presumption that a worker is an employee if one or more specified factors listed in subsection (1) are present, regardless of

[63] MJ van Staden 'Identification of the parties to the employment relationship: an appraisal of teleological interpretation of statutes' (LLD thesis, University of Pretoria, 2017) 215.
[64] 2006 (3) SA 247 (CC) par 59.
[65] WM Mokofe, 'Achieving decent work for digital platform workers in South Africa' (2022) 43 *Obiter* 161 at 161-2.
[66] Section 213 of the LRA.
[67] Ibid.
[68] Smit & Stopforth op cit note 30 at 152.
[69] Ncamane op cit note 8 at 8.
[70] K Mokoena 'Are uber drivers employees or independent contractors: a comparative analysis' (2018) 39 *Industrial Law Journal* 1452 are 1454.
[71] Ibid.

contractual labels.[72] However, this presumption applies only if at least one statutory criterion is met, otherwise, the interpreter must rely on common-law tests for distinguishing employees from independent contractors.[73] Although the presumption does not apply to persons who earn an amount equivalent to or above the Section 6(3) threshold of the BCEA (R261 748.45 pa[74]), the Code of Good Practice on Who is an Employee expressly states that the same factors used to determine employee status remain relevant and may be applied to workers earning above the threshold.[75] This carefully circumscribed mechanism reflects the legislature's deliberate balance between protecting vulnerable workers and maintaining contractual certainty for higher-earning individuals.

However, the problem of worker classification is not confined to labour law only, but also disrupts the functioning of social protection mechanisms. The UIA adopts a definition of 'employee' that aligns with core labour legislation. However, it notably omits the extended criterion found in other statutes, specifically the inclusion of persons who assist in conducting an employer's business[76]. This narrower construction creates a more restrictive scope of coverage under the UIA. For instance, during peak COVID, the state introduced the COVID-19 Temporary Employee/Employer Relief Scheme (TERS) under the unemployment insurance system to mitigate the pandemic's economic impact by providing benefits to income-deprived contributors.[77] Eligibility for benefits required a 'contributor' status, defined by the UIA as an employed natural person who is or was employed and covered under its provisions, effectively excluding gig drivers who lack formal employment classification.[78] This exclusion severely affected drivers as lockdown restrictions eliminated their earning capacity while their non-employee status barred access to TERS relief, creating a critical social protection gap for this vulnerable workforce.[79] While COIDA adopts an expansive definition of 'employee', it expressly excludes independent contractors, a category that typically encompasses gig drivers.[80] This exclusion denies them access to occupational injury

[72] Section 200A of the LRA.
[73] Van Staden op cite note 63 at 158.
[74] GN 5970 in GG 52232 of 7 March 2025.
[75] *Code of Good Practice: Who is an Employee* GN 1774 in *GG* 29445 of 1 December 2006 r20.
[76] Section 1 of the UIA.
[77] Directive by the Minister of Employment and Labour in terms of Regulation 10(8) issued by the Minister of Cooperative Governance and Traditional Affairs in terms of Section 27(2) of the Disaster Management Act 57 of 2002.
[78] Section 1 of the UIA.
[79] Ncamane op cit note 8 at 12.
[80] Section 1 (xviii) of COIDA.

compensation, despite facing workplace risks comparable to those in formal employment.[81] These legislative shortcomings illustrate how rigid employment classifications fail to accommodate evolving work structures, systematically excluding growing segments of the workforce from essential protections.

The *Uber SA v NUPSAW* dispute underscored the legal ambiguities surrounding gig drivers' employment status.[82] When several deactivated Uber drivers alleged unfair dismissal, Uber South Africa (Uber SA) challenged the CCMA's jurisdiction, asserting that the drivers were independent contractors rather than employees.[83] The Commissioner, applying Section 213 of the LRA and the Code of Good Practice: Who is an employee?, ruled that Uber SA's control over performance standards and the drivers' provision of personal services established an employment relationship.[84] This finding, however, was overturned by the Labour Court, which deemed the evidence insufficient to classify the drivers as conventional employees. This decision disregarded the 'reality of the relationship' in favour of formalistic contractual interpretations.[85]

This judicial reluctance mirrors the broader failure to adapt labour protections to gig work, starkly contrasted by the progressive reasoning in *Kylie v CCMA*[86]. There, Cheadle AJ affirmed that Section 213's definition of an employee extends even to legally unenforceable contracts, requiring an examination of the actual working relationship rather than contractual formalities.[87] While Kylie's specific claim failed due to the illegality of her work,[88] the precedent underscores that statutory labour protections hinge on substantive, not superficial, assessments of control, dependence, and integration into the business.[89] The *Kylie* judgment's insistence on examining the reality of the relationship test provides an essential analytical framework for evaluating gig work. Just as the Labour Appeal Court (LAC) looked beyond the unenforceable contract in *Kylie* to assess the actual conditions of work, courts confronting gig work cases must pierce through the veneer of 'independent contractor'

[81] Ncamane op cit note 8 above at 12.
[82] [2017] ZACCMA 1 (7 July 2017).
[83] Ibid par 8, 10, 24-26.
[84] Ibid par 37, 43, 52, 62.
[85] *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC) (12 January 2018) par 71-72.
[86] [2010] 7 BLLR 705 (LAC) (26 May 2010).
[87] Ibid par 3.
[88] Ibid.
[89] Ibid par 21.

labels to examine the operational realities of gig-mediated labour. Gig drivers, like Kylie, may have contractual language suggesting autonomy, but the substantive relationship reveals key hallmarks of employment.

Therefore, having established the broad implications of worker misclassification across both labour and social protection frameworks, the following discussion will examine two critical consequences of misclassification: (1) the denial of organisational rights, including freedom of association and collective bargaining, and (2) restricted access to statutory dispute resolution mechanisms.

2.3.1. Collective and Organisational Rights and the Gig Worker Paradox

Organising and collective bargaining constitute fundamental tools for redressing workplace power imbalances, enabling workers to negotiate equitable conditions through collective solidarity.[90] Trade unions institutionalise this process by amplifying worker voice against employer dominance, a function particularly vital in the gig economy, where platform-mediated precariousness exacerbates vulnerability.[91] However, these mechanisms remain constitutionally guaranteed but legislatively inaccessible. While Section 23 of the Constitution broadly protects freedom of association for 'everyone', Section 4 of the LRA strategically limits collective bargaining to statutorily defined employees. This deliberate legislative dissonance between constitutional inclusivity and statutory exclusion creates classificatory gatekeeping that denies gig drivers essential protections. The constitutional court's jurisprudence compounds this tension.[92] In *SANDU v Minister of Defence*, the Court adopted an expansive interpretation of 'worker' that could encompass gig drivers, given their functional alignment with employment relationships.[93] Similarly, the National Minimum Wage Act's (NMWA) definition of 'worker', focused on remuneration rather than contractual formalities, signals legislative recognition of work beyond traditional employment.[94] However, the LRA's insistence on 'employee' status triggers a systemic Catch-22—without formal classification, gig drivers cannot unionise to demand reclassification, nor access the dispute resolution mechanisms that might affirm their rights.[95]

---

[90] TE Coleman and LG Mpedi 'Collective bargaining and representation in the gig economy in South Africa: A call for a purposive approach' (2023) 48 *Tydskrif vir Regswetenskap* 54 at 65.
[91] Ibid at 66.
[92] *South African National Defence Union v Minister of Defence and Others* (1999) 20 *ILJ* 2265 (CC).
[93] Ibid par 27.
[94] Section 1 of the NMWA.
[95] Coleman & Mpedi op cit note 90 at 69-70.

The LRA's organisational rights framework presupposes union recognition contingent on employee status.[96] This creates an insurmountable barrier for gig drivers—lacking statutory classification, gig drivers cannot form recognised unions, and lack union representation, so they cannot challenge their exclusion.[97] Even the constitutional right to strike, intrinsic to worker dignity and affirmed in *NUMSA v Bader Bop*as, becomes procedurally unattainable when platforms deny employment relationships preemptively.[98] This paradox reveals a deeper jurisprudential failure. It was determined in *Plascon Decorative* that constitutional labour rights demand expansive interpretation, unless explicitly limited.[99] Yet the LRA's procedural rigidity presumes traditional employment structures, rendering these protections theoretically applicable but practically inaccessible to gig drivers.[100] The law thus entrenches their precarity—they are 'workers' for constitutional purposes but 'non-employees' for legislative enforcement, suspended in a rights limbo that neutralises collective agency.

2.3.2. Structures for dispute resolution

The classification of an individual as an employee serves as a jurisdictional prerequisite for accessing statutory dispute resolution mechanisms established under the LRA framework, including the CCMA, Labour Court and Labour Appeal Court.[101] This legal threshold creates a fundamental barrier:- where no employment relationship exists between disputing parties, these specialised labour institutions lack competence to adjudicate the matter, excluding non-employee workers from their protective ambit.[102] Consequently, excluded from statutory dispute resolution channels, gig drivers must navigate costly and protracted civil litigation or private arbitration systems, processes overwhelmingly skewed in favour of platform operators.[103] This current framework for dispute resolution exhibits structural discrimination under the Employment Equity Act (EEA). It creates an inherently unequal system where those in precarious work arrangements face significant barriers to justice.[104]

---

[96] Ibid.
[97] Ibid.
[98] (2003) 24 ILJ 305 (CC) par 13.
[99] *Chemical Workers' Industrial Union v Plascon Decorative (Inland) (Pty) Ltd* [1998] 12 BLLR 1191 (LAC) par 18-20.
[100] Section 64 & 65 of the LRA.
[101] D du Toit, S Fredman & M Graham 'Towards legal regulation of platform work: Theory and practice' (2020) 41 *Industrial Law Journal* 1493 at 1517.
[102] Ncamane op cit note 8 at 10.
[103] Smit & Stopforth op cit note 30 at 163.
[104] Smit & Stopforth op cit note 30 at 162-3.

The discriminatory nature of this system is further compounded by the realities of algorithmic management in gig work.[105] Gig drivers are subject to opaque automated systems that make critical decisions about work allocation, performance evaluation, and account deactivation without transparency or due process.[106] These algorithmic systems can perpetuate various forms of discrimination, including biased customer ratings that reflect racial or gender prejudices, and unfair exclusion from work opportunities.[107] However, because the EEA's protections against workplace discrimination apply only to recognised employees,[108] gig drivers have no legal recourse to challenge such algorithmic discrimination, leaving them vulnerable to systemic bias without institutional safeguards.[109] The law's failure to adapt to new forms of work has created a two-tiered system where gig drivers, despite performing labour that is functionally equivalent to formal employment, are denied fundamental protections against unfair discrimination and workplace injustice.[110] The resulting power imbalance allows platforms to maintain control over workers while avoiding the responsibilities traditionally associated with formal employment relationships.[111]

2.4. SYNTHESIS AND DISCUSSION

At the core of the challenges and vulnerabilities faced by gig drivers is their classification as independent contractors, which acts as a common denominator for all labour and social protection-related problems. This classification highlights how existing South African laws, despite their potential for extension, primarily prioritise formal employment. Academics like Mokofe and Van Eck propose utilising the term 'worker', as defined in the NMWA, as a legal foundation to expand workplace protections to self-employed individuals and independent contractors, including gig drivers.[112] This broad and purposive approach would reinforce the principle of substance over form, meaning that even if formally classified as self-employed, gig drivers operating under significant control by gig platforms, and whose working conditions are functionally equivalent to traditional employment, would be entitled to labour and social

[105] Ibid.
[106] Ibid.
[107] Ibid.
[108] Section 1 of the EEA.
[109] Smit & Stopforth op cit note 30 at 162-3.
[110] Ibid.
[111] Ibid.
[112] WM Mokofe & S van Eck 'Reflections on marginalised workers and the role of trade unions in the changing world of work '(2021) 42 *Industrial Law Journal* 1365 at 1372-1373.

protection.[113] Such an interpretation would fundamentally shift the legal paradigm by removing the necessity of formally designating gig drivers as 'employees' to qualify for labour rights, ensuring that rights follow function and extend protections to economically dependent workers regardless of their contractual status.[114] An alternative approach, such as amending the LRA to declare gig drivers as 'employees', faces criticism because existing labour statutes were designed for formal employment, which might limit the scope of protection for gig drivers, particularly concerning collective labour rights, due to their often isolated work arrangements. Consequently, a mere extension of the current labour legislation to include gig drivers may be inadequate.[115]

[113] Coleman & Mpedi op cit note 90 at 75.
[114] Ibid.
[115] Du Toit, Fredman & Graham op cit note 101 at 1501.

3. SOUTH AFRICA'S SOCIAL PROTECTION FRAMEWORK

3.1. INTRODUCTION

Part three analyses South Africa's social protection system, assessing its capacity to address gig drivers' vulnerabilities. Beginning with a conceptualisation of social protection as both a human right and safety net against socioeconomic risks, it highlights how rigid statutory definitions systematically exclude gig workers from coverage - a continuation of Part 2's findings. The analysis then examines the constitutional foundation guaranteeing social protection for 'everyone', while distinguishing between social assistance and insurance measures. A critical examination reveals how narrow legislative definitions of 'employee' restrict gig drivers' access to these protections, creating a coverage gap. The discussion concludes by evaluating whether this exclusion complies with constitutional obligations for progressive realisation of rights and international labour standards, ultimately exposing a systemic failure to protect this growing workforce segment.

3.2. WHAT IS SOCIAL PROTECTION?

Being classified as independent contractors, drivers are not eligible for social protection. However, what is social protection? Scholars such as Smit and Mpedi, in relation to employment, conceptualise social protection as an inclusive framework that incorporates various social security mechanisms designed to safeguard individuals against diverse economic and social vulnerabilities.[116] Loewe et al describe social protection and social security as interconnected concepts that broadly refer to systems designed to protect individuals and households against various risks and vulnerabilities throughout their lives.[117] While often used interchangeably, there can be subtle differences in scope and emphasis depending on the context.

Historically, the ILO defines social security as 'the protection which society provides for its members, through a series of public measures, against the economic and social distress that otherwise will be caused by the stoppage or substantial reduction of earnings resulting from sickness, maternity, employment injury, unemployment, invalidity, old age and death; the

[116] Smit & Mpedi op cit note 28 at 12.
[117] M Loewe & E Schüring 'Introduction to the *Handbook on Social Protection Systems'* in N Ellison & T Haux (eds) *Handbook on Society and Social Policy* (2020) 1 at 1.

provision of medical care; and the provision of subsidies for families and children'.[118] It is recognised as a fundamental human right, codified in international instruments like the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), with states bearing the duty to guarantee its realisation for all residents.[119] Narrowly construed, social security typically pertains to formal statutory schemes addressing income-related contingencies, with benefits granted collectively rather than through individualised agreements.[120]

In contrast, social protection on the other hand, is understood as the 'entirety of policies and programmes that safeguard people against poverty and risks to their livelihoods and wellbeing'.[121] Although often conflated, social protection is the broader construct, subsuming social security alongside additional measures.[122] The framework operates through three key functions: a protective function, which reduces poverty through social assistance, and subsidies, thereby narrowing the poverty gap; a promotive function which strengthens resilience by securing future income streams, enabling measured risk-taking in livelihood activities, and bolstering economic stability; and a transformative function addressing systemic inequities, advancing human development, and fostering social justice and cohesion.[123] Social protection incorporates various instruments to combat social and economic risks, meet basic needs, and integrate developmental strategies to secure a minimum standard of living.[124]

However, the rise of the gig economy highlights the limitations of traditional social security systems, which are predominantly tied to formal economic participation.[125] This gap leaves many workers without sufficient protection, especially in developing countries.[126] Consequently, the broader concept of social protection has gained traction, as it

[118] ILO *Introduction to Social Security* (1984) 3.
[119] Articles 22 and 25 of the UDHR; Article 9 of the ICESCR.
[120] A van den Heever 'Social security/protection in South Africa' Wits School of Governance: SA Future Economy Research Paper, University of Witswatersrand 1, 5.
[121] Ellison & Haux op cit note 135 at 1.
[122] Smit & Mpedi op cit note 28 at 169.
[123] Ibid at 2-3.
[124] Smit & Stopforth op cit note 30 at 169.
[125] W Charles 'The Extension of Social Protection to Informal Farm Workers in South Africa' (unpublished thesis 2023, University of The Western Cape) 1, 29.
[126] Ibid.

encompasses safeguards for all workers, including those outside conventional employment structures.[127]

3.3. SOCIAL PROTECTION LAWS: FRAMEWORK AND POLICY IMPLICATIONS

The foundational basis for evaluating South Africa's social protection framework lies in its constitutional examination under Section 27 of the Constitution. Section 27 serves as a pivotal foundational legal guarantee, affording 'everyone' access to social security, including appropriate social assistance if they cannot support themselves and their dependents.[128] The state must take 'reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights'.[129] These subsections solicit four considerations:

3.3.1. The term 'everyone'

While Section 27(c) employs the universal term 'everyone', it implicitly establishes distinct subcategories within this broad classification.[130] The specific reference to individuals 'unable to support themselves' creates a delineated subgroup characterised by income inadequacy, while their dependents constitute a further subset.[131] This formulation suggests an inherent recognition that comprehensive social protection requires a combination of social insurance (for those with contributory capacity) and social assistance (for those without adequate means) to achieve universal coverage across all socioeconomic classes.[132]

3.3.2. *'the right to have access to'*

The constitutional court in *Government of the Republic of South Africa v Grootboom*, clarified that a 'right to have access to' social security embodies a broader entitlement than a mere 'right to' provision.[133] This distinction arises because social protection intersects with and reinforces other rights enshrined in the Bill of Rights, reflecting their inherent interdependence and mutual reinforcement.[134] As Nyenti observed, the core objective of this right is to prevent destitution by ensuring individuals can meet basic needs when faced with

[127] Ibid.
[128] Section 27(1)(c) of the Constitution.
[129] Section 27(2) of the Constitution.
[130] Van den Heever op cit note 120 at 7.
[131] Ibid.
[132] Ibid.
[133] 2001 (1) SA 46 (CC) par 23-24.
[134] Ibid.

income loss, disrupted earning capacity, or the inability to develop livelihood opportunities.[135] Fundamentally, it safeguards against poverty and material deprivation, securing human dignity amid economic vulnerability.[136] Given its inclusive phrasing, this constitutional right has been interpreted expansively, encompassing traditional social security and broader social protection mechanisms.[137]

3.3.3. Social security

In South Africa, social protection is divided into three branches: social insurance, social assistance and social relief. For this paper, the former two branches will be discussed. Social assistance offers financial support to the vulnerable through government-funded initiatives, such as the disability grant and child grant.[138] These programs serve as a critical safety net to ensure individuals facing extreme economic deprivation maintain access to a basic subsistence income.[139] This fundamental social protection mechanism aims to prevent absolute poverty by guaranteeing a minimal standard of living for vulnerable populations who lack alternative means of support.[140] However, social assistance grants are only accessible to certain people considered beneficiaries under the SAA.[141] As echoed by Mufumadi et al, social assistance mechanisms cannot be regarded as either an optimal means of extending social security coverage to independent contractors or as fully aligned with South Africa's constitutional and international human rights commitments regarding the right to social security.[142] The limited means-tested nature of social assistance fails to satisfy the comprehensive protection required by these obligations, particularly for workers in non-standard employment arrangements.[143]

On the other hand, social insurance serves an 'income maintenance function' by providing earnings-based protections to workers for work-related risks through mandatory contributions by both the employer and employee.[144] Social insurance schemes are designed to maintain

---

[135] M Nyenti 'Role of constitutional principles and values in the development of social protection in South Africa' (2016) Volume number?' *Global Social Policy* 201.
[136] Ibid at 202.
[137] Van Staden op cite note 63 at 234.
[138] Section 8 & 9 of the SAA.
[139] K Mufamadi & L Koen 'Independent contractors and Covid-19 relief: Tax and social insurance legislative reform to extend protection to independent contractors' (2021) 37 *SAJHR* 277 at 280.
[140] Ibid.
[141] Ibid at 281.
[142] Ibid.
[143] Ibid.
[144] Ibid at 280.

adequate living standards for economically active populations during periods of income interruption or reduction caused by predefined contingencies.[145] These contributory systems function as income replacement mechanisms, protecting workers against temporary or permanent loss of earnings due to recognised social risks such as unemployment, disability, or retirement.[146] Concerning employment, South Africa has two social insurance schemes, namely the Unemployment Insurance Fund, regulated by the UIA and Unemployment Insurance Contributions Act 4 of 2002 (UICA); and the Compensation for Occupational Illness and Diseases Fund established through COIDA.

3.3.3.1. Unemployment insurance fund

The unemployment insurance fund functions as a contributory social protection mechanism, providing temporary income support to eligible workers during periods of job loss.[147] The scheme imposes mandatory contributions on formally recognised employers and employees. Yet, its benefits remain inaccessible to non-contributing workers, particularly those excluded by the restrictive statutory definition of an 'employee'.[148] As mentioned earlier, the UIA adopts a narrow construction of what constitutes an employee, creating a more restrictive scope of coverage under the UIA compared to broader labour protections.[149] In Section 1 of the UIA, an employee refers to 'any natural person who receives remuneration or to whom remuneration accrues in respect of services rendered or to be rendered by that person, but excludes any independent contractor'.[150] Therefore, the UIA's coverage remains confined to conventional employment relationships, creating a protection gap for workers in dependent but non-standard work arrangements.[151] Gig drivers are classified as independent contractors and thus explicitly excluded. This restrictive interpretation demonstrates a misalignment between South Africa's social security architecture and the growing precarity of modern work.[152]

3.3.3.2. Compensation for occupational illness and diseases fund

[145] Ibid.
[146] Ibid.
[147] Section 2 of the UIA.
[148] Ibid.
[149] Part 2 above par 2.2.
[150] Act 63 of 2001.
[151] MP Olivier & A Govindjee 'A critique of the unemployment insurance amendment bill, 2015' (2015) 18 *PER* 2739 at 2746.
[152] Ibid.

The compensation fund is an employer-funded compensation scheme, established under COIDA. It is administered through national revenue mechanisms, which provide qualifying workers and their dependents with medical treatment, disability benefits, and survivour support.[153] COIDA protects employees against earnings loss resulting from work-related injuries or illnesses, whether temporary or permanent.[154] However, as with other labour statutes, COIDA's applicability is contingent upon its definition of an 'employee,' which continues to exclude gig drivers lacking formal employment contracts.[155] COIDA defines an employee:

> 'a person who has entered into or works under a contract of service or of 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 or in kind, and includes (*a*) a casual employee employed for the purpose of the employer's business; (*b*) a director or member of a body corporate who has entered into a contract of service or of apprenticeship or learnership with the body corporate, in so far as he acts within the scope of his employment in terms of such contract; (*c*) a person provided by a labour broker against payment to a client for the rendering of a service or the performance of work, and for which service or work such person is paid by the labour broker; and (*d*) in the case of a deceased employee, his dependants, and in the case of an employee who is a person under disability, a curator acting on behalf of that employee'.[156]

While COIDA adopts an expansive definition of 'employee', it expressly excludes independent contractors, rendering benefits inaccessible to those operating outside traditional employment relationships.[157] However, jurisprudential development, although limited, represents incremental progress towards broader social protection coverage. The constitutional court's landmark decision in *Mahlangu v Minister of Labour* extended protections to previously excluded domestic workers.[158] The case centred around a domestic worker who tragically drowned during employment, leaving dependents without recourse to COIDA compensation due to their statutory exclusion under Section 1(xix)(*v*).[159] The

[153] Section 15 & 16 of COIDA.
[154] Preamble of COIDA.
[155] Section 1 of COIDA.
[156] Ibid.
[157] Ibid.
[158] 2021 (2) SA 54 (CC) (19 November 2020) par 183. See M van Staden & E Fourie 'Domestic workers, (in) justice and occupational injuries - Mahlangu v Minister of Labour' (2021) 81 *THRHR* 434.
[159] Ibid par 7-9.

constitutional court rightly found this exclusion unconstitutional, recognising it perpetuated historical discrimination based on race, gender and work type.[160] The judgment highlighted how domestic workers, although often primary breadwinners supporting multiple households while earning below substandard wages, had been rendered legally invisible,[161] a fate now shared by many gig drivers excluded from worker protections. There is now a compelling constitutional imperative to move beyond categorical exclusions and give meaningful effect to Section 23's universal guarantee of fair labour practices for all workers, regardless of employment classification.[162]

3.3.4. State obligation

The constitutional framework establishes a nuanced obligation regarding socioeconomic rights. Section 27(2) imposes a positive duty on the state to implement reasonable legislative and policy measures toward realising the Bill of rights, subject to two critical qualifications: (1) consideration of available resources, and (2) the imperative of progressive realisation. This dual requirement means that temporary fiscal constraints cannot justify permanent deprivation of rights.[163] The gig drivers' exclusion from formal social protection schemes, however raises questions on whether the state is meeting its obligation, particularly given the growing prevalence of gig work.[164]

South Africa's legislative framework lacks a comprehensive legal definition of social security that accounts for non-standard work. This ambiguity allows for the continued exclusion of gig drivers, contrary to Section 27(2)'s inclusive intent.[165] The absence of a legislative framework covering gig drivers despite their economic contributions suggests a failure to realise social security rights for all progressively.[166] Moreover, the state cannot indefinitely delay extending protections to gig drivers under the guise of resource constraints.[167] The standard developed in *Grootboom* requires that measures be reasonable in conception and implementation.[168] Therefore, any law or policy that excludes gig drivers from social security limits their

[160] Ibid par 183.
[161] Ibid par 2, 103, 104, 108.
[162] R Mojapelo and OK Odeku 'Perspectives on failure to extend protection to the atypical workers' (2023) 14 *African Journal of Public Affairs* 112 at 115.
[163] Van den Heever op cit note 120 at 7.
[164] Ibid.
[165] Van den Heever op cit note 120 at 8.
[166] Ibid.
[167] Ibid.
[168] 2001 (1) SA 46 (CC).

constitutional rights.[169] Under Section 36, such exclusion must be prescribed by law, reasonable and justifiable in an open and democratic society, and proportionate.

Additionally, the section mandates that limitations must align with a society based on human dignity, equality, and freedom.[170] The precarity of gig work, where workers lack benefits despite economic dependence on platforms, directly undermines these values.[171] In this regard, Van den Heever concisely articulated that the proper fulfilment of the Section 27(2) obligation requires the state to develop both a comprehensive social security definition and a complete articulation of the right; regular publication of verifiable data tracking the realisation status of this right; and the establishment of a transparent reform roadmap distinguishing between immediately realisable rights (not resource-dependent), and rights subject to progressive realisation (resource-constrained).[172] This framework would clarify while maintaining constitutional compliance with Sections 27 and 36 requirements.[173]

3.4. CRITICAL REVIEW OF THE SOCIAL PROTECTION FRAMEWORK AND CONCLUSION

This section examines the disconnect between South Africa's social protection framework and the realities of gig work. Despite constitutional guarantees, the employment-based structure of existing systems creates insurmountable barriers for gig drivers, leaving them without safety nets against occupational and economic risks. Considered independent contractors, gig drivers fall beyond the scope of coverage under the UIA and COIDA. This systemic exclusion exacerbates their vulnerability, given the inherently precarious nature of gig work. Without adequate safeguards, these workers face heightened risks—including road accidents, robberies, and hijackings,[174] while bearing the full burden of workplace harms without access to compensation or support. [175] This gap in the country's legislative framework reflects a failure to adapt to modern employment arrangements and disregards constitutional

[169] Van Staden op cite note 63 at 227.
[170] Section 36(1)(*c*).
[171] van Staden op cite note 63 at 111.
[172] van den Heever op cit note 138 at 8.
[173] Ibid.
[174] PP Ngubeni 'The gig economy and food-delivery in South Africa: Opportunities and challenges for workers' (unpublished LLM thesis, University of Johannesburg, 2023) 2.
[175] Ibid.

guarantees of dignity and social security.[176] Moreover, it is misaligned with international standards, particularly the ILO' Decent Work Agenda.[177]

Although the ILO has long championed an inclusive approach, with a substantial portion of its conventions dedicated to advancing social protection as a universal right,[178] the Decent Work Agenda specifically underscores the necessity of universal and inclusive labour and social protection policies that accommodate all workers, irrespective of their employment status.[179] The Agenda calls for equitable access to social protection, opportunities for professional growth, and the freedom to organise, principles that are conspicuously absent for South Africa's gig drivers.[180] In response to this initiative, the South African Decent Work Country Program (DWCP) was launched.[181] The DWCP was designed to extend baseline protections to all workers, including the unemployed, regardless of socioeconomic position.[182] This comprehensive approach reflects the DWCP's commitment to establishing baseline protections that uphold human dignity through equitable access to workplace rights and social security.[183] However, the country's reliance on outdated employment classifications undermines these commitments, leaving gig workers disproportionately excluded.[184]

Therefore, to uphold constitutional guarantees of dignity and social security, South Africa must reassess its social protection framework, to ensure its alignment with international standards and addresses the exclusion of gig drivers.[185] Reforms which align with ILO norms and constitutional obligations to ensure social protection systems are inclusive, equitable, and responsive to 21st-century labour markets are needed to close the protection and compliance gap, considering the realities of the employment relationship and striving for decent work.[186] Without such measures, the promise of decent work and equitable protection will remain unfulfilled for a significant and growing workforce segment. In light of these shortcomings, the next part examines international frameworks in an effort to reconceptualise social protection for gig workers, offering potential legislative models.

---

[176] Ncamane op cit note 8 at 17.
[177] Ibid.
[178] ILO *Decent Work - International Labour Conference 87th Session* (1999).
[179] Ibid at 3.
[180] Ibid at 4.
[181] Ncamane op cit note 8 at 17-19.
[182] Ibid.
[183] Ibid.
[184] Ncamane op cit note 8 at 17-19.
[185] Ibid.
[186] Ibid.

4. THE INTERPLAY OF DOMESTIC AND INTERNATIONAL LAW IN ADDRESSING GIG WORKER PROTECTIONS

4.1. INTRODUCTION

This part explores the interplay between domestic and international law concerning gig worker protections, particularly in South Africa. It begins by acknowledging how globalisation has amplified challenges in labour markets worldwide, making comparative legal analysis crucial as issues often transcend national borders. A key aspect discussed is South Africa's constitutional mandate under Section 233 and Section 39(1)(*b*) to interpret domestic legislation and the Bill of Rights in compliance with international law. This framework necessitates aligning local legal provisions with international standards to reinforce fundamental rights and uphold state obligations. The part then focuses on international efforts to adapt existing labour and social protection frameworks to address the unique characteristics of gig work. It will specifically examine two pivotal international developments that provide adaptable frameworks for addressing gig work challenges: the ILO's Social Protection Floors Recommendation (No. 202, 2012) and the European Union's (EU) Directive on Improving Working Conditions in Platform Work. The discussion will highlight how these instruments offer insights and actionable pathways for extending social protections to South Africa's gig workforce, which would address existing protection gaps and advance South Africa's constitutional and human rights obligations in the evolving world of work.

4.2. BACKGROUND

Legal scholars frequently have observed that legal systems are historically intertwined, and these connections may legitimise the incorporation of foreign and international legal principles.[187] Globalisation has amplified this dynamic, particularly as the gig economy's challenges extend beyond South Africa, reshaping labour markets worldwide and complicating efforts to secure decent working conditions.[188] Since these issues transcend national borders, comparative legal analysis provides critical insights.[189] With such examinations, courts can refine domestic interpretations of labour law by engaging with

[187] Van Staden op cite note 63 at 243.
[188] ILO *Realizing decent work in the platform economy International Labour Conference 113th Session* (2025) 9.
[189] Van Staden op cite note 63 at 243.

foreign and international jurisprudence and legislative models, thereby uncovering the normative and policy foundations that shape legal frameworks elsewhere.[190]

South Africa's constitutional framework further mandates this comparative approach. In Section 233 of the Constitution, legislation must be interpreted in compliance with international law, and must be construed following international law. On the ohther hand, Section 39(1)(*b*) of the Constitution requires courts to consider international law when interpreting the Bill of Rights. These provisions necessitate alignment between domestic law and international standards, including non-binding instruments, to ensure the state meets its international commitments.[191] Du Plessis argues that such harmonisation reinforces the protection of fundamental rights while upholding the state's international obligations.[192] This approach also ensures compliance with global standards for safeguarding fundamental rights and freedoms.[193]

Internationally, there is a concerted effort to adapt existing labour and social protection frameworks to address the specificities of gig work, aiming to balance flexibility with workers' rights and financial stability. The ILO's conventions such as the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), the Right to Organize and Collective Bargaining Convention, 1949 (No. 98), the Equal Remuneration Convention, 1951 (No. 100), and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) the Forced Labour Convention, 1930 (No. 29), and its Protocol of 2014, as well as the Abolition of Forced Labour Convention, 1957 (No. 105), the Occupational Safety and Health Convention, 1981 (No. 155) and the Social Security (Minimum Standards) Convention, 1952 (No. 102), ilustrate this effort, offering protections without restrictive employment classifications. Unlike South Africa's narrow reliance on traditional employer-employee relationships, these instruments adopt inclusive approaches to coverage.

However, this part only focuses on two pivotal developments within this context – the ILO's Social Protection Floors Recommendation (No. 202, 2012) and the EU's Directive on Improving Working Conditions in Platform Work[194]. Though non-binding, these instruments

[190] Ibid.
[191] *S v Makwanyane* 1995 (3) SA 391 (CC) par 35.
[192] L Du Plessis *Re-Interpretation of Statutes* (2002) 173.
[193] Ibid.
[194] Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 on improving working conditions in platform work.

provide adaptable frameworks which address gig work's distinct challenges, blending normative principles with pragmatic solutions. Their relevance to South Africa lies in their targeted applicability to gig drivers, their adaptability to diverse labour contexts, and their evidence-based design. By analysing these models, this part highlights actionable pathways to extend social protections inclusively to South Africa's gig workforce.

4.3. SOCIAL PROTECTION FLOORS RECOMMENDATION, 2012 (NO. 202) (SPFR)

In 2012, the ILO adopted Recommendation No. 202 concerning National Social Protection Floors, marking a significant step toward realising universal social security. This instrument establishes that all individuals, particularly the most vulnerable, should have guaranteed access to essential social protection.[195] The Recommendation aligns with constitutional principles by affirming social security as a fundamental human right and a critical component of comprehensive social protection systems.[196] It guides member states on establishing nationally defined social protection floors while encouraging progressive coverage expansion to achieve higher levels of protection for all citizens.[197] The Recommendation outlines four fundamental guarantees for adequate protection: access to essential health care, income security for children, income security for working-age individuals, and income security for older persons.[198] The instrument emphasises the need for social protection systems to be inclusive, sustainable, and implemented through coordinated approaches.[199] By promoting these standards, the ILO seeks to advance human rights, strengthen social justice, and contribute to economic stability while addressing global challenges of poverty and inequality.[200]

Although, as mentioned earlier, that the Recommendation is not legally binding, scholars such as Cichon describe it as 'an unparalleled document of good will' that has significantly influenced national policy development and crisis response strategies.[201] The widespread endorsement of social protection floor initiatives by international organisations suggests a

[195] Article 1 of the SPRF.
[196] Preamble and article 2 of the SPRF.
[197] Article 1(b), 7, 15.
[198] Article 5.
[199] Article 9.
[200] Tshoose op cite note 25 at 7.
[201] M Cichon 'The Social Protection Floors Recommendation, 2012 (No. 202): Can a six-page document change the course of social history?' (2012) 66 *International Social Security Review* 1 at 37.

growing consensus on their importance.[202] Naturally, the question would be how the Recommendation can be legally binding. Cichon argues that transforming these principles into binding obligations through a United Nations Convention on minimum social protection standards would represent a natural progression.[203] Such a convention would institutionalise the global commitment to universal social security as a fundamental requirement for ensuring human dignity and sustainable development.[204] The momentum behind social protection floors demonstrates their potential to serve as the foundation for an internationally recognised right to basic social security.[205]

4.4. EU'S DIRECTIVE ON IMPROVING WORKING CONDITIONS IN PLATFORM WORK

The Directive on Improving Working Conditions in Platform Work represents a comprehensive regulatory response to the challenges posed by gig platforms, with significant implications for gig drivers' social protection.[206] The Directive establishes mechanisms to ensure proper employment classification while implementing algorithmic transparency and accountability safeguards. Although the Directive does not create new social security entitlements per se, its structural reforms fundamentally shape gig drivers' access to existing protections through four key interventions:

4.4.1. Employment misclassification

The Directive addresses the critical issue of employment misclassification through a rebuttable presumption of employment status.[207] This legal mechanism activates when platforms exercise control over workers by determining remuneration, imposing work rules, supervising performance, or restricting autonomy.[208] By shifting the evidentiary burden to platforms, this provision aims to combat disguised employment relationships in line with the ILO's primacy of facts principle articulated in Recommendation No. 198[209].[210] A correct classification is the gateway to traditional social protections, as most systems condition

[202] Ibid.
[203] Ibid at 40.
[204] Ibid.
[205] Ibid.
[206] EU Directive 2024/2831.
[207] Article 5.
[208] Ibid.
[209] Article 9 of Employment Relationship Recommendation, 2006 (No. 198).
[210] Article 4 of the EU Directive 2024/2831.

benefits on formal employment status.[211] While member states retain discretion regarding social security proceedings, the presumption creates substantial pressure for alignment with standard employee protections.[212]

4.4.2. Governance frameworks

Secondly, the Directive institutes robust governance frameworks for algorithmic management systems.[213] Recognising how automated decision-making affects working conditions, the legislation mandates transparency regarding monitoring systems that influence remuneration, task allocation, or account status.[214] It guarantees workers' rights to human review of significant algorithmic decisions, including account deactivations, thereby reducing precarity and enhancing job stability.[215] Moreover, the Directive establishes rigorous transparency obligations regarding automated systems in gig work.[216] Article 9 mandates comprehensive disclosure, obligating gig platforms to provide detailed information about their automated monitoring and decision-making practices.[217] The Directive adopts an expansive approach by explicitly covering all types of decisions supported or taken by automated decision-making systems, including those that may not significantly affect gig drivers.[218] The scope of required disclosures is substantial, extending beyond mere notification of system use to include specific details about the categories of data being monitored, the types of decisions being made, the key parameters influencing these decisions, and their relative weighting.[219] Significantly, these transparency obligations also encompass automated systems used in recruitment and selection processes.[220]

Furthermore, Article 11(1) establishes crucial accountability measures by requiring platforms to provide timely and comprehensible explanations for any decisions made or supported by automated systems that affect the employment relationship.[221] Thus, the Directive's provisions represent a significant advancement in regulating workplace algorithms, creating

[211] Smit & Stopforth op cit note 30 at 164.
[212] Article 5(2) of the EU Directive 2024/2831.
[213] Article 9 & 10.
[214] Article 9(3).
[215] Article 10(5).
[216] Article 9(1).
[217] Ibid.
[218] Ibid.
[219] Article 9(2) and (3).
[220] Article 9(5).
[221] The EU Directive 2024/2831

robust transparency standards and concrete accountability mechanisms for automated employment decisions.[222] These procedural safeguards contribute to social protection by ensuring fair treatment and due process in platform operations.

4.4.3. Collective labour rights

The Directive strengthens enforcement through enhanced information-sharing requirements.[223] Platforms must declare work activities to national authorities, improving regulatory oversight and supporting the formalisation of previously informal work arrangements.[224] The framework also establishes accessible dispute resolution mechanisms, permitting collective representation in enforcement proceedings.[225] These measures collectively improve the traceability of gig work and compliance with labour standards.[226] This approach reflects broader international labour standards, particularly the ILO Centenary Declaration's call for adapted social protection systems and Recommendation No. 202's emphasis on universal coverage.[227] Combining employment classification reforms with algorithmic accountability and more vigorous enforcement, the Directive creates an ecosystem more conducive to comprehensive social protections, even operating within existing benefit structures. This regulatory strategy offers valuable insights for jurisdictions like South Africa seeking to extend protections to gig drivers without undermining labour market flexibility.

4.4.4. Work-related safety protections

Lastly, the Directive establishes robust occupational safety and health obligations for gig platforms using automated systems while fully complying with existing workplace safety regulations.[228] These provisions require platforms to systematically evaluate potential risks posed by automated monitoring and decision-making systems, particularly concerning occupational hazards such as workplace accidents, psychosocial stressors, and economic concerns.[229] The Directive explicitly prohibits deploying computerised systems in ways that

[222] Article 11.
[223] Article 13 & 14.
[224] Ibid.
[225] Article 18.
[226] Ibid.
[227] ILO Centenary Declaration for the Future of Work, 2019.
[228] Article 12(1) of the EU Directive 2024/2831.
[229] Ibid.

could subject workers to excessive pressure or compromise their physical and mental well-being.[230] Following such assessments, platforms must implement appropriate safeguards and preventive measures tailored to the specific characteristics of gig work environments.[231] This restriction applies broadly to all automated systems that influence working conditions, regardless of whether they make fully autonomous decisions or merely support human decision-making processes. [232]

A critical component of these safety provisions mandates that platforms actively engage workers and their representatives through comprehensive information sharing, meaningful consultation, and substantive participation in safety matters.[233] To further strengthen workplace protections, member states bear responsibility for ensuring that gig platforms establish effective preventive measures against all forms of occupational hazards, including violence and harassment.[234] This includes implementing reliable reporting mechanisms that enable workers to raise safety concerns without fear of reprisal.[235] The comprehensive framework created by these provisions represents a significant advancement in adapting traditional workplace safety regulations to the unique challenges of gig work.[236]

4.5. SYNTHESIS AND DISCUSSION

The global proliferation of the gig economy has fundamentally transformed labour markets worldwide, presenting both opportunities and regulatory challenges. South Africa's engagement with international labour standards, particularly through implementing ILO Recommendation No. 202 and participation in Decent Work Country Programs, demonstrates formal alignment with universal social protection principles. However, the nation's current social protection framework remains inadequately adapted to address the distinctive needs of gig drivers, creating a protection gap that is misaligned with the fundamental objectives of R202's universal coverage mandate. On the other hand, the European Union's Platform Work Directive adopts a sophisticated dual approach to this challenge. The Directive establishes mechanisms for proper employment classification, facilitating gig drivers' access to

[230] Article 12(2).
[231] Cichon op cit note 201.
[232] Article 12(3) of the EU Directive 2024/2831.
[233] Article 12(2).
[234] Article 12(5).
[235] The EU Directive 2024/2831 at 34.
[236] Ibid.

conventional social protection benefits. Simultaneously, it implements innovative protections addressing algorithmic management challenges while strengthening transparency requirements and enforcement procedures. This comprehensive regulatory model effectively bridges the gap between traditional workers' protections and the realities of gig work.

South Africa's constitutional obligations under Section 27(1)(*c*), which guarantees the right to social security and its international commitments create an imperative for legal reform. The country could productively examine these international instruments to develop an inclusive regulatory framework that accommodates emerging work arrangements while fulfilling its domestic and international human rights obligations. Such adaptation would address current protection gaps and future-proof the social protection system against evolving labour market trends. The comparative analysis suggests South Africa's path to compliance requires legislative modernisation and innovative enforcement mechanisms tailored to gig work environments.

5. RECOMMENDATIONS

5.1. INTRODUCTION

The proliferation of gig platforms has ushered in a new era of work, significantly transforming traditional employment models and bringing to the forefront the critical need to reconceptualise social protection, particularly for gig drivers operating within the informal economy in South Africa.[237] The central challenge emerges because these gig drivers are predominantly classified as independent contractors, which typically excludes them from the benefits and protections offered by formal labour laws and social protection schemes.[238] Consequently, a systemic approach to social protection is not merely desirable but essential for extending overall coverage, enhancing efficiency, and improving effectiveness.[239] Against this backdrop, this part explores potential pathways to extend social protection to gig drivers. The recommendations are based on robust theoretical frameworks rooted in human rights, the crucial insights derived from stakeholder needs and international instruments.

5.2. LEGAL AND POLICY REFORM OF EMPLOYMENT STATUS

A foundational step involves updating South Africa's social protection framework to appropriately classify gig drivers, moving beyond restrictive traditional definitions that exclude them from employee benefits. This involves recognising the gig economy as a durable and diverse component of global economies, particularly in developing countries like South Africa, where its expansion is vital for job creation and poverty alleviation.[240] Traditional and discriminatory labour law and social security systems, designed for formalised employment relationships are ill-suited to protect the vulnerable workforce within this sector and therefore, must be adapted to this prevailing reality.[241] Expanding the definition of 'employee' is necessary for adopting a 'reality of the work relationship' approach that prioritises the economic dependence of workers for them granting access to legal protections and social security benefits, regardless of their contractual status.[242] A broader interpretation of the

[237] Dubbelman op cit note 61 at 3.
[238] Smit & Stopforth op cit note 30 at 152.
[239] N Wiebe 'Case study F: The challenges of moving towards universal social protection in Bolivia' in N Ellison & T Haux *Handbook on Society and Social Policy* (2020) *210.*
[240] E Fourie 'Perspectives on Workers in the Informal Economy in the SADC Region' (2017) 4 *Revue de droit comparé du travail et de la sécurité sociale* 76 at 77.
[241] Ibid.
[242] N Smit & E Fourie 'Extending Protection to Atypical Workers, Including Workers in the Informal Economy, in Developing Countries' 2010) 6:1 International journal of comparative law 43 at 52.

'employee' definition, as advocated, would make existing labour dispute resolution bodies, such as the CCMA in South Africa, accessible to gig workers.[243]

Section 83(1) of the BCEA allows the Minister to deem certain individuals as 'employees' for specific legislative purposes, thereby extending protections to gig drivers. However, due to the limited scope of protection for gig drivers, particularly concerning collective labour rights, and their often isolated work arrangements as mentioned earlier, simply extending the current labour legislation to include gig drivers would likely prove insufficient.[244] In this regard, the academic consensus is shifting toward adopting the 'worker' category in labour regulation as a more appropriate framework for addressing the unique characteristics of gig work.[245] This is also premised on the use of 'everyone' in Sections 23 and 27 of the Constitution. Currie and De Waal contend that using this term reflects Parliament's intention to extend the scope of these rights beyond the traditional, common-law employment relationship.[246] They argue that, through judicial interpretation and application, this constitutional provision could grant social protections to a broader range of individuals, including those who fall outside conventional employment categories.[247] This approach aligns with the Constitution's transformative purpose and commitment to ensuring equitable social protection for all, which aligns with Recommendations No. 198 and No. 202.[248]

5.3. DEVELOPMENT OF LEGISLATIVE FRAMEWORKS

Alternatively, South Africa must adopt new legislation tailored to the gig economy. Developing a tailor-made framework for gig workers in South Africa requires a comprehensive approach that addresses the unique challenges and opportunities presented by gig platforms within the country's gig economy.[249]

The EU Directive offers a concrete model for South Africa's legislative reform through its rebuttable presumption of an employment relationship. As discussed above, this directive establishes a rebuttable presumption of employment when gig platforms exert control over

[243] Ibid 52-3.
[244] Du Toit et al op cit note 101 at 1501.
[245] Mokofe & Van Eck op cit note 112 at 1372-1373.
[246] Currie I & De Waal J *The Bill of Rights Handbook* 6th ed (2013).
[247] Ibid.
[248] Employment Relationship Recommendation, 2006 (No. 198) & Social Protection Floors Recommendation (No. 202, 2012).
[249] Fourie op cit note 240 at 92.

work performance, requiring satisfaction of at least three specified conditions related to remuneration determination, rule enforcement, performance supervision, or work organisation restrictions.[250] This shifts the burden of proof onto the platform to demonstrate that no employment relationship exists.[251] Although South Africa already has a similar rebuttable presumption in Section 200A of the LRA, the EU's detailed criteria provides a robust framework to strengthen and apply these existing South African provisions more effectively to gig drivers. This means adapting social insurance mechanisms to cover workers in all types of employment, accounting for their specific needs, and simplifying administrative procedures for contributions. Fostering voice and representation is paramount, especially given the typically low trade union representation among gig workers.[252] Fourie highlights the importance of exploring and supporting various worker organisations beyond traditional trade unions to generate political pressure for the advancement of workers' interests nationally and internationally.[253] Therefore, unions must expand their role beyond negotiating wages with employers to also bargaining with government bodies on social and political issues, thereby directly influencing law and policy.[254]

South Africa can also draw from the directive's emphasis on transparency, fairness, human oversight, and accountability in algorithmic management to address the vulnerability and exploitation prevalent in the gig economy, particularly for workers who are economically dependent on one platform.[255] This includes ensuring human intervention for critical decisions like account termination and providing communication channels for workers to connect and raise concerns privately and securely. While the EU directive primarily broadens the understanding of an employment relationship, the international trend towards recognising a third worker category, such as a 'dependent contractor', is also gaining traction.[256] This approach could offer tailored protections without forcing a binary employee/independent contractor classification, allowing for context-specific regulations that reflect the complex realities of gig work.[257] South Africa could explore this model to extend the reach of social protection laws to gig drivers. By adopting these legislative and interpretative approaches

[250] See 4.4 above.
[251] Ibid.
[252] Fourie op cit note 240 at 92.
[253] Ibid.
[254] Ibid.
[255] Ibid.
[256] ILO op cit note 32 at 80. Please make sure that the cross-ref numbers are correct.
[257] Ibid.

informed by the EU directives and ILO standards, South Africa can align its legal framework with its Constitution's transformative vision of social justice, extending crucial rights and social protection to gig drivers in the informal economy.

6. CONCLUSION

The gig economy has become a significant component of South Africa's labour market, providing flexible work opportunities amid high unemployment and economic inequality. However, the classification of gig drivers as independent contractors excludes them from the protections of South African labour and social protection laws. This study underscores the urgent need for legal and policy reforms to address the distinct vulnerabilities of gig drivers, ensuring their dignity, fairness, and access to social protection. Grounded in constitutional principles and relevant legal instruments, these reforms emphasise the necessity of accurately determining employment relationships, establishing a presumption of employment, and guaranteeing universal social protection. Despite challenges such as resistance from platform companies, funding limitations, legislative constraints, and the balance between flexibility and protection, the benefits of reform outweigh the costs. Extending social protections to gig drivers promises to reduce inequality, advance social justice, and foster a more sustainable and inclusive economy. The ILO's recommendations offer a valuable framework to achieve these objectives and ensure no worker is excluded in the changing world of work. By adopting international best practices substantively, the country can align its labour market with its transformative constitutional vision. Meaningful reform requires legislative modernisation and a strong commitment to the effective interpretation and implementation of legal frameworks, proactively extending labour rights and social security to gig workers, thereby promoting dignity, social justice, and inclusivity in the evolving labour landscape.

Bibliography

Books

Collins H, Lester G & Mantouvalou V (eds) *Philosophical foundations of labour law* (2018)

L Du Plessis *Re-Interpretation of Statutes* (2002)

N Ellison & T Haux (eds) *Handbook on Society and Social Policy* (2020)

Currie I & De Waal J *The Bill of Rights Handbook* 6th ed (2013)

Legislation

The Constitution of the Republic of South Africa, 1996

Basic Conditions of Employment Act 75 of 1997

Employment Equity Act 55 of 1998

Labour Relations Act 66 of 1995

Social Assistance Act 13 of 2004

Unemployment Insurance Act 63 of 2001

Case law

Chemical Workers' Industrial Union v Plascon Decorative (Inland) (Pty) Ltd [1998] 12 BLLR 1191 (LAC)

Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC)

Kylie v CCMA [2010] 7 BLLR 705 (LAC) (26 May 2010)

Mahlangu v Minister of Labour 2021 (2) SA 54 (CC) (19 November 2020)

South African National Defence Union v Minister of Defence and Others (1999) 20 ILJ 2265 (CC)

S v Makwanyane 1995 (3) SA 391 (CC)

Uber SA v NUPSAW [2017] ZACCMA 1 (7 July 2017)

Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others (2018) 39 ILJ 903 (LC) (12 January 2018)

Journal

South Africa' (2016) Volume number? *Global Social Policy* South Africa' (2016) Volume number? *Global Social Policy*

C Behrendt, QA Nguyen & U Rani 'Social protection systems and the future of work: Ensuring social security for digital platform workers' (2019) 72 *International Social Security Review*

CI Tshoose 'Appraisal of selected themes on the impact of international standards on labour and social security law in South Africa' (2022) 25 *PER*

D du Toit, S Fredman & M Graham 'Towards legal regulation of platform work: Theory and practice' (2020) 41 *Industrial Law Journal*

D Fourie 'The individual in the gig society: is the gig economy exploitative of the informal economy, or a means of empowerment?' (2024) 55 *Acta Academica: Critical Views on Society, Culture, and Politics*

D Coetsee & P Buys 'A doctrinal research perspective of master's degree students in accounting' (2018) 32 *South African Journal of Higher Education*

DM Smit & G Stopforth 'An overview of categories of vulnerability among on-demand workers in the gig economy (Part 2)' (2023) 27 *LDD*

E Fourie 'Perspectives on Workers in the Informal Economy in the SADC Region' (2021) 4 *Revue de droit comparé du travail et de la sécurité sociale*

MP Olivier & A Govindjee 'A critique of the unemployment insurance amendment bill, 2015' (2015) 18 *PER*

M van Staden & E Fourie 'Domestic workers, (in) justice and occupational injuries - Mahlangu v Minister of Labour' (2021) 81 *THRHR*

M Nyenti ‘Role of constitutional principles and values in the development of social protection in South Africa’ (2016) Volume number?’ *Global Social Policy*

N Smit & E Fourie ‘Extending Protection to Atypical Workers, Including Workers in the Informal Economy, in Developing Countries’ 2010) 6:1 International journal of comparative law

N Ncamane ‘Digital platform workers and the conundrum of the definition of an ‘employee’ in the era of the fourth industrial revolution’ (2024) 35 *South African Mercantile Law Journal*

J Jairous, M Mikko Perkiö, A Metteri & S Atkins ‘The informal sector and social protection’

K Kavese, A Mbali, & I Anyikwa *The Gig Economy, Digital Labour Platforms, and Independent Employment in the Eastern Cape* (2022)

K Mokoena ‘Are uber drivers employees or independent contractors: a comparative analysis’ (2018) 39 Industrial Law Journal

K Mufamadi & L Koen ‘Independent contractors and Covid-19 relief: Tax and social insurance legislative reform to extend protection to independent contractors’ (2021) 37 *SAJHR*

LG Mpedi ‘Social protection for workers posted to and from South Africa: A critical assessment’ (2021) 30 *Obiter*

LM Katiyatiya ‘Part A: socio-economic inequality in South Africa and the continual plight for social protection in the future world’ (2020) 24 *Journal of Poverty*

LM Katiyatiya & N Lubisi ‘Part B: The Role of Substantive Equality in Shaping Transformative Social Protection in South Africa into the Digital Platform Work’ (2020) 25 *Journal of Poverty*

LM Katiyatiya & N Lubisi ‘The current social protection discourse, gig economy within the advent of COVID-19: some emerging legal arguments’ (2014) 66 *Labour History*

M Loewe & E Schüring ‘Introduction to the *Handbook on Social Protection Systems’*

M Graham & MA Anwar ‘Between a rock and a hard place: Freedom, flexibility, precarity and vulnerability in the gig economy in Africa’ (2019) 25(2) *Competition & Change*

N Smit & LG Mpedi ‘Social protection for developing countries: Can social insurance be more relevant for those working in the informal economy?’ (2010) *LDD*

PI Bhat ‘Doctrinal legal research as a means of synthesizing facts, thoughts, and legal principles’ (2020) 1 *Idea and Methods of Legal Research*

PP Ngubeni ‘The gig economy and food-delivery in South Africa: Opportunities and challenges for workers’ (unpublished LLM thesis, University of Johannesburg, 2023)

R Heeks, M Graham, P Mungai, JP Van Belle & J Woodcock ‘Systematic evaluation of gig work against decent work standards: The development and application of the fairwork framework’ (2021) 37 *The Information Society*

R Mojapelo and OK Odeku ‘Perspectives on failure to extend protection to the atypical workers’ (2023) 14 *African Journal of Public Affairs*

TE Coleman and LG Mpedi ‘Collective bargaining and representation in the gig economy in South Africa: A call for a purposive approach’ (2023) 48 *Tydskrif vir Regswetenskap*

WM Mokofe, ‘Achieving decent work for digital platform workers in South Africa’ (2022) 43 *Obiter*

WN Mutengwe, A Mazenda & S Moreblessing ‘Uber’s digital labour platform and labour relations in South Africa’ (2023) 42 *Development Policy Review*

WM Mokofe & S van Eck ‘Reflections on marginalised workers and the role of trade unions in the changing world of work ‘(2021) 42 *Industrial Law Journal*

V Mantouvalou ‘Legal construction and structures of exploitation’

Research Papers

A van den Heever ‘Social security/protection in South Africa’ Wits School of Governance: SA Future Economy Research Paper, University of Witswatersrand

B Dubbelman ‘E-hailing and the crisis of work: A contextual investigation into the working conditions of e-hailing drivers in South Africa’ (MA: Development studies research report, University of the Witwatersrand, 2021)

K Naidoo ‘Innovation, digital platform technologies and employment: an overview of key issues and emerging trends in South Africa’ (SCIS Working Paper, University of the Witwatersrand, 2020)

MJ van Staden ‘Identification of the parties to the employment relationship: an appraisal of teleological interpretation of statutes‘ (LLD thesis, University of Pretoria, 2017)

M Cichon ‘The Social Protection Floors Recommendation, 2012 (No. 202): Can a six-page document change the course of social history?’ (2012) 66 *International Social Security Review*

N Wiebe ‘Case study F: The challenges of moving towards universal social protection in Bolivia’

W Charles ‘The Extension of Social Protection to Informal Farm Workers in South Africa’ (unpublished thesis 2023, University of The Western Cape)

International Instruments

Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 on improving working conditions in platform work.

International Labour Organization Documents

ILO *The ILO DW for SDGs' Notes Series: Social Protection* (2017)

ILO *World Labour Report: Income Security and Social Protection in a Changing World* (2000)

ILO *Principles of Social Security* (1998)

ILO *Realizing decent work in the platform economy - International Labour Conference 113th Session* (2025)

ILO *Introduction to Social Security* (1984)

ILO *Decent Work - International Labour Conference 87th Session* (1999).

ILO *Realizing decent work in the platform economy International Labour Conference 113th Session* (2025)

ILO Centenary Declaration for the Future of Work, 2019.

Recommendations

Employment Relationship Recommendation, 2006 (No. 198).

Social Protection Floors Recommendation, 2012 (No. 202)

Internet Sources

M Hassan 'Navigating South Africa's employment landscape: Jobtech's transformative role' *Jobtech Alliance* 01 February 2024 available at https://jobtechalliance.com/navigating-south-africas-employment-landscape-jobtechs-transformative-role/ accessed 15 May 2025.

Statista 'Number of people employed in the informal sector in South Africa from 2010 to 2023' available at https://www.statista.com/statistics/1296024/number-of-informal-sector-employees-in-southafrica/ accessed on 14 July 2025

Government Notices

Directive by the Minister of Employment and Labour in terms of Regulation 10(8) issued by the Minister of Cooperative Governance and Traditional Affairs in terms of Section 27(2) of the Disaster Management Act 57 of 2002

GN 5970 in GG 52232 of 7 March 2025.

Codes of Good Practice

Code of Good Practice: Who is an Employee GN 1774 in *GG* 29445 of 1 December 2006