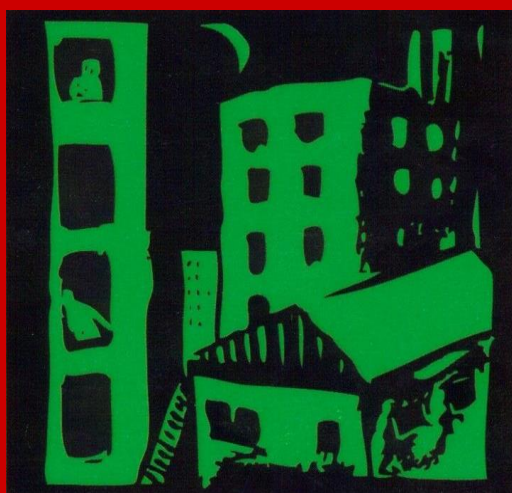
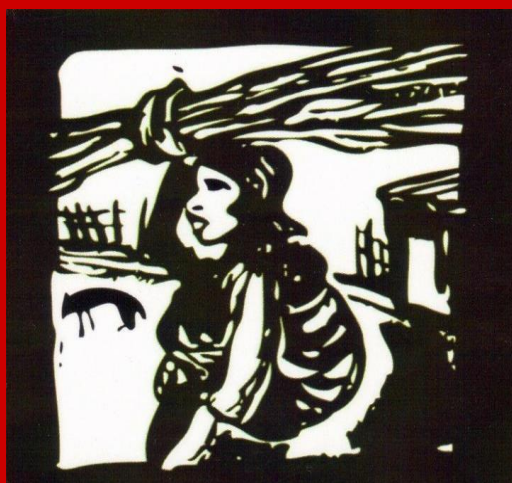


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## An overview of categories of vulnerability among on-demand workers in the gig economy (Part 1)

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### ABSTRACT

*The gig economy has given rise to new forms of work that fall outside the domain of traditional employment. In most jurisdictions, the status of the work performer needs to fall within the traditional definition of “employee” to guarantee labour law protection and social security, as well as to allow for collective bargaining. In the digital era, and particularly in a socially distanced world that increasingly uses online services, platforms such as Uber and DoorDash are established providers of work. Yet their very structure renders their service providers extremely*

*vulnerable. In the 21<sup>st</sup> century, capital seemingly seeks to return to basics by paying strictly only for services delivered and passing the bulk of risk to workers on these platforms. This contribution aims to add to a growing body of evidence on gig work, and gives an overview of categories of vulnerability among on-demand workers, without focusing on the classification issue. This article is in two parts. Part 1 focuses on the need for job creation in the Fourth Industrial Revolution and the potential of the gig economy to curb unemployment, particularly among the youth. A brief overview of the different industrial revolutions to date creates the backdrop for an in-depth look at the gig economy and platform work. The focus then shifts to the vulnerability created by the peculiar relationship between the three parties involved in on-demand work. This leads to a discussion in part 2 of worker vulnerability, the legal position of platform work, and the suggested way forward, drawing on International Labour Organization and European Union instruments, with a strong focus on South Africa, without resolving classification issues.*

**Keywords:** platform work; decent work; gig economy; unemployment; vulnerability; youth

*“The dearth of jobs and the asymmetries of globalization have created competition for jobs in which workers have lost and the owners of capital have won.”<sup>1</sup>*

## 1 INTRODUCTION

One of the distinguishing features of the 21st century is undoubtedly the proliferation of digital platforms. As people increasingly turn to cyberspace for services such as transport and food deliveries, the number of those registered as service providers on these platforms continues to grow. But has the regulatory regime kept pace with this new mode of work? In recent years, it has become clear that work on these digital platforms cannot necessarily be regarded as “decent”. The problem seems to be one of classification<sup>2</sup> but also of design. It is exacerbated by the need for businesses to respond to market trends, and by a world of work where, by 2020, an estimated 39% of core skills required across all occupations were not available in South Africa.<sup>3</sup>

In this, part 1 of a two-part article, we contribute to the growing body of evidence regarding the potential of platform (on-demand) work to curb unemployment and embrace the change brought about by the Fourth Industrial Revolution (4IR), provided that worker vulnerabilities are addressed. The categories of vulnerability and the legalities will be dealt with in part 2 of this research. It needs to be stressed that we will by no means attempt to address the classification of on-demand workers. Not only has much been written on these classification issues, but the classification of on-demand workers as employees would resolve many of the current vulnerabilities that present

<sup>1</sup> Stiglitz, as cited in Hendrickx F & De Stefano V *Game changers in labour law: Shaping the future of work* Alphen aan den Rijn, The Netherlands: Kluwer Law International BV (2018) at 20.

<sup>2</sup> More on this follows in part 2 of this article.

<sup>3</sup> The World Economic Forum (WEF) “The future of jobs and skills in Africa: Preparing the region for the Fourth Industrial Revolution” (2017) available at [http://www3.weforum.org/docs/WEF\\_EGW\\_FOJ\\_Africa.pdf](http://www3.weforum.org/docs/WEF_EGW_FOJ_Africa.pdf) (accessed 23 April 2021).

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themselves in our legal dispensation. The unique contribution of this research is to point out, and give an overview of, existing vulnerabilities that need to be addressed, at least in the interim until classification issues have been resolved.

In the paragraphs that follow, we assess the need for job creation, especially for South Africa's youth, and ask whether the youth are suited to taking up more precarious employment opportunities (such as platform work), where formal work is in short supply. We also examine whether platform operators' tendency to shift responsibility back to the workers in the gig economy could be linked to the effect of the different industrial revolutions, particularly the 4IR. This leads up to a thorough exposition of platform work and the gig economy, including its vast scope, its benefits, as well as the peculiar triangular contracting model on which it is based.

## 2 BACKGROUND

South Africa has one of the highest unemployment rates globally, and the youth are particularly vulnerable. In addition, the world of work as we know it is rapidly changing, to such an extent that 65% of primary-school learners will, by 2030, take up positions as yet unknown.<sup>4</sup> Big data,<sup>5</sup> or the modern-day ability to harvest and utilise large quantities of business data, does have the potential to create work for highly skilled workers,<sup>6</sup> but is likely to result in massive job losses lower down in the hierarchy. Savul opines that although not much is known about the number of new jobs created by technology, it is clear that new technologies will require new skills, and it seems as though a large number of workers will be replaced by technologies.<sup>7</sup> Matthews' view is supported by Savul, who stresses that labour power in the future will be selected from

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<sup>4</sup> See generally WEF (2017). Major disruptors in the work landscape are robotics, big data and artificial intelligence (AI). Examples include Libby, a robot that serves students in the University of Pretoria library, and Sophia, a social humanoid robot that travels the globe with her own passport and has given interviews at the United Nations. See UP News "Libby the library robot is on duty at UP" (2019) available at <https://www.up.ac.za/alumni/news/post/2825427-libby-the-library-robot-is-on-duty-at-up%20> (accessed 29 September 2020). See also Hanson Robotics "Sophia" (2019) available at <https://www.hansonrobotics.com/sophia/> (accessed 29 September 2020); Magwentshu N et al. "The future of work in South Africa: Digitisation, productivity and job creation" McKinsey & Company Report (2019) available at <https://www.mckinsey.com/featured-insights/middle-east-and-africa/the-future-of-work-in-south-africa-digitisation-productivity-and-job-creation> (accessed 30 September 2020); Sadeski F et al. "Potential of the Fourth Industrial Revolution in Africa" Study Report (2019) available at <https://4irpotential.afdb.org/> (accessed 13 October 2020).

<sup>5</sup> Sörman-Nilsson A "Decoding tomorrow: Futurism and foresights today" (2019) available at <https://www.anderssorman-nilsson.com/blog/fourth-industrial-revolution-futurist-perspective-big-data-data-analytics> (accessed 29 September 2020).

<sup>6</sup> Matthews K "What is big data's role in the Fourth Industrial Revolution?" (2017) available at <https://bigdata-madesimple.com/big-datas-role-fourth-industrial-revolution/> (accessed 29 September 2020).

<sup>7</sup> Savul G "The logic of technological progress under capitalism in the context of industry 4.0" (2020) 1 *Labor and Society* at 18.

high-skilled people and that the defenders of this anticipate an increase in job opportunities.<sup>8</sup>

These developments generally leave low-skilled workers out in the cold.<sup>9</sup> In fact, it is anticipated that 47% of current jobs in the United States and 59% in Germany are at risk of being replaced by computer technologies.<sup>10</sup> The Organization for Economic Cooperation and Development (OECD) member countries may suffer the same fate, with 57% of their current jobs said to be at risk.<sup>11</sup>

In addition to these substantial overall predicted job losses,<sup>12</sup> countries such as South Africa, where unemployment is already into the double digits,<sup>13</sup> will find themselves in serious difficulty. Covid-19 has merely fast-tracked the 4IR, which has seen immense growth in new forms of work in the digital space. A key feature of this new work dispensation is gig work,<sup>14</sup> also known as on-demand work,<sup>15</sup> crowdwork,<sup>16</sup> app work<sup>17</sup> and capital platform work,<sup>18</sup> to which many a young person in South Africa has turned to earn a living. Examples are plentiful, with platforms such as Uber,<sup>19</sup> DiDi, Bolt and Lyft having transformed mobility, and Uber Eats, DoorDash and Grubhub taking the

<sup>8</sup> See Savul (2020) at 21.

<sup>9</sup> See Savul (2020) at 18.

<sup>10</sup> Frey CB & Osborne MA "The future of employment: How susceptible are jobs to computerisation?" (2017) 114 *Technological Forecasting and Social Change* at 254.

<sup>11</sup> See Frey & Osborne (2017) at 38.

<sup>12</sup> Makamase M "The Fourth Industrial Revolution: Impact on unemployment and inequality in South Africa" (2018) available at <https://www.igd.org.za/infocus/12080-the-fourth-industrial-revolution-impact-on-unemployment-net-and-inequality-in-south-africa> (accessed 8 September 2020); Kurt R "Industry 4.0 in terms of industrial relations and its impacts on labour life" (2019) 158 *Procedia Computer Science* at 590.

<sup>13</sup> Kurt R (2019) at 596; Stats SA "Vulnerability of youth in the South African labour market" (2020) available at <http://www.statssa.gov.za/?p=13379> (accessed 8 September 2020), which put SA's unemployment rate at 30.1% in the first quarter of 2020.

<sup>14</sup> ILR School and the Aspen Institute "What is a gig worker?" (2020) available at <https://www.gigeconomydata.org/basics/what-gig-worker> (accessed 29 September 2020).

<sup>15</sup> See Disselkamp L & Parent D "Workforce on demand: Are you ready?" (2015) available at <https://www2.deloitte.com/us/en/insights/focus/human-capital-trends/2015/on-demand-workforce-human-capital-trends-2015.html> (accessed 29 September 2020).

<sup>16</sup> International Labour Organization (ILO) "Crowdwork and the gig economy" (2020) available at <https://www.ilo.org/global/topics/non-standard-employment/crowd-work/lang--en/index.htm> (accessed 29 September 2020). The ILO defines "crowdwork" as instances where work is outsourced through an open call to a geographically dispersed crowd.

<sup>17</sup> The ILO defines app work as location-based applications (apps) that allocate work to individuals in a specific geographic area, typically to perform service-oriented tasks, such as driving, cleaning houses, or running errands. See ILO "Crowdwork and the gig economy".

<sup>18</sup> Where individuals use a digital platform to sell goods peer-to-peer or to lease assets, such as Airbnb and Etsy. See Duggan J et al. "Algorithmic management and app-work in the gig economy: A research agenda for employment relations and HRM" (2020) 30(1) *Human Resource Management Journal* at 117.

<sup>19</sup> Offering rides in more than 10,000 cities. Uber "Use Uber in cities around the world" (2020) available at <https://www.uber.com/global/en/cities/> (accessed 29 September 2020).

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food delivery world by storm. In essence, workers perform tasks coordinated through faceless online platforms; they are paid through digital transfers, and no longer “go to work” or report to a superior.<sup>20</sup> Platform work offers workers benefits such as greater flexibility and control over working hours,<sup>21</sup> while companies have access to the best skills globally.<sup>22</sup> Flexibility in particular is a key driver for both male and female workers, who prefer gig work because it “fit[s] their schedule”.<sup>23</sup>

These rapidly growing platforms have disrupted not only a wide range of sectors,<sup>24</sup> but also the traditional employer-employee relationship as the gateway to labour protection.<sup>25</sup> Platform providers try to avoid being classified as employers in order to avoid employment responsibilities,<sup>26</sup> and workers are largely treated as independent contractors, with courts and legal scholars<sup>27</sup> taking opposing views on this.<sup>28</sup> This has

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<sup>20</sup> Stewart A & Stanford J “Regulating work in the gig economy: What are the options?” (2017) 28(3) *The Economic and Labour Relations Review* at 421. “Going to work” refers to the traditional workplace where an employee would ordinarily deliver his or her services. This would differ between different types of work. For more on this, see World Economic Forum (WEF) “The promise of platform work: Understanding the ecosystem” (2020) available at <https://www.weforum.org/whitepapers/the-promise-of-platform-work-understanding-the-ecosystem> (accessed 27 April 2021).

<sup>21</sup> The opposing view is that non-standard hours and overwork undermine individual autonomy, control and well-being. See Shevchuk A et al. “Always on across time zones: Invisible schedules in the online gig economy” (2021) 36(1) *New Technology, Work, and Employment* at 108. Although platform workers have a degree of control of their schedules, many platforms use algorithms to assign tasks, which takes away much of the perceived freedom. See Kuhn KM & Maleki A “Micro-entrepreneurs, dependent contractors, and instaservers: Understanding online labor platform workforces” (2017) 31(3) *Academy of Management Perspectives*.

<sup>22</sup> The World Economic Forum (WEF) “The promise of platform work: Shaping the future of the new economy and society” (2020) available at <https://www.weforum.org/whitepapers/the-promise-of-platform-work-understanding-the-ecosystem> (accessed 27 April 2021). The vulnerability of zero-hours and algorithmic management is addressed in part 2 of this contribution.

<sup>23</sup> Churchill B & Craig L “Gender in the gig economy: Men and women using digital platforms to secure work in Australia” (2019) 55 (4) *Journal of Sociology* at 741. Examples here are Uber, which changed the means of transport; Sweep, in the cleaning sector; Deliveroo, which changed food deliveries; TaskRabbit, which changed once-off repairs; and clerical work which is directed via apps. See Hajal & Rowson “The future of hospitality jobs: The rise of the gig worker” (2021) 11 *Research in Hospitality Management* at 185–186.

<sup>24</sup> See generally WEF (2020).

<sup>25</sup> Maloka TC & Mangambi MF “The complexities of conditional employment” (2020) 32(2) *South African Mercantile Law Journal* at 295. Also see Holzapfel V & Van Staden M “The protection of employees in fixed-term contracts in South Africa and Germany” (2020) *Journal of South African Law* at 49, who refer to a shift from more standard contracts to flexible working arrangements to meet the needs created by globalisation and a competitive labour market.

<sup>26</sup> See Stewart & Stanford (2017) at 430.

<sup>27</sup> See Stewart & Stanford (2017) at 429–431, where numerous options are discussed for alleviating the vulnerability of workers in the gig economy, such as clarifying or expanding the definition of employment, the creation of a new category of “independent worker”, the creation of rights for workers (as opposed to employees), and the extension of protection to gig workers. Part 2 of this article discusses this form of precarious work in more detail.

complicated the protection granted by traditional labour regulations and employment standards.<sup>29</sup> Since the application of labour law has failed to keep pace, this new type of worker is left unprotected by traditional labour law models and extremely vulnerable. While they are being paid only for the task performed, they ultimately carry the bulk of the risk. Failure to find a workable solution to this intrinsic vulnerability of on-demand workers might undermine these platforms' ability to grow and to provide decent work.<sup>30</sup> This seems to call for a balancing act between the job-creation ability of digital platforms and appropriate regulation to offer gig workers sufficient protection from exploitation.

In many ways, platform work resembles other "traditional" forms of precarious work characterised by irregular scheduling, piecework compensation, or workers providing their own tools of the trade and workplace.<sup>31</sup> However, while it shares certain traits with some forms of non-standard "formal" work, such as fixed-term, part-time or temporary (agency) employment, fitting the practices of on-demand work into existing labour law models<sup>32</sup> has been likened to "fitting a square peg into a round hole".<sup>33</sup> The bottom line? In South Africa, the platforms are currently not regarded as employers in the traditional legal sense. This requires an ambitious response from the regulatory regime in order to catch up with new ways of organising, directing and compensating work.

### 3 THE FOUR INDUSTRIAL REVOLUTIONS

#### 3.1 Background

Through the ages, the world of work has kept on changing, calling for speedy adjustment to keep up with new trends.<sup>34</sup> Traditional nine-to-five employment is

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<sup>28</sup> In South Africa, the jury is still out on whether workers on the platform should be treated as employees or independent contractors. See *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers and others* 2019 JOL 42315 (LC) and CCMA case *Ngalonkulu /Uber South Africa Technology Services (Pty) Ltd* 2018 (12) BALR 1346 (CCMA).

<sup>29</sup> See Stewart & Stanford (2017) at 420.

<sup>30</sup> See generally WEF (2020).

<sup>31</sup> See Stewart & Stanford (2017) at 422.

<sup>32</sup> Hauben H (ed), Lenaerts K & Waeyaert W "The platform economy and precarious work" (2020) at 29 available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652734/IPOL\\_STU\(2020\)652734\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652734/IPOL_STU(2020)652734_EN.pdf) (accessed 19 September 2022).

<sup>33</sup> Spahr B, Farmer S & Federico J "Fitting a square peg into a round hole: Worker classification in the gig economy" (2018) available at <https://www.jdsupra.com/legalnews/fitting-a-square-peg-into-a-round-hole-55421/> (accessed 28 November 2022)

<sup>34</sup> See generally Magwentshu et al. (2019).

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increasingly making way for remote and other work arrangements.<sup>35</sup> Many workers utilise new technologies either as their primary source of income or to supplement their traditional salaries.<sup>36</sup> Companies too have rushed to tap into technology to increase their profits. One global mining company, for instance, has cut its costs by 15% by introducing autonomous haul trucks, which can operate for 1 000 hours longer than workers.<sup>37</sup>

At the same time, the number of people needing employment keeps on growing. The International Labour Organization (ILO) estimates that, by 2030, the global labour force will have increased by 428 million, the majority of whom will be in low- and middle-income regions such as Africa and Southeast Asia.<sup>38</sup> In addition there is the effect of Covid-19, which at the time of writing had resulted in an unemployment rate of 43,6%<sup>39</sup> in South Africa.

The world clearly needs more jobs, in whatever form, to cater for a growing workforce. This is a need the gig economy can provide, if the regulatory framework is adapted to give effect to the ILO obligation to valorise workers across platforms.<sup>40</sup> The 4IR is not unique in the impact it is having on the employer-employee relationship. Every industrial revolution to date has affected this interdependency, with workers bearing the brunt in most instances.

### 3.2 First Industrial Revolution

Before industrialisation, the term “employer” was virtually unknown. Agriculture and domestic service dominated the world of work at the time and the “face of capital” was the owner of the enterprise.<sup>41</sup> There were no contracts of employment and the owner

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<sup>35</sup> Gervis Z “The traditional 9 – 5 office job is dying” (2018) available at <https://nypost.com/2018/10/18/the-traditional-9-5-office-job-is-dying/> (accessed 29 September 2020).

<sup>36</sup> See Booth I “Rocking the gig economy” (2020) available at [https://www.investec.com/en\\_za/focus/economy/rocking-the-gig-economy.html](https://www.investec.com/en_za/focus/economy/rocking-the-gig-economy.html) (accessed 30 September 2020).

<sup>37</sup> See generally Magwentshu et al. (2019).

<sup>38</sup> Gironde C & Carbonnier G *The ILO @ 100: Addressing the past and future of work and social protection* Leiden: Brill Nijhoff (2019) at 225.

<sup>39</sup> See Stats SA “Quarterly Labour Force Survey (QLFS) – Q1:2021” (2021) available online at [http://www.statssa.gov.za/publications/P0211/Presentation%20QLFS%20Q1\\_2021.pdf](http://www.statssa.gov.za/publications/P0211/Presentation%20QLFS%20Q1_2021.pdf) (accessed 2 June 2021); Turner KJ “Third consecutive increase in unemployment since Covid-19 lockdown – Stats SA” (2021) available at <https://www.iol.co.za/news/south-africa/third-consecutive-increase-in-unemployment-since-covid-19-lockdown-stats-sa-c3c9e99c-39f5-4a97-a48a-23a1ff271fd7> (accessed 2 June 2021).

<sup>40</sup> See Gironde & Carbonnier (2019) at 239.

<sup>41</sup> Bellace JR “The changing face of capital: The withering of the employment relationship in the information age” in Hendrickx & De Stefano (2018) at 12.

set the rules. Even highly skilled workers offered their services for a fee, or for a short period only.<sup>42</sup>

With the First Industrial Revolution – from 1765 until the early 19th century – the face of capital became the employer and workers were generally paid low wages.<sup>43</sup> Through the harnessing of steam and mechanisation, societies which had been agricultural became more industrialised and urban,<sup>44</sup> which profoundly affected workers' livelihoods. Working hours were long. A typical day started at 05:00 and ended at 19:00, with a mere 30-minute break for breakfast and lunch, respectively. Women averaged a working week of 70 hours in the mills.<sup>45</sup> While some division of labour was noted, this was limited by market need, which was low during this period.<sup>46</sup>

Industrialisation turned the spotlight on capital's labour-buying practices. As capital would not buy more labour than required, this made the lives of early industrial workers insecure and unpredictable.<sup>47</sup> The abolition of slavery and feudalism<sup>48</sup> prompted a move from the master-servant scenario to the employer-employee relationship.<sup>49</sup> Trade unions, as representatives of mainly unskilled workers, were predominantly concerned not with minor changes to an existing set of principles, but canvassed for new arrangements, such as minimum wages, hours of work and a voice in management.<sup>50</sup> The word "strike" was first recorded in 1768 at the beginning of the first industrial revolution.<sup>51</sup> Trade union involvement and strikes led to interventions by legislatures to permit collective action and the imposition of minimum employment conditions towards the latter half of the 19th century in Britain and Germany.<sup>52</sup> A contract of employment was developed as legal backing for poorly supported workers.<sup>53</sup>

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<sup>42</sup> For a discussion of whether industrialisation led to a rise in living standards for the working class and the opposing arguments of the critics (mainly Marxists) and defenders of the free market, see Nardinelli C "Industrial revolution and the standard of living" (2019) available online at <https://www.econlib.org/library/Enc/IndustrialRevolutionandtheStandardofLiving.html> (accessed 17 February 2021). See also Bellace (2018) at 12–13.

<sup>43</sup> See Bellace (2018) at 13.

<sup>44</sup> The IED "The 4 industrial revolutions" (2019) available at <https://ied.eu/project-updates/the-4-industrial-revolutions/> (accessed 13 April 2021).

<sup>45</sup> Huberman M "Industrial relations and the Industrial Revolution: Evidence from M 'Connel and Kennedy, 1810-1840" (1991) 65(2) *The Business History Review* at 356; Bellace (2018) at 13.

<sup>46</sup> Huberman (1991) at 356; Bellace (2018) at 13.

<sup>47</sup> See Bellace (2018) at 13.

<sup>48</sup> See Blaufarb R "A reassessment of the abolition of feudalism, 1789–1793" (2018) 15 *La Revolution Francaise* at 4.

<sup>49</sup> See Bellace (2018) at 13.

<sup>50</sup> See Evans EW & Creigh SW "The natural history of the strike in Britain" (1980) 39 *Labour History* at 48.

<sup>51</sup> See Evans & Creigh (1980) at 47. For more information on the role of trade unions, collective bargaining and strikes, see the aforementioned article.

<sup>52</sup> See Huberman (1991) at 356; Bellace (2018) at 13.

<sup>53</sup> See Bellace (2018) at 13.



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With on-demand work, we seem to have returned to a scenario where platforms only “buy” what is needed under the guise of a voluntarily concluded governing contract, with the workers carrying all the risk.

### 3.3 Second Industrial Revolution

The Second Industrial Revolution – from 1870 to 1914 – was the age of science and mass production.<sup>54</sup> This revolution is widely regarded as the most important because of its development of steel, chemical synthesis, and means of communication such as the telephone and the telegraph, and the invention of cars and aeroplanes around the start of the 20th century.<sup>55</sup>

This period was characterised by a move from general-purpose to special-purpose machinery and had a significant effect on the organisation of labour.<sup>56</sup> Legislative protection was introduced for a small minority of workers and white-collar jobs, and the middle class expanded. Changes were brought about by strikes, especially in 1893 in Britain on the mines.<sup>57</sup> However, working hours remained long, payment was low, safety regulations for dangerous work were few and far between, there were no disability pensions, and insurance was rare.<sup>58</sup> Mass production also brought its own share of problems.<sup>59</sup> As with gig work, the lion’s share of the risk rested on workers’ shoulders, with low pay, long hours, a lack of proper organisation, and no social security protection.

### 3.4 Third Industrial Revolution

The Third Industrial Revolution – from 1969 to the end of the 20th century – was prompted by the use of electronics and information technology, mainly to automate production,<sup>60</sup> as well as the development of nuclear energy.<sup>61</sup> The use of computers, robots and programmable logic controllers (PLCs) opened the door to space research and expeditions.<sup>62</sup> Driven by market demand, manufacturers turned to computer-based technologies to provide customers with new and differentiated products.<sup>63</sup> This implied

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<sup>54</sup> History.com “Industrial revolution” (2021) available at <https://www.history.com/topics/industrial-revolution/industrial-revolution> (accessed 21 February 2021).

<sup>55</sup> IED “The 4 industrial revolutions” (2019) available at <https://ied.eu/project-updates/the-4-industrial-revolutions/> (accessed 13 April 2021).

<sup>56</sup> Helfgott RB “America’s Third Industrial Revolution” (1986) 29(5) *Challenge* at 41.

<sup>57</sup> See Evans & Creigh (1980) at 49.

<sup>58</sup> Palmisano JM “Industrial Revolution” in Palmisano JM (ed) *World of Sociology* Detroit: Gale Research Inc. (2001).

<sup>59</sup> See Helfgott (1986).

<sup>60</sup> See generally History.com (2021).

<sup>61</sup> See IED (2019).

<sup>62</sup> See IED (2019).

<sup>63</sup> See Helfgott (1986).

greater autonomy and control over work done by employees,<sup>64</sup> and increased union participation.<sup>65</sup>

### 3.5 Fourth Industrial Revolution

The 4IR has been characterised by a rapid rise in technological advances, such as AI, robotics, blockchain and big data. In South Africa, the 4IR is said to have the potential to create up to 4.5 million new jobs due to productivity improvements and technological evolution, but, at the same time, to displace 3,3 million current jobs by 2030.<sup>66</sup> In time, new technologies may indeed displace human expertise in the economy and lead to significant job redundancy, but could also require different skill sets<sup>67</sup> with higher-order thinking. Specific jobs will be disrupted and employers will have to manage the transition from current skill sets to fit the new future.<sup>68</sup>

Sadly, however, over the past 50 years, even advanced countries have not managed to reskill workers who have lost their jobs due to technological innovation, in most instances because changes in the external environment were not spotted early enough for adaptation.<sup>69</sup> Therefore, the 4IR might see machines replacing human labour, and as technology develops, the labour market will be significantly affected.<sup>70</sup>

According to Tiraboschi, however, labour laws have not yet provided for the technological revolution, and still focus on manual, automatic or mechanical work.<sup>71</sup> This needs to be addressed if we are to balance the need for economic development with employee protection, especially during the 4IR.<sup>72</sup> With the rise of technology, it is imperative for law-makers to understand and govern the technological revolution, and

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See History.com (2021).

<sup>64</sup> See Helfgott (1986) at 43.

<sup>65</sup> For more on the role of SACTU, COSATU and trade unions around the 1980s see Monyatsi G “The role and challenges of trade unions in post-apartheid South Africa: The case of the National Education Health and Allied Workers Unions” (2013) at 48–50.

<sup>66</sup> See generally Magwentshu et al. (2019).

<sup>67</sup> Norton Rose Fulbright “Artificial intelligence: The Fourth Industrial Revolution and the need for improved employee representation” (2018) available at <https://www.nortonrosefulbright.com/en-za/knowledge/publications/4166fdcd/artificial-intelligence-the-fourth-industrial-revolution-and-the-need-for-improved-employee-representation> (accessed 21 February 2021).

<sup>68</sup> See generally Magwentshu et al. (2019).

<sup>69</sup> See Bellace (2018) at 15.

<sup>70</sup> Min J et al. “The Fourth Industrial Revolution and its impact on occupational health and safety, worker’s compensation and labor conditions” (2019) 10(4) *Safety and Health at Work* at 400.

<sup>71</sup> Tiraboschi M “Tradition and innovation in labour law: The ambiguous case of ‘agile working’ in Italy” in Hendrickx & De Stefano (2018) at 239.

<sup>72</sup> See Tiraboschi (2018) at 236.

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to provide for large-scale connections between people and devices, whether directly or through the Internet of Things.<sup>73</sup>

Discussion should no longer centre on flexibility and the power differential.<sup>74</sup> Instead, to adapt to the 4IR, where the lines between personal and work life have been blurred, the labour laws of the future need to provide for the reality of workers who manage their own time and have more freedom and power in terms of decision-making.<sup>75</sup> Lifelong learning could help to secure jobs by equipping people to cope in a digital and automated world,<sup>76</sup> and employers should be incentivised to invest in training.<sup>77</sup> In this way, we might be able to reskill workers to use technology to their advantage, as opposed to being replaced with machines, provided that we act and adapt swiftly.

Similarly, the official definition of “employment” in our labour laws no longer seems to correspond with the reality of the modern-day working relationship.<sup>78</sup> Traditional employment and the relationship between workers and employers have changed considerably, and work has become more intermittent and unstable.<sup>79</sup> This requires urgent attention, as the definition of the employment relationship is regarded as the primary way of acquiring employee rights and benefits.<sup>80</sup> More importantly, it is a major determinant of employer rights and obligations.<sup>81</sup>

Interestingly, Bellace<sup>82</sup> also suggests a dismantling of the outdated distinction between employee and independent contractor in this transitional phase of the digital economy. Workers such as Uber drivers are ultimately labour, not capital, and should enjoy basic labour law protection, including job security, decent work, a social safety net and workplace safety.<sup>83</sup> With outdated labour laws and definitions, therefore, many future-oriented forms of work that should be protected are not, including on-demand work. As such, these modes of employment are rendered “precarious”, being not only unstable,

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<sup>73</sup> Schwab K “The Fourth Industrial Revolution: What it means, how to respond” (2016) available at <https://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond/> (accessed 26 May 2021). See also Tiraboschi (2018) at 238.

<sup>74</sup> See Tiraboschi (2018) at 238.

<sup>75</sup> See generally Sadeski et al. (2019).

<sup>76</sup> Karolia-Hussain F & Mokoena K “Lessons from the ILO’s Global Commission in the Future of Work Report for South Africa” in Van Eck S, Bam P & Chungu C (eds) *Celebrating the ILO 100 years on: Reflections on labour law from a Southern African perspective* Alphen aan den Rijn, The Netherlands: Kluwer Law International BV (2020) at 325, 332.

<sup>77</sup> See Karolia-Hussain & Mokoena (2020) at 332.

<sup>78</sup> Van Staden M & Van Eck S “The parties to the employment relationship: A comparative analysis” (2018) *Journal of South African Law* at 546.

<sup>79</sup> International Labour Organization “Helping the gig economy work better for gig workers” (2019) available at [https://www.ilo.org/washington/WCMS\\_642303/lang--en/index.htm](https://www.ilo.org/washington/WCMS_642303/lang--en/index.htm) (accessed 3 January 2021).

<sup>80</sup> Zhou I “Digital labour platforms and labour protection in China” (2020) at 44.

<sup>81</sup> See Zhou (2020) at 44.

<sup>82</sup> See Bellace (2018) at 25.

<sup>83</sup> See Bellace (2018) at 25.

but also insecure, with employees instead of business and government carrying the risk.<sup>84</sup>

As such a vital part of life, work should never create insecurity, as this affects workers' health and well-being.<sup>85</sup> While it is not suggested that all future work will be in the platform economy,<sup>86</sup> labour law needs to transform now to stay ahead of the curve. Non-standard forms of employment have proliferated in most sectors, and their importance in the development of labour law should not be underestimated.<sup>87</sup>

#### 4 THE NEED FOR JOB CREATION IN SOUTH AFRICA

South Africa has had an unemployment rate of more than 20% for at least two decades. This has been attributed to an education system that fails to provide adequate skills and laws that make it extremely difficult for job seekers to enter and remain in the formal sector.<sup>88</sup> Now exacerbated by the Covid-19 pandemic, official unemployment in the second quarter of 2021 stood at 34,4%, or 7,8 million people,<sup>89</sup> while the expanded unemployment rate was 44,4%.<sup>90</sup> A staggering 64,4% of young people<sup>91</sup> were unemployed, and 33,0% were not in training, education or employment.<sup>92</sup>

This echoes the findings in a 2020 ILO report, which confirmed that youth aged 15 to 25 were hardest hit by unemployment, and that the Covid-19 pandemic had resulted in one in six young people being jobless worldwide.<sup>93</sup> If the country's unemployment rate should remain stagnant, the economy would need to grow by 1.5–2.25% a year to match the annual increase in the working-age population.<sup>94</sup> This seems unlikely, considering

<sup>84</sup> See Churchill B, Ravn S & Craig L "Gendered and generational inequalities in the gig economy era" (2019) 55(4) *Journal of Sociology* at 627.

<sup>85</sup> Chesters J & Wyn J "Chasing rainbows: How many educational qualifications do you young people need to acquire meaningful, ongoing work?" (2019) 55(4) *Journal of Sociology* at 673.

<sup>86</sup> The ILO too recognises that work can be in varied forms, and that all types of work should be decent. See Berg J et al. "Non-standard employment around the world: Regulatory answers to face its challenges" in Hendrickx & De Stefano (2018) at 28.

<sup>87</sup> See Berg et al. (2018) at 28.

<sup>88</sup> Bloomberg "South Africa's scary unemployment figures are coming" (2020) available at <https://businesstech.co.za/news/business/436153/south-africas-scary-unemployment-figures-are-coming/> (accessed 28 May 2021).

<sup>89</sup> See Stats SA "Quarterly Labour Force Survey (QLFS) – Q2:2021" available at <http://www.statssa.gov.za/publications/P0211/Media%20release%20QLFS%20Q2%202021.pdf> (accessed on 2 September 2021).

<sup>90</sup> Stats SA "Quarterly Labour Force Survey (QLFS) – Q2:2021".

<sup>91</sup> Persons aged between 15 and 24.

<sup>92</sup> Stats SA "Quarterly Labour Force Survey (QLFS) – Q2:2021".

<sup>93</sup> See ILO "More than one in six young people out of work due to COVID-19" (2020a) available at [https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_745879/lang--en/index.htm](https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_745879/lang--en/index.htm) (accessed 8 September 2020).

<sup>94</sup> See generally Bloomberg (2020). See also Lekabe T "Ramaphosa's plan to create 2 million jobs for unemployed youth" (2019) available at <https://ewn.co.za/2019/06/21/cyril-ramaphosa-s-plan-to-create-2-million-jobs-for-unemployed-youth> (accessed 29 September 2020).

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that GDP growth over the period 2006 to 2018, long before Covid, averaged only 2%, which already represented a 43% decline on the previous decade.<sup>95</sup> Moreover, almost 30% of the population, which currently stands at 59.6 million, will enter the labour market in the next decade.<sup>96</sup>

There simply are not enough jobs available, despite President Cyril Ramaphosa's call for renewed focus on job creation.<sup>97</sup> With the added effect of Covid-19, a PricewaterhouseCoopers economist has estimated, it could take three to seven years for the economy to return to 2019 levels. To recover in the next three years, the South African economy will require an estimated R3.4 trillion.<sup>98</sup>

Certainly, some impetus is needed to save a dwindling economy. Online platforms hold vast potential for creating new forms of desperately needed work. Some argue that digitalisation could result in a net gain of one million jobs by 2030, providing a significant economic boost and lowering the country's high unemployment rate.<sup>99</sup> It would create a demand for 1.7 million graduates in technical skills, and offer new opportunities for 1.6 million women in South Africa.<sup>100</sup> However, the gig economy could also result in the exploitation of on-demand workers' vulnerabilities. Therefore, to harness the potential of the gig economy in stimulating economic growth and getting young people into jobs, existing labour law would need to be reworked to provide for the realities of the 4IR.

### **5 THE YOUTH: SUITED TO PLATFORM WORK, BUT - FOR NOW - STUCK IN PRECARIETY**

Africa has among the youngest populations globally, with 200 million people aged between 15 and 24.<sup>101</sup> It is estimated that this figure will have doubled by 2045. Already, the private and public sectors are failing to create enough jobs, and roughly two out of every three youths in South Africa find themselves unemployed.<sup>102</sup> This is not limited to South Africa, however. Young people worldwide find themselves in precarious employment positions. A study in the United Kingdom on the underemployment of young adults reveals that some working-class young adults are stuck in a "low-pay cycle", while their highly qualified peers are trapped in exploitative

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<sup>95</sup> Magwentshu et al. (2019).

<sup>96</sup> Bloomberg (2020); Lekabe (2019).

<sup>97</sup> See generally Lekabe (2019).

<sup>98</sup> See Visser A "COVID-19: South Africa will need R3.4 trillion to recover" (2020) available at <https://www.moneyweb.co.za/mymoney/moneyweb-tax/covid-19-sa-will-need-r3-4trn-to-recover/> (accessed 9 September 2020).

<sup>99</sup> See Magwentshu et al. (2019).

<sup>100</sup> See Magwentshu et al. (2019).

<sup>101</sup> See Sadeski et al. (2019).

<sup>102</sup> See Sadeski et al. (2019).

conditions or casual employment.<sup>103</sup> Standing<sup>104</sup> rightly refers to the emergence of a new global precariat class, whose members, although diverse, are bound together by insecure work, with young people at the core. It is said that the present young generation will be the first since World War II who will not experience “upward mobility”, implying that they will not be able to improve on the quality of life their parents had.<sup>105</sup> The youth, therefore, face the reality of low-paid, insecure and, in most instances, dead-end jobs.<sup>106</sup>

The younger-generation worker has certain distinctive features that will affect what the future of work looks like. Those born after the 1970s were born into smaller families and raised with expectations of individualised treatment.<sup>107</sup> This sets the scene for a generation living in a scattered middle class who no longer see themselves as a typical working generation.<sup>108</sup> The millennial generation, born between 1981 and 1996, and Generation Z, born from the late 1990s to the early 2010s, are often referred to as “digital natives”, living a large part of their lives online and finding community engagement in cyberspace much more than in traditional workplace communities.<sup>109</sup> As a result, they tend to be more suited to digital-based work.

However, while the youth may be more suited to platform or gig work, it would seem that this type of work also has a lot to do with their job precarity. In the United Kingdom, authors such as Story and Strange<sup>110</sup> refer to “bogus employment” in noting the vulnerabilities experienced by Amazon drivers in particular, including intense pressure to meet delivery schedules, eating on the run, having to urinate in plastic bottles, working illegal shift times, with long hours and unrealistic schedules – all in a bid by multinationals to maximise their profits. Scholars such as Churchill and colleagues<sup>111</sup> also refer to the youth entering a labour market where “work” is steadily being replaced by “gigs” and “tasks” as an extension of the “new precariat” for whom insecure and non-standard forms of employment have become the norm. The ILO found in a 2017 study that young people are at the forefront of taking up gig work, but are unable to prove to a future employer that they have worked.<sup>112</sup>

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<sup>103</sup> See Schildrick T et al. “The low-pay, no-pay cycle: Understanding recurrent poverty” (2010) available at <https://www.jrf.org.uk/sites/default/files/jrf/migrated/files/unemployment-pay-poverty-full.pdf> (accessed 29 September 2021) at 5.

<sup>104</sup> MacDonald R & Giazitzoglu A “Youth, enterprise and precarity: Or, what is, and what is wrong with, the ‘gig economy’?” (2019) 55(4) *Journal of Sociology* at 724.

<sup>105</sup> Churchill, Ravn & Craig (2019) at 629.

<sup>106</sup> Churchill, Ravn & Craig (2019) at 633, with reference to MacDonald & Giazitzoglu (2019).

<sup>107</sup> See Magwentshu (2019).

<sup>108</sup> See Bellace (2018) at 19.

<sup>109</sup> See Bellace (2018) at 19.

<sup>110</sup> Cited in MacDonald & Giazitzoglu (2019) at 8.

<sup>111</sup> Churchill, Ravn & Craig (2019) at 628.

<sup>112</sup> Caro PC & Berg J “Young people and the gig economy” (2021) at 51.

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Another important yet under-researched aspect of the gig economy is its disruption of the traditional transition from education to work,<sup>113</sup> which could put young gig workers at a further disadvantage in terms of future job prospects. These considerations should be kept in mind when assessing calls such as that made by President Ramaphosa<sup>114</sup> for South Africa to embrace 4IR technology to help the country create jobs, enhance economic transformation and rise to the challenges of poverty, unemployment and inequality. Ultimately, embracing 4IR technology in the context of employment will be disruptive<sup>115</sup> and require our labour law regime to adapt. For instance, most reports on youth unemployment in particular still refer to formal employment only, without any reference to the possibility of on-demand work in the gig economy.<sup>116</sup> If the platform economy can stimulate job creation, we will have a responsibility to ensure that the jobs so created provide decent work and enjoy proper labour protection.

### 6 AN EXPOSITION OF THE GIG ECONOMY AND ON-DEMAND WORK

#### 6.1 Definition, scope and benefits

The establishment of the platform economy, characterised by digital platforms and isolated, independent workers, is shaking up the world of work as “gigs” replace jobs and challenge the traditional model of regulating work and setting minimum standards.<sup>117</sup> While the platform economy holds the benefits of greater flexibility and choice, its lack of traditional worker rights and protections has been identified as a risk, which could lead to a “race to the bottom” as freelancers compete to support themselves.<sup>118</sup>

Narrowly defined, the platform economy refers to the process where short-term tasks are advertised on online platforms, for which workers (not employees) then bid a price to undertake as independent contractors.<sup>119</sup> In essence, therefore, it refers to a labour market made up of freelance, short-term, on-demand work, mostly via digital

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<sup>113</sup> Chesters & Wyn (2019) at 672.

<sup>114</sup> Wits University “Embrace 4IR to address poverty, inequality and unemployment – Ramaphosa” (2019) available at <https://www.wits.ac.za/news/latest-news/research-news/2019/2019-07/embrace-4ir-to-address-poverty-inequality-and-unemployment---ramaphosa.html> (accessed 26 May 2021); Moyo A “SA must be tech-driven, says President as he receives 4 IR blueprint” (2020) available at <https://www.itweb.co.za/content/o1Jr5Mx92eAqKdWL> (accessed 26 May 2021); Dlodla S “Cyril Ramaphosa wants SA to embrace 4IR” (2019) available at <https://www.iol.co.za/news/politics/cyril-ramaphosa-wants-sa-to-embrace-4ir-28728430%20accessed%208/9/2020> (accessed 26 May 2021).

<sup>115</sup> See Magwentshu et al. (2019).

<sup>116</sup> Stats SA (2020). While the youth are identified as a vulnerable category in this report, this is discussed from the perspective of formal employment, with lack of education and work experience mentioned as barriers to permanent employment.

<sup>117</sup> See Stewart & Stanford (2017) at 421.

<sup>118</sup> See Stewart & Stanford (2017) at 421.

<sup>119</sup> See MacDonald & Giazitzoglu (2019) at 2; Churchill & Craig (2019) at 742.

applications.<sup>120</sup> The platform economy is also known by various other names, including the sharing economy,<sup>121</sup> the gig economy,<sup>122</sup> and the collaborative economy,<sup>123</sup> and operates across various sectors.

According to Taeihagh,<sup>124</sup> for instance, the sharing economy can be applied in sectors as diverse as tourism and hospitality (e.g. Air BnB), mobility (e.g. car-sharing, ride-sharing, Uber, etc.) and worldwide logistics (e.g. Parcelninja).<sup>125</sup> It is a vast and growing economy. The number of people in the United States earning an income via on-demand platforms is estimated to have increased 47-fold between 2012 and 2015. In the European Union, the number doubled between 2000 and 2014. South Africa has an estimated 30 000 gig workers.<sup>126</sup>

The majority of those working in the gig economy have no doubt been attracted by the ability to freely regulate one's affairs, which, even if it is to one's own detriment, still constitutes the essence of freedom and forms a vital part of dignity.<sup>127</sup> On-demand work not only enables workers to work for several companies at the same time, but also to avoid some of the more challenging aspects of employment such as schedules, supervision and dealing with co-workers.<sup>128</sup> Indeed, one of the most pertinent features of on-demand work is the flexibility of working hours. Once a job request has been completed, workers can independently arrange their time until the next request appears on their screens, and are then free to decide whether to take on or refuse the job.<sup>129</sup> They do not report to a superior, can work full-time or part-time, and there is no personal affiliation.<sup>130</sup>

<sup>120</sup> See Booth (2020); Min et al. (2019) at 401.

<sup>121</sup> A transformative and disruptive economic model where the consumption of physical goods, assets or services occurs through either rental sharing or the exchange of resources via IT by means of crowd-based services or intermediates, without any permanent transfer of ownership. See Taeihagh A "Crowdsourcing, sharing economies and development" (2017) 33(2) *Journal of Developing Societies* at 194.

<sup>122</sup> Wood AJ et al. "Good gig, bad gig: Autonomy and algorithmic control in the global gig economy" (2019) 33(1) *Work, Employment and Society* at 57.

<sup>123</sup> See Taeihagh (2017) at 2 – 3; Corporate Legal Accountability "Annual briefing" (2019) available at [https://media.business-humanrights.org/media/documents/files/documents/CLA\\_Annual\\_Briefing-FINAL.pdf](https://media.business-humanrights.org/media/documents/files/documents/CLA_Annual_Briefing-FINAL.pdf) (accessed 9 October 2020).

<sup>124</sup> See Taeihagh (2017) at 5.

<sup>125</sup> Logistics Tech "Startups in South Africa" (2019) available at <https://tracxn.com/explore/Logistics-Tech-Startups-in-South-Africa> (accessed 9 October 2020).

<sup>126</sup> Corporate Legal Accountability (2019). More than a quarter of workers participate in the gig economy in some or other capacity, and more than one in ten people rely on gig work for their primary income. The McKinsey Global Institute also found that 25–30% of workers engaged in non-traditional or gig work. See ILR School and the Aspen Institute (2020).

<sup>127</sup> See Maloka & Mangammbi (2020) at 297, with reference to *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) para 7, *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 9 (SCA) paras. 38–40.

<sup>128</sup> See Churchill & Craig (2019) at 742.

<sup>129</sup> Xiao S "Understanding the employment status of gig-workers in China's sharing economy era – an empirical legal study" (2019) 10(3) *Asian Journal of Law and Economics* at 11. It should be mentioned



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Understandably, zero-hour contracts and on-demand work arrangements do serve a purpose, especially where people seek flexible working hours and locations, instead of the rigidity associated with traditional full-time employment.<sup>131</sup> However, this new “platform + individual”<sup>132</sup> mode of work also comes with minimal certainty as to the scope of traditional regulations, minimum standards of work and worker remedies.<sup>133</sup> Gig workers are paid mainly by item or piecework and are not entitled to social insurance from the platform,<sup>134</sup> rendering them vulnerable. Van Staden and Van Eck<sup>135</sup> too refer to the increase in “precarious work”, which reduces the protection granted to these workers.

Ironically, therefore, although the gig economy is a feature of the 4IR, the job precarity it is often associated with does remind one of the early industrial revolutions, where working hours were also non-standard and work was more piecemeal.<sup>136</sup> As the following section will show, a major part of the vulnerability associated with platform work is, in our view, located in the very structure of this type of work, which is characterised by a triangular contractual model.

### 6.2 The triangular platform work relationship as a source of vulnerability

In South Africa<sup>137</sup> and most other jurisdictions, being employed implies being regarded as an employee, irrespective of the type of contract entered. While traditional employment depends on the continued success of a commercial endeavour,<sup>138</sup> profits, in a traditional relationship, must give way to the employer’s contractual obligations to employees, even in the face of a great disruptor such as Covid-19. This is not necessarily what happens with platform work, however, mainly because workers are not regarded as employees and the provider of work is not designated as an employer.<sup>139</sup> Classified as

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that algorithmic management, especially in the domain of ride-hailing, could lead to severe discrimination, and is discussed in part 2 of this work.

<sup>130</sup> See Xiao (2019) at 11.

<sup>131</sup> Corporate Legal Accountability (2019).

<sup>132</sup> See Xiao (2019) at 13.

<sup>133</sup> Stewart & Stanford (2017) at 420.

<sup>134</sup> See Xiao (2019) at 11.

<sup>135</sup> Van Staden & Van Eck (2018) at 539.

<sup>136</sup> Churchill & Craig (2019) at 742.

<sup>137</sup> Employee status is a necessity for the application of the Basic Conditions of Employment Act 75 of 1997 (BCEA) and the Labour Relations Act 66 of 1995 (LRA), and creates a rebuttable presumption if the worker earns below the threshold amount and one or more of the listed factors in sec 200A of the LRA and corresponding sec 83 of the BCEA are present.

<sup>138</sup> Bradstreet R “Sanctity of contract prevails over force majeure: The Brand Kitchen judgement” (2021) 42(1) *Industrial Law Journal* at 26.

<sup>139</sup> Classification issues will be touched on in part 2 of this article. The courts have mostly been prepared to find that digital platform workers are independent contractors, but there are exceptions. For more detail see McDonald et al. (2021) at 884.

“independent contractors”,<sup>140</sup> on-demand workers in the gig economy take on temporary employment by contracting with one or several employers simultaneously. Voluntarily entering a contract is a cherished principle of contractual autonomy, and adherence to contractual obligations is deeply embedded in our jurisprudence. Therefore, to argue that the platform economy is *sui generis* in terms of contracting would be inaccurate. However, the platform economy does utilise a peculiar model of contracting, the very design of which renders gig workers particularly vulnerable and is regarded as a contributing factor to the difficulties in regulating gig work in general.<sup>141</sup>

Contracting in the gig economy generally occurs according to a triangular relationship model<sup>142</sup> and is highly commercial in character.<sup>143</sup> The illustration towards the end of this section sets out this triangular model graphically, as will be explained below. The supplier (worker) enters into a contract with the platform operator (intermediary), setting out the terms and conditions of the worker’s participation in the process.<sup>144</sup> This contract usually grants rights to the intermediary to discipline or discharge the worker,<sup>145</sup> with little or no corresponding rights of recourse for the worker against the intermediary. Workers carry all or most of the risk associated with providing the tools of the trade and the equipment needed to perform their functions, and even interruptions on the platform itself.<sup>146</sup> This “demutualisation”<sup>147</sup> of risk is similar to the experience of workers in pre-industrialised times when no protective labour law existed.

In addition, another contract governs the relationship between the platform and the end user of its services. End-users are expected to accept the terms and conditions of this contract when they log in on the platform, typically limiting the platform’s liability for any problems that may occur, whether in production or delivery.<sup>148</sup> In essence, therefore, the platform is protected to the detriment of both the end user and the worker – reminiscent of earlier days when the common law was the only basis for regulating the employment contract, long before the introduction of collective bargaining and statutory protection for vulnerable workers.<sup>149</sup>

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<sup>140</sup> Rani U & Furrer M “Digital labour platforms and new forms of flexible work in developing countries: Algorithmic management of work and workers” (2020) 25(2) *Competition & Change* at 13.

<sup>141</sup> Stewart & Stanford (2017) at 424.

<sup>142</sup> Carvalho JC “From bilateral to triangular: Concluding contracts in the collaborative economy” in Redinha MR, Guimarães MR & Fernandes FL (eds) *The sharing economy: Legal problems of a permutations and combinations society* (2021) at 199.

<sup>143</sup> Stewart & Stanford (2017) at 424.

<sup>144</sup> Carvalho (2021) at 199.

<sup>145</sup> Stewart & Stanford (2017) at 425.

<sup>146</sup> Stewart & Stanford (2017) at 424.

<sup>147</sup> Stewart & Stanford (2017) at 424.

<sup>148</sup> Stewart & Stanford (2017) at 425.

<sup>149</sup> Du Plessis JV & Fouché MA *A practical guide to labour law* 9<sup>th</sup> ed (2019) at 3.

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However, if workers enter into these contracts out of their own free will, how can they be considered vulnerable? Recognising the sanctity of a contract entered voluntarily<sup>150</sup> and the freedom to arrange your own work relationship in a way that best suits your circumstances, it could be argued that no vulnerability can arise from this type of commercial contract. Yet, as stated in the introduction, the vulnerability of the gig worker is partly one of classification, but also of design, the latter referring to the peculiar triangular contracting model.

Particularly troublesome is the relationship between the gig worker and the end-user of the service or product, as depicted in the figure below.<sup>151</sup> Contractual terms and conditions, supported by terms and conditions stipulated on websites, are underexamined and could form a research study on their own, as different platforms deal with this relationship differently, but what needs to be stated here is that terms and conditions are often set out in overly legalistic terms, are lengthy, often only available in small print, but still have to be accepted before registration on the platform can be effected.<sup>152</sup> These terms and conditions generally shift all responsibility to the end-user and worker, including dispute resolution, non-payment of fees, and responsibility for cancellations; at the same time, they add layers of charges associated with participating on the platform.<sup>153</sup>

The figure below is a graphic display of the intricacies inherent to the triangular relationship, which in itself does not make provision for labour protection or social protection of the worker. Part 2 of this article will provide possible solutions to the categories of vulnerability of which the very design of this civil triangular relationship is one. Without tendering a solution, one option could be to compel the owners of platforms to write basic protection into the terms and conditions of employment in the absence of classifying workers as employees.<sup>154</sup>

Indeed, the new work dispensation has seen a shift away from the traditional or standard permanent employment contract. Flexible work circumstances<sup>155</sup> have been introduced to meet the labour force needs of those that wish to supplement their income and allow businesses to respond to adverse macroeconomic conditions and

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<sup>150</sup> Kubjana (2018) 370; Bradstreet (2021) 33.

<sup>151</sup> Adapted from Stewart & Stanford (2017) at 425.

<sup>152</sup> See McDonald et al. (2021) at 878 – 879. For terms and conditions at Bolt, see [https://assets.ctfassets.net/tk7rwcciwvbyq/7ti4eakNSKFyxHoYP3nE4K/c47086984d099e87fefec38c01b208d1/Driver - Terms Conditions South Africa Cash-out amendments 2021-04-22.pdf](https://assets.ctfassets.net/tk7rwcciwvbyq/7ti4eakNSKFyxHoYP3nE4K/c47086984d099e87fefec38c01b208d1/Driver_-_Terms_Conditions_South_Africa_Cash-out_amendments_2021-04-22.pdf) (accessed 9 May 2022).

<sup>153</sup> See McDonald et al. (2021) at 878 – 879, Uber <https://ubr.to/3kTsETj> (accessed 9 May 2022) and SweepSouth <https://sweepsouth.com/terms/> (accessed 9 May 2022).

<sup>154</sup> Remember that the focus of this article is not to address classification, but to afford the reader insight into the different categories of vulnerability that platform workers face in the absence of finalising classification.

<sup>155</sup> Moore MT “The gig economy: A hypothetical contract analysis” (2019) 39(4) *Legal Studies* at 3.

financial pressure; but at the same time there is little job security, income stability<sup>156</sup> or protection for those that use the platforms.

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<sup>156</sup> Moore (2019) at 3.

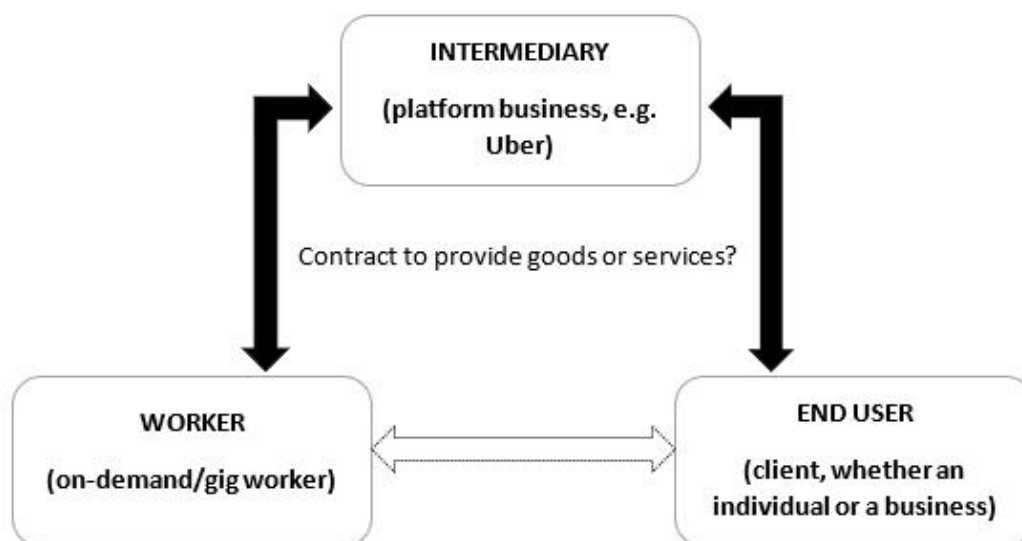


Figure 1: The precarious triangular contracting relationship governing gig work

Fixed-term contracts have been adopted as a means to alleviate poverty, strike a better balance between work and social life, address the need for greater flexibility, and offer jobs for those who cannot secure permanent employment.<sup>157</sup> Generally, the courts are prepared to reassess and declare unenforceable contractual terms that conflict with constitutional values or the common law, even though parties willingly entered into such contracts.<sup>158</sup> Platform work in the gig economy holds great potential of being an added way to expand the traditional job market and meet labour force needs. However, the very nature of the agreement on which it is based – with the worker carrying all the risk and enjoying virtually no rights – could very well be contrary to public policy<sup>159</sup> and clash with the constitutional provisions of equity and dignity.<sup>160</sup> The relationship on the platform may mimic traditional employment, but the lack of labour protection and rights for gig workers, coupled with no accountability on the part of the work provider, leaves workers exposed and vulnerable.

## 7 CONCLUSION

With the formal economy already struggling to provide enough jobs for a fast-growing working-age population, it is not surprising that a significant number of people globally have taken to the platform economy and gig work to earn a living. This is especially true

<sup>157</sup> Holzapfel & Van Staden (2020) at 49.

<sup>158</sup> See Maloka & Mangammbi (2020) at 298.

<sup>159</sup> For a contract to be found in contravention of public policy, it needs to have a detrimental effect on the interests of the community. Although the tripartite contract regulating gig work has not been tested on this basis in South Africa's courts, it does not necessarily have to be unlawful or immoral to be found in contravention of public policy. See Kubjana "When the letter cannot speak: Determining the duration of the contract and whether dismissal has taken place: *Mamelodi Sundowns Football Club (Pty) Ltd v Ngomane & Council for Conciliation, Mediation and Arbitration* (unreported case no JR 2710/10) 2015 ZALCJHB 53" (2018) 30(2) *South African Mercantile Law Journal* at 372.

<sup>160</sup> See Maloka & Mangammbi (2020) at 298.

for South Africa, where the rate of unemployment is into the double digits and young people are particularly hard hit. A modern-day mode of employment, the gig economy and platform work offer the flexibility, freedom and independence the younger generation craves. Indeed, the gig economy has “seen the rise of the everyday entrepreneur”.<sup>161</sup>

People now own their time and control who receives their services ... They can pick and mix their employers, their hours, their offices, their holiday patterns. This is one of the most significant developments in the labour market. The potential is enormous, and the change is exciting.<sup>162</sup>

This may hold true for the platform owner, but viewed from the side of the worker, the opposite holds true. In South Africa there is currently no job security, nor social or labour protection for platform workers, and the very design of this precarious triangular relationship is regarded as a contributing factor. However, for platform work to be a viable solution to joblessness, it needs to provide decent work, granting gig workers the labour protection their peers in the traditional labour market enjoy. This is not currently the case, with the triangular contracting model that protects the platform operator to the detriment of both the end-user and the worker,<sup>163</sup> while the worker carries the majority of the risk. In part 2, we examine worker vulnerability and the legal position of platform work in more detail to suggest ways forward.

#### **AUTHORS' CONTRIBUTIONS**

Both authors conceptualised the study. Smit DM was primarily responsible for the drafting and overseeing of Part 1 of this integrated study. Stopforth G was primarily responsible for the drafting and overseeing of Part 2 of this integrated study. Both authors contributed in equal parts to the editing and the finalisation of this project.

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<sup>161</sup> Former UK secretary of state for work and pensions Damian Green, cited in MacDonald & Giazitzoglu (2019) at 1.

<sup>162</sup> Former UK secretary of state for work and pensions Damian Green, cited in MacDonald & Giazitzoglu (2019) at 1.

<sup>163</sup> Many platform workers are quasi-managed by algorithms that include client feedback and other metrics, which are implemented and even developed by platforms that are officially not their employers. See McDonald et al. (2021) at 4.

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