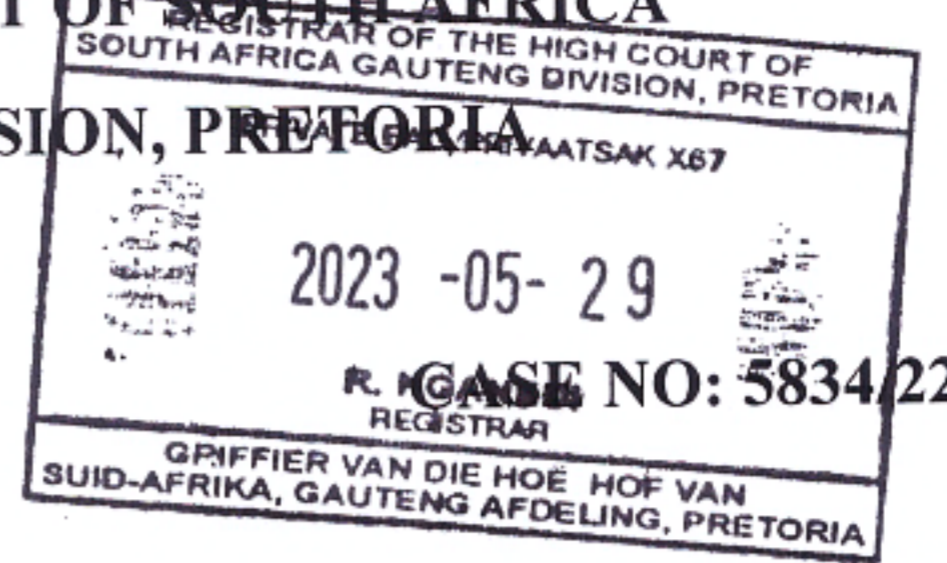


ORIGINAL**IN THE HIGH COURT OF SOUTH AFRICA****GAUTENG DIVISION, PRETORIA**

In the matter between:-

NDALA NOLUTHANDO DORAH**PLAINTIFF**

And

AARON BALOYI**1ST DEFENDANT****BOLT SERVICES ZA (PTY) LTD****2ND DEFENDANT**

NOTICE IN TERMS OF RULE 16A

BE PLEASE TO TAKE NOTICE THAT the applicant has raised the following constitutional issues in the application filed under the above case number:

1. In a matter in which the plaintiff seeks to hold the 2nd defendant, BOLT SERVICES ZA (PTY) LTD, an e-hailing company, vicariously liable for her delictual claim against the 1st defendant.
2. The plaintiff, in her particulars of claim, alleges that the 2nd defendant is vicariously liable for the damages she suffered as a result of the assault on her body and the malicious damages to her property by the 1st defendant. She further alleges that at all times relevant hereto, she was a passenger in a e-hailing motor vehicle driven by the 1st defendant who was an app-based driver, using the 2nd defendant's e-hailing app to transport passengers, under the control and supervision of the 2nd defendant, while the 1st defendant was furthering the financial interests of the 2nd defendant and making profit for them. The plaintiff alleges that the 1st defendant acted within the course and scope of his employment with the 2nd defendant.
3. The 2nd defendant, in its plea, alleges that it has never employed the 1st defendant and 1st defendant could not have acted within the course and scope of the averred employment, was thus self-employed. The 2nd defendant denies that e-hailing application providers have no control or supervision over drivers such as the 1st defendant, and thus deny being vicariously liable for the wrongful acts of the 1st defendant.
4. The 2nd defendant denial of vicarious liability is solely base on the denial of 1st defendant employment and if the common law is developed in such a way that employment is established, then 2nd defendant is vicariously liable.

DEVELOPMENT OF COMMOM LAW AND INTERNAL LAW

5. That Section 233 of the Constitution be applied to develop the common by imputing liability upon e-hailing application providers like the 2nd defendant and by divergence

of vicarious liability. The existing jurisprudence in which application providers like the 2nd defendant are not liable for its employees actions is a defect which needs to be rectified.

6. The case of *Carmichele v Minister of Safety and Security (CCT 48/00) [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) (16 August 2001)* will be of great assistance in directing the court in the need to develop of the common law in this regard. This case dealt with the responsibility that state organ employees have to members of the public when fulfilling their duties. These responsibilities cannot only be in the hands of organs of state but must be extended to private companies whose businesses profits involve service to members of the public such as e-hailing companies. The *Carmichele* case development of common law ought to be extended to private companies. This case goes further to reflect the importance of taking into account material facts that could lead to the unsafety of any member of society once an employee, organ or company has become aware of it. Bolt Services Pty (Ltd) has made it publicly known that it is aware through complaints and social media about instances where women have felt unsafe and have been attacked/violated whilst using their e-hailing services. As in *Carmichele*, the duty of care placed on state organs once being made aware of the threat to members of society should also be placed on private companies whose business and profits is dependent on members of the public. E-hailing companies have a duty of care in that they operate the same as public transportation systems, the safety of passengers is of paramount importance.
7. The applicant submits that this can be achieved by applying Section 233 of the Constitution be applied to develop the common law to the effect that common law definition of “employee” is extended to include e-hailing drivers and consequently, holding e-hailing providers like the 2nd defendant, vicariously liable for the unlawful and wrongful actions of its employees like the 1st defendant.
8. This can also be simplified by reasonably interpreting the common law definition of an employee as re-enforced by AJA Murphy *Phaka and Others v Bracks and Others (JA 3/2014) [2014] ZALAC 73; [2015] 5 BLLR 514 (LAC); (2015) 36 ILJ 1541 (LAC) (18 December 2014)* being “a person who performs work or services under supervision and control of another in exchange for remuneration or reward on such terms and conditions agreed upon by both parties”, to include e-hailing drivers.
9. The plaintiff raises as constitutional issue:
 - 9.1. that Section 233 of the Constitution be applied to the effect that the court prefer a reasonable interpretation of section 213 and section 200A of the Labour Relations Act 66 of 1995 to include e-hailing drivers.
 - 9.2. that section 213 and section 200A of the Labour Relations Act be interpreted in line with international law in terms of which e-hailing drivers are declared employees, with the consequence that the e-hailing application providers like the 2nd defendant, be held vicariously liable for the unlawful and wrongful actions of their drivers like the 1st defendant.
 - 9.2.1. Section 213 provides that an employee is “anyone, other than an independent contractor, who works for another person or who assists in conducting the business of an employer.”

9.2.2. Section 200A of the Labour Relations Act that:

“Until the contrary is proved, a person, who works for or renders services to any other person, is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present: (a) the manner in which the person works is subject to the control or direction of another person; (b) the person’s hours of work are subject to the control or direction of another person (c) in the case of a person who works for an organisation, the person forms part of that organisation; (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months; (e) the person is economically dependent on the other person for whom he or she works or renders services; (f) the person is provided with tools of trade or work equipment by the other person; or (g) the person only works for or renders services to one person.”

INTERNATIONAL LAW

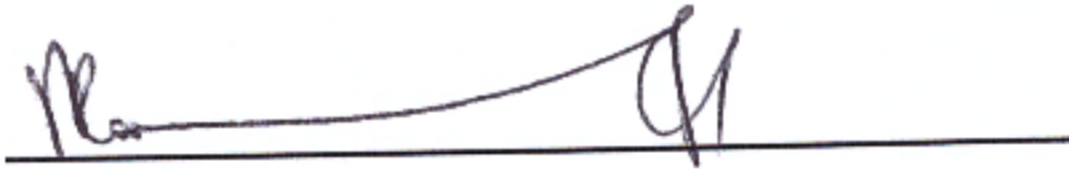
10. In *Uber BV and others v Aslam and others [2019] 3 All ER 2748* the court declared e-hailing drivers as employees based on the aspect of ‘control’ which is also stipulated as a presumption in section 200A(1)(a). The principle of control is discussed extensively in *Aslam*, on page 549. The court noted the following important aspects of control that Uber has over its employees: *“the fact that Uber imposes numerous conditions on drivers (such as the limited choice of acceptable vehicles), instructs drivers as to how to do their work, in numerous ways, controls them in the performance of their duties; the fact that Uber subjects drivers through the rating system to what amounts to a performance management/disciplinary procedure; the fact that Uber determines issues about rebates, sometimes without even involving the driver whose remuneration is liable to be affected; the guaranteed earning schemes; the fact that Uber accepts the risk of loss which, if the drivers were genuinely in business on their own account would fall upon them; the fact that Uber handles complaints by passengers, including complaints about the driver and lastly the fact that Uber reserves the power to amend the driver’s terms unilaterally”*.
11. In the case of *Kavita S. Sharma v. Uber India (“Kavita Sharma”)* was decided in the Thane District Consumer Forum, Uber was held liable for the actions of its drivers without deciding whether the App-based Transport Workers are employees or not. The decision to impute liability on App-based providers was despite the argument by Uber that drivers are ‘independent contractors’ and they merely offer technological and algorithm-based solutions to connect the supply and demand in the market. It was decided based on the degree of control that it has over its drivers as more than just a facilitator. The Forum considered the following factors to reach their conclusion *“(i) the right to determine the total fare, over which the driver has no say, (ii) the right to charge additional amounts in excess of the original agreement, based on the additional services by the driver (such as additional pickups), and (iii) the consideration is not paid to the driver, instead, it is paid to Uber, which then pays the drivers”*.
Therefore, the court can even impute vicarious liability on the 2nd defendant without determining whether the 1st defendant is an employee or not.

12. In *The People v Uber Technologies Inc, et all A160701* the Court of Appeal made a finding that e-hailing drivers working for Uber and Lyft did in fact perform services for these companies in the usual scope of business for the business to be a success. Due to this finding this court declared that drivers should in fact be deemed to be employees. Although this ruling by the Court of Appeal was turned over by Proposition 22 made by California residents the basis they used in finding that they are in fact employees can be used to develop South African legislation.

TAKE NOTICE FURTHER THAT any party interested in any of the abovementioned constitutional issues may, with the written consent of all the parties to the proceedings, give notice by no later than 20 (TWENTY) days after the posting of this notice, to be admitted to these proceedings as amicus curiae, upon such terms and conditions as may be agreed upon in writing by the parties.

KINDLY place this notice on the notice board assigned for this purpose and ensure that the notice remains on the notice board for a period of 20 (TWENTY) days, whereafter you shall endorse the notice to state on which day the notice was placed on the notice board and, on the expiry of the 20 (TWENTY) day period place such endorsed notice in the court file.

DATED AT PRETORIA ON THIS 26TH DAY OF MAY 2023.



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CENTURION
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AND TO : **DLA PIPER SOUTH AFRICA (RF) INC.**
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