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COLLECTIVE BARGAINING AND REPRESENTATION IN THE GIG ECONOMY IN SOUTH AFRICA: A CALL FOR A PURPOSIVE APPROACH*

SUMMARY

The growing interest of private individuals to participate in gig and platform work poses some organisational challenges to trade union movements in many countries. The situation is vexed in South Africa, as recent trends reveal that gig workers, without legislative recognition, have collectively organised themselves to demand better working conditions from digital platform providers. The challenges associated with gig work evoke certain legal debates about the legislative preparedness of South Africa to deal with the increasingly changing dynamics of the labour market. This article discusses collective representation and bargaining in the gig economy in South Africa. The article reflects on the employment nature of gig workers and ascertains whether gig workers can effectively organise themselves for collective bargaining in South Africa. Considering the legal complications that contemporary forms of employment present, this article suggests that the trade unions movement in South Africa must adopt legal strategies that revitalise union interests. This contribution calls for existing trade unions to extend their representation to include gig workers. The article suggests that the current constitutional framework governing collective bargaining and representation can accommodate and promote the collective representation and bargaining rights of gig workers in South Africa.

Keywords: Gig economy, collective representation, collective bargaining, trade unions, right to organise, the right to strike, gig workers, international labour standards, Constitution of the Republic of South Africa,1996, purposive labour law

1. INTRODUCTION

Technological advancement has led to new forms of work and a buoyant gig economy.[1] The emergence of new forms of employment presents some economic advantages and opportunities. In South Africa, the employment opportunities created by the gig economy have triggered growing interest and participation by private individuals. The growing interest of private individuals to explore employment opportunities created by the gig economy presents certain legal challenges and debates. One of the critical legal issues is whether gig workers have the statutory right to collectively organise and bargain to demand better working conditions from digital platform providers.[2] While the debates seem conceptual, the practical dimension of the discussion was witnessed in South Africa in 2022, when gig/platform workers, without any legislative recognition, collectively organised themselves and embarked on a three-day strike amid an increase in commodities, mainly fuel prices.[3] The demands of gig workers ignite some questions and pose particular organisational challenges to the trade unions in South Africa. The demands of the gig workers raise conceptual issues about whether gig workers can, as a matter of right and in the strictest sense, use the levers of collective bargaining and representation to demand better working conditions from digital platform providers, by having regard to the very nature of their working relationship and them being classified as independent contractors (self-employed individuals) by the digital platform providers.

Gig workers are, by the nature of the working arrangement, classified as independent contractors. Independent contractors (self-employed individuals) are distinguished from employees. Independent contractors, by their working relationship, are not subject to the dictates, control, direction, or supervision of an employer. An employee, on the other hand, works under the control, supervision, and direction of an employer.[4] An employee is described as providing "subordinate labour" and works under the confines of an employment contract.[5] An independent contractor works autonomously and provides services within the bounds of a contract of service.[6] In ascertaining hether there

1 Drahokoupil & Jespen 2017:103-105; Graham *et al.* 2017:135-138; Wass *et al.* 2018:1-5; Serrano-Pascual & Jespen 2019:63-80; Du Toit 2019:1-10; Klebet & Weiss 2019:263-265; Raj-Reichert *et al.* 2021:133-141; Kim & Rönnmar 2020:133-162; Nxumalo & Nxumalo 2019:16-20.

2 Schiek & Gideon 2018:275-294; Doherty & Franca 2020:352; Bogg 2021:409-411; Falasca 2021:87-91.

3 Chandran & Farouk "Gig economy workers feel the pinch amid rising prices and layoffs", https://www.businesslive.co.za/bd/world/2022-06-30-gig-economy-workers-feel-the-pinch-amid-rising-prices-and-layoffs/ (accessed on 17 December 2022).

4 Powe 1986:86-101; Bruntz 1991:337-341; Fudge 2003:194; Fragoso & Kleiner 2005:136-140; Finkin & Mundlak 2015:15; Todoli-Signes 2017:241-248; Todoli-Signes 2019:255-257; Schlachter 2019:229-239; Eurofound "Impact of digitalisation on social dialogue and collective bargaining", https://www.eurofound.europa.eu/data/digitalisation/research-digests/impact-of-digitalisation-on-social-dialogue-and-collective-bargaining (accessed on 11 December 2022).

5 Deakin 2007:70.

6 Deakin 2007:70.

exists an employment relationship, due consideration is given to the foregoing binary distinction between an employee and an independent contractor. The binary understanding is vital because, conventionally, access to statutory labour rights and protection such as the right to organise, the right to engage in collective bargaining, the freedom to form or join a trade union, and a host of collective labour rights under international and domestic labour laws apply to or are claimed by those individuals who provide "subordinate labour".

Traditionally, as a tool used by trade unions to demand better working conditions from employers or employers' organisations, collective bargaining is fit for purpose for employees or workers, and not independent contractors or self-employed persons. Generally, and subject to the contours of competition law, independent contractors may collectively bargain through associations.[7] Although independent contractors and self-employed persons may collectively bargain, the critical question is whether they are entitled to bargain as a matter of right. To some academics, extending collective bargaining rights to independent contractors or self-employed persons is unnecessary and counterproductive.[8] This is because of the very complex and voluntary nature of collective bargaining, coupled with it being hinged on a person's employment status. Fundamentally, it is against the spirit of collective bargaining to compel a party to bargain. Generally, the voluntary nature of bargaining means that an employer can decide with whom to negotiate. This may exclude gig workers from demanding better working conditions from digital platform providers.[9]

This article seeks to reflect on collective bargaining rights of gig workers in South Africa. The article begins with a discussion of the employment status of gig workers in South Africa. The debate is essential since the enjoyment of statutory labour rights hinges on a person's employment status. This contribution gives due consideration to pronouncements by courts and academic texts on the need to conceive labour arrangements purposively and not merely on the contract's text between the parties. The article reflects on the contractual mischaracterisation of gig workers by digital platform providers and the need to re-align the labour laws of South Africa to accommodate the interests of gig workers. This article argues that the *Constitution of the Republic of South Africa*, 1996 (hereinafter, the '1996 *Constitution of South Africa'*) can accommodate gig workers and persons in analogous employment to form and join trade unions, collectively organise, and collectively bargain. In addition, the article suggests that the current legal framework on collective representation and bargaining should be construed broadly and purposively to encompass working relationships akin to the employment relationship (worker-employer relationship). Such legal construction will go a long way to ensure that the mere contractual designation of gig workers as independent contractors does not deprive them of enjoying or claiming collective labour rights in South Africa.

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7 *Albany International BV v Stichting Bedrijfspensioen Textilelindustrie* Case C-67/96 EU:C:1999:28 [1999] ECR I-5751; Biasi 2018:372.

8 Lianos *et al.* 2019:324-331; Paul *et al.* 2022:280-297.

9 Bogg 2021:413.

This article is organised into five main sections. The first section commences with a discussion on the factors used to distinguish an employee from an independent contractor. It considers the debates advanced by academics and courts on the proper classification of gig workers under South African law. This discussion is significant, as it serves as a springboard to ascertain the employment status of gig workers in South Africa and whether they are entitled to collectively organise themselves and bargain under South African law. It also draws some comparative lessons from other jurisdictions. The section highlights the reality that determining the employment status of a person has moved from the traditional or orthodox approach of mainly relying on the text of a contract. As such, courts in many jurisdictions are increasingly relying on the actual realities surrounding the working relationship to ascertain an employment relationship.[10] Reflecting on the employment status of gig workers is necessary because the enjoyment of statutory protection and labour rights is often constricted to the narrowest group of employees rather than to independent contractors or self-employed persons.

The second section deals with the scope of the right to form or join trade unions and the confines of collective representation in South Africa. It discusses the ambit of the right to collective bargaining under the 1996 *Constitution of South Africa* and the *Labour Relations Act* 66 of 1995 (hereinafter, the '*LRA*'). The essence of the discussion is to ascertain how gig workers can be accommodated within the current legal framework in South Africa.

The third section reflects on how much the right to collective bargaining can be extended to gig workers in South Africa. It reflects on the normative importance of collective bargaining, by exploring whether such significance can be extended to protect gig workers in South Africa.

The final section concludes that the constitutional and legislative framework of South Africa can accommodate gig workers to collectively bargain, in order to advance their interests.

2. WHO IS AN EMPLOYEE, A WORKER, OR AN INDEPENDENT CONTRACTOR

Generally, in common law, the term 'employee' is a category of working relationship that is based on a contract of employment. The determination of an employment relationship between an employee and an employer is often predicated on a series of tests or criteria developed by common law courts.[11] At the core of those legal tests are certain significant issues such as the

10 See, for instance, the Nigerian case of *Olatunji & Others v Uber Technologies Systems (Nigeria) & Taxify Technology Nigeria Limited* Suit No. NICN/LA/564/2017 (unreported), where the court averred that the actual working relationship between parties can be determined through the doctrine of primacy of facts. See also the recent UK Supreme Court decision in *Uber BV & others v Aslam & others* [2021] UKSC 5.

11 Wood 2008:45-48; Freedland 2016:73-95; Carlson 2018:127-128; Deakin 2020:180-193; McDonnell & Bodie 2022:887-950; Engelmann 2022:959-960; Harvey 2022:1-28.

degree of subordination emanating from contractual arrangements between an employee and the employer, the duty of an individual to perform personal work, an employer's mutual obligation to provide employment and compensate that individual for personal work rendered, the provision of tools and work materials by the employer to an individual, and the extent to which a person is economically dependent on an employer.[12] The general judicial interpretative approach regarding applying these threshold tests tends to be purposive or liberal.[13] Courts in many jurisdictions are increasingly adopting a purposive approach because determining the existence of an employment relationship goes beyond the text of a contract.[14] In addition to the purposive approach, some jurisdictions subscribe to, or favour the test of the rebuttable presumption of the existence of employment.[15] Some common law courts consider the context, the circumstances surrounding the employment, practices, and the actual working relationship between the parties to purposively determine the existence of an employment relationship.[16]

The purposive/liberal approach requires that courts look beyond the written document between the parties and explore factors that substantiate their actual working relationship.[17] The wave towards the adoption of a purposive interpretative approach in ascertaining employment is important, especially considering the proliferation of new forms of work that do not easily fit in the orthodox or binary conception of employee (who is often subordinate and dependent on an employer) and an independent contractor or self-employed person (who is autonomous and independent). Determining the working relationship can serve as a springboard for persons in atypical employment to seek protection under domestic labour laws. In many jurisdictions, statutory imperatives have made inroads into the factors required to distinguish an employee from an independent contractor. For instance, in South Africa, determining who an employee is falls within the rubrics of sec. 200A of the *LRA*. Sec. 200A of the *LRA* creates a rebuttable presumption of the existence of an employment relationship.[18] Under sec. 200A, a person who claims that he or she is an employee and renders certain services for an employer must prove that any of the following factors are present:

12 For a discussion on the legal criteria to determine employment status under UK law, see *McCormick v Fasken Martineau Dumoulin LLP* 2014 SCC 39; *Hashwani v Jivraj* [2011] UKSC 40; *Allonby v Accrington and Rossendale College* [2004] ICR 1328; *Byrne Bros (Formwork) Ltd v Baird* [2002] ICR 667; *Bates van Winkelhof v Clyde & Co LLP* [2014] 1 WLR 2047; *James v Redcats Brands Ltd* [2007] ICR 1006; *Mirror Group Newspapers Ltd. v Gunning* [1986] ICR 145. See also Superson 1983:45-47; Fudge 2006:609-648; Bogg *et al.* 2015:169-187; Bomball 2019:372; Freedland & Kountouris 2012:56.

13 See McClelland 2012:428-431; Davidov 2016:115-156; Davidov 2017: 6-15; Mundlak 2017:41-43; Dukes 2017:52; Deakin 2017:28; Estlund 2019:349-350.

14 Atkinson & Dhorajiwala 2022:787-800; Davidov & Alon-Shenker 2022:235.

15 Gould IV & Biasi 2022:87-95; Kullmann 2022:68-72.

16 *Autoclenz Ltd v Belcher* [2011] UKSC 41.

17 *Autoclenz Ltd v Belcher*:par. 35.

18 *LRA*:sec. 200. See, generally, Theron 2007:25; Fourie 2008:1; Diedericks 2017:1; Le Roux 2010:139; Theron 2002:27; Benjamin 2004:787; Broembsen 2012:2-3.

> 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 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.[19]

The above criteria apply to individuals who earn less than the annual earning threshold determined by the Minister of Employment and Labour in accordance with the *Basic Conditions of Employment Act* 75 of 1997.[20] In the event an employer proves the absence of any of the above-mentioned factors, the presumption of employment will be rebutted. In addition to sec. 200A of the *LRA*, South African courts have developed a multifactorial legal test such as the dominant impression test to determine whether there exists an employment relationship between an employee and an employer. The dominant impression test is often utilised by South African courts to highlight the differences between an independent contractor and an employee.[21] According to this test, a person is an employee if that person renders personal services and performs those services personally, or the person follows the instructions and lawful commands of an employer, and if the contract of employment is terminated upon the death of the employee or expiration of the contract of employment.[22] An independent contractor, on the other hand, and per the dominant impression test, performs a specific work or produces a particular result, within a specified time, through that contractor or others, not under the supervision, direction, or control or commands of another person, among other considerations.[23] Many academics in South Africa have criticised

19 According to the *LRA*:sec. 213, an employee is "any person, excluding an independent contractor, who works for another person or for the State, and who receives or is entitled to receive remuneration; and any other person who in any matter assists in carrying on or conducting the business of an employer". See *Phaka and others v Bracks and others* (2015) *ILJ* 1541 (LAC); *Denel (Pty) Ltd v Gerber* (2005) *ILJ* 1256 (LAC); *Wyeth SA (Pty) Ltd v Manqele and others* (2005) *ILJ* 749 (LAC); *Niselow v Liberty Life Association of SA Ltd* (1998) 19 *ILJ* 752 (SCA).

20 The new annual earning threshold (ZAR 241,110.59) entered into force on 1 March 2023. See GN 3067 *Government Gazette* 2023:48092.

21 *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A); *South African Broadcasting Corporation v McKenzie* (1999) 20 *ILJ* 585 (CCMA); *Johnson v Piccollo Mama CC* (2001) 22 *ILJ* 759 (CCMA); *Von Backstrom and others v Independent Electoral Commission* (2002) 21 *ILJ* 267 (CCMA); *Dempsey v Home & Property* (1995) 16 *ILJ* 378 (LAC); *Pam Golding Property v Erasmus & others* (2010) 31 *ILJ* 1460 (LAC). See also Oberholzer & Beer 2006:664; Manamela 2002:107; Mokofe 2022:349-356.

22 *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A).

23 Basson *et al.* 2009:27; Smit 2005:200-207.

the dominant impression test,[24] which remains an essential criterion in ascertaining whether a person is an employee or an independent contractor.

It is noteworthy that the mere fact that a contractual arrangement mirrors one of subordination, control, or where a party is economically dependent on an employer does not necessarily mean that that person is an employee. Hence, there are many instances where a contractual relationship may mirror one of subordination or economic dependence but may fail to meet the legal threshold required to establish an employment relationship. Examples of contractual relationships that may mirror subordination or economic dependence but may not pass the legal threshold test include temporary and casual work and atypical/non-standard forms. Contractual relationships of such nature are often prone to exclude those individuals from enjoying basic statutory protection. The exclusion of such categories of individuals from legislative protection implies that they are vulnerable and thereby susceptible to contractual exploitation by employers. Many scholars describe temporary, casual, and non-standard workers to be in precarious and vulnerable relationships with their "employers".[25]

According to Bogg, the exclusion of temporary and casual work and other analogous forms of employment were often dysfunctional. An attempt to remedy this dysfunctionality under the United Kingdom (UK) law, for instance, led to increased reliance on a "worker" category.[26] Bogg explains that the 'worker' category under the UK legal system is an "extended statutory category which includes a wider range of personal work relations otherwise excluded from the narrower 'employee' category.[27] The 'worker' category under UK law is entitled to statutory legal protection, including trade union rights, anti-discrimination rights, and the right to receive remuneration in accordance with the National Daily Minimum Wage (NDWA), among others.[28] The term 'worker' is defined in sec. 230(3) of the *Employment Rights Act* 1996 (hereinafter, the '*ERA*'). According to sec. 230(3) of the *ERA*, a worker is an individual who has entered into or works under

24 Brassey 1990:889-920; Mureinik 1980:257-260; Conaghan *et al.* 2004:74-92. In *Medical Association of South Africa and others v Minister of Health and another* (1998) 18 *ILJ* 528 (LC), the dominant impression test was described as unsatisfactory because it leads to uncertainty. In *State Technology Agency (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others* (2008) 29 *ILJ* 2234 (LAC), the Labour Appeals Court (LAC) averred that three critical criteria must be considered when determining employment status: "(a) An employer's right to supervision and control, (b) whether the employee forms an integral part of the organisation with the employer, and (c) the extent to which the employee is economically dependent on the employer".

25 Casey 1988:487; Wratny & Ludera-Ruszel 2020:203-214; Campbell & Price 2016:314-332; Rapatsa 2014:1967; Quinlan 2012:3-24; Dor & Runciman 2022:20-40; Hammer & Ness 2021:1-15; Barchiesi 2008:119-142.

26 Bogg 2021:413-414. See also Atkinson & Dhorajiwala 2019:278-295.

27 Bogg 2021:413-414.

28 Hardy 2022:18; Grusic 2015:75.

> a contract of employment or, any other contract, whether expressed or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.[29]

Individuals who fall under sec. 230(3) of the *ERA* include self-employed persons who provide their services as part of a profession or a business undertaking carried on by another person.[30] According to the UK Supreme Court, individuals who fall under sec. 230(3) of the *ERA* are entitled to statutory protection, such as protection against unfair dismissal.[31] The policy orientation of ascribing legal protection to sec. 230(3) category of individuals is because their working relationship is characterised by vulnerability and precarity.[32] The broad construction of a worker implies that courts rely on purposive interpretative tools to remedy said precarity or vulnerability. The purposive interpretation of employment relationship means that the courts must look beyond the textual requirements or content of a contract and consider the peculiarities and features of a particular working arrangement.[33] That is to say, determining the employment status of individuals is not only based on the content of what the contract may provide, but also means that specific categories of individuals engaged in atypical employment may be afforded statutory protection under the domestic labour laws of a particular jurisdiction.

Many jurisdictions are increasingly using the term 'worker' rather than the common law term of 'employee', which is anchored on the parameters of a contract of employment. In Nigeria, for instance, sec. 91 of the *Labour Act* (Chapter L1, Laws of the Federation of Nigeria) of 2004 (hereinafter, '*Labour Act of Nigeria*') uses the term 'worker'. Sec. 91 of the *Labour Act of Nigeria* defines a worker as

> any person who has entered into or works under a contract with an employer, whether the contract is for manual or clerical work or is expressed or implied or oral or written, and whether it is a contract of service or a contract personally to execute any work or labour.[34]

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29 *Employment Rights Act* 1996:sec. 230(3). See also Freedland 2016:321-340; Atkinson 2022:355; Davidov 2005:58; Nyombi 2015:3-16; Freedland & Prassl 2017:23-25; *Bates van Winkelhof v Clyde & Company LLP and another* [2014] UKSC 32; Mangan 2020:327-333.

30 *Byrne Bros (Formwork) v Baird* [2002] ICR 667. See also Davidov 2002:359; Cavalier & Upex 2006:594-596; Freedland 2016:209-230; Berry 2017:309-311; Prassl 2014:495.

31 *Byrne Bros (Formwork) v Baird* [2002] ICR 667; Bogg 2021:413-414.

32 *Byrne Bros (Formwork) v Baird* [2002] ICR 667; Freedland "The contract of employment and the paradoxes of precarity", https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2794877 (accessed on 5 January 2023); Carpenter 2022:123; Harper 2019:176. For a discussion on the acceptance of the broad term 'worker' under EU law, see Menegatti 2020:29-37.

33 *Autoclenz Ltd v Belcher* [2011] UKSC 41.

34 Labour Act of Nigeria:sec. 91. See also Otuturu 2021:681-883.

Nigerian courts have acknowledged that the contract establishing the relationship between the parties is significant in identifying the employment status of an individual. However, to accommodate situations where a person alleges that the written contract does not mirror the actual realities of the relationship, courts must determine the actual relationship between the parties.

In *Olatunji & Others v Uber Technologies Systems (Nigeria) & Taxify Technology Nigeria Limited*,[35] the Industrial Court of Nigeria explained that determining whether a person is a worker is contingent on the contractual arrangements and the surrounding facts. According to the court, ascertaining an employment relationship is based on the fact and the principle of primacy of facts.[36] Hence, express terms of a contract can even be ignored if "they are not consistent with the reality of the relationship between the parties".[37] The broad and purposive approach to determining employment relationship is brought to the fore with the acknowledgement that "forms of work have changed and the traditional or orthodox distinctions between the worker/employee and the employer no longer exist or have been stretched to absurd limits. But all of this cannot be determined if there are no facts upon which the inquiry can be done."[38] The court stated that sufficient facts must be presented when determining the employment status of an individual.[39]

In addition, some international conventions and instruments recommend a broad range of factors to be considered when ascertaining the existence of an employment relationship. The International Labour Organisation (ILO) Employment Relationship Recommendation (No. 198) of 2006 (hereinafter, the 'Recommendation 198') prescribes that national policies in member states on employment relationships must include preventive measures that combat disguised employment relationships that may hide the true legal status of a person. Disguised employment relationship occurs "when the employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee.[40] Recommendation 198 provides that national policies of member states on determining the existence of employment relationships should consider the possibility of

> allowing a broad range of means for determining the existence of an employment relationship, provide for a legal presumption that employment relationship exists where relevant factors are present, and determining, following prior consultations with the most representatives of employers and workers, that workers with certain characteristics … must be deemed to be either employed or self-employed.[41]

35 Suit No. NICN/LA/564/2017 (unreported) (hereinafter *Olatunji*).
36 *Olatunji*:par. 77. See also *PENGASSAN v Mobil Nig. Ltd* [2013] 32 NLLR (Pt 92).
37 *Olatunji*:par. 77.
38 *Olatunji*:par. 77.
39 *Olatunji*:par. 77.
40 Recommendation 198:art. 4(b).
41 Recommendation 198:art. 11.

One of the essential concepts underlying Recommendation 198 is the principle of primacy of fact. According to this principle, irrespective of the existence of a contractual arrangement, determining employment relationship should be informed by the facts surrounding the performance of work.[42] Recommendation 198 further outlines a range of factors that ought to be considered when ascertaining whether there exists an employment relationship between an individual and an employer. These factors include periodic payment of remuneration to the worker and whether the work is carried out according to the instructions and control of another party,[43] the worker is integrated into the business of an employer,[44] or the work is performed exclusively for the benefit of another person, and worker receives periodic remuneration, etc.[45]

2.1 Broad construction of the employment status of gig workers in South Africa

Ascertaining whether the existing statutory framework and judicial pronouncements in South Africa support the rights of gig workers to claim collective labour rights, particularly the right to collective bargaining for better working conditions from digital platform providers, is somewhat complex. This is because of unresolved issues regarding the employment status of gig workers in South Africa. South African courts have not conclusively or definitively pronounced the employment status of gig or platform workers, even though they had the opportunity to do so.[46] As such, it is unclear whether gig workers should be treated as employees or independent contractors. In *Uber South Africa Technological Services (Pty) Ltd v NUSPAW & SATAWU Obo Morekure and others*,[47] the Commission for Conciliation, Mediation and Arbitration (CCMA) explored the working relationship between Uber and Uber drivers.[48] In that case, a couple of drivers who were deactivated from the Uber app approached the CCMA with the claim of unfair dismissal by Uber South Africa (Uber SA).[49]

In opposing to the claim, Uber SA objected to the jurisdiction of the CCMA in determining the case, in that the CCMA could only deal with issues that

42 The International Labour Organisation (ILO) "Regulating employment relationship in Europe: A guide to Recommendation No. 198", https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_209280.pdf (accessed on 5 January 2023). See also Sergio & Rosado-Marzan 2019:63-92; Van Haasteren 2017:71.

43 Recommendation 198:art. 13(a).

44 Recommendation 198:art. 13(a).

45 Recommendation 198:art. 13(b).

46 For a detailed discussion of the cases, see Mokoena 2018:1453; Marcano 2018:273-295; Malherbe 2018:216-219; Mokoena 2016:1574-1583; Mpedi & Coleman 2022:249-268. For a discussion on the experiences of ride-hailing drivers in South Africa, particularly in terms of health and safety, see Wilmans & Rashied 2021:1-9.

47 *Uber South Africa Technological Services (Pty) Ltd v NUSPAW & SATAWU Obo Morekure and others* [2017] ZACC 1 (hereinafter, *Uber CCMA*).

48 *Uber CCMA*:par. 8.

49 *Uber CCMA* par. 10.

involved employees. Uber SA contended that the drivers were not employees of Uber BV, let alone Uber SA (the subsidiary company of Uber BV) and were independent contractors.[50] The Commissioner of the CCMA, upon considering the nature of the working relationship, the provisions of the *LRA*, and the Code of Good Practice: Who is an Employee, held that sec. 213 of the *LRA* was broad to accommodate the uber drivers.[51] According to the CCMA, the Uber drivers performed personal services and were under the control of Uber.[52] The extent of control by Uber includes determining the requirements and standards of performance of the drivers, among others.[53] The Commissioner of the CCMA, therefore, held that the Uber drivers were employees of Uber SA.[54] The case was referred to the Labour Court for review in *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service & Allied Workers and Others*.[55] The Labour Court held that there existed no contractual relationship between Uber SA and the drivers.[56] The analysis of the Labour Court revealed that, had the case been instituted against Uber BV, the conclusion of the Labour Court would have been different, regarding the multifactorial legal tests to ascertain the employment relationship.[57] Academics have widely criticised the position of the Labour Court as a missed opportunity to definitively pronounce the employment status of gig workers in South Africa.[58]

As explained earlier, a multifactorial legal test has been developed under common law to ascertain the existence of an employment relationship. However, a strict application of those factors often excludes certain categories of individuals whose working relationship is characterised by vulnerability and precarity. In remedying such vulnerability and precarity, some jurisdictions have adopted an intermediary and relaxed term 'worker' to encapsulate self-employed individuals and afford them the requisite legal protection. The reliance on the term 'worker' in those jurisdictions is significant, as it can serve as a basis to extend legal protection to those categories of individuals who were hitherto excluded from enjoying statutory rights. With the proliferation of new forms of employment such as gig work, the determination of employment status must move beyond the textual imperatives in working contracts. The determination of employment status must consider the realities of the working relationship. Such a purposive and broad conceptualisation of employment relationships is important, as it ensures that individuals whose working arrangement is akin to employment relationship are not excluded from enjoying statutory rights.

50 *Uber CCMA*:par. 10.
51 *Uber CCMA*:paras. 40-41.
52 *Uber CCMA*:par. 43.
53 *Uber CCMA*:par. 44.
54 *Uber CCMA*:par. 50.
55 *Uber South Africa Technological Services (Pty) Ltd v National Union of Public Service & Allied Workers and Others* (2018) 39 ILJ 903 (LC) (hereinafter, *Uber LC*).
56 *Uber LC*:par. 7
57 Mokoena 2018:1453
58 Van Eck & Nemusimbori 2018:478.

Considering the call in many jurisdictions to broadly construe working relationships beyond the text of a contract, it is not surprising that academics in South Africa have already advocated for the utilisation of the term 'worker' under sec. 1 of the *National Minimum Wage Act* 9 of 2018 (hereinafter, the '*Minimum Wage Act*').[59] To academics in South Africa, sec. 1 of the *Minimum Wage Act* can be employed to extend statutory protection to self-employed individuals such as gig workers in South Africa. Sec. 1 of the *Minimum Wage Act* defines a worker as "any person who works for another and who receives, or is entitled to receive, any payment for that work whether in money or in kind".[60] Compared to the *LRA*, the *Minimum Wage Act* does not exclude independent contractors. The definition in sec. 1 of the *Minimum Wage Act* is broad enough to include independent contractors and self-employed individuals, including gig workers and those in employee-like relationships. Mokofe and Van Eck have re-echoed the essence of sec. 1 of the *Minimum Wage Act* as a springboard for extending statutory labour protection to specific categories of independent contractors and self-employed individuals such as gig or platform workers.[61] Some of the statutory rights that can be enjoyed or claimed by self-employed individuals whose working relationships are akin to employment relationships include the right to join and form a trade union, the right to organise, the right to engage in collective bargaining and the right to strike.

3. THE RIGHT TO FORM OR JOIN A TRADE UNION, THE RIGHT TO ORGANISE, THE RIGHT TO STRIKE, AND COLLECTIVE BARGAINING RIGHTS IN SOUTH AFRICA

Trade unions play an important role in advancing the social and economic interests of their members, particularly with regard to negotiating for better wages or pay, conditions of employment, health and safety, as well as providing support and advising their members. One of the essential tools used by trade unions to pursue the interests of their members is collective bargaining. As mentioned, collective labour rights such as the right to form or join trade unions, the right to organise, and the right to engage in collective bargaining are rights that employees or workers can claim. Hence, independent contractors are not eligible to collective bargaining. Even if they engage in collective bargaining, such negotiation does not accrue to them as a matter of right. Collective bargaining has several benefits, including democratising the workplace for employees or workers to be heard, and promoting workplace stability, among others. According to Khan-Freund, collective bargaining countervails the inequality inherent in an employment relationship by allowing the workers to form collective power.[62]

59 *National Minimum Wage Act* 9/2018:sec. 1. See also Mokofe & Van Eck 2021:1372-1373.
60 *National* Minimum Wage Act 9/2018:sec. 1.
61 Mokofe & Van Eck 2021:1372-1373.
62 Khan-Freund 1978:6-10; Freedland 1983:69.

Through this collective power, workers can advance their interests and pursue an agenda of standard-setting.[63] Collective bargaining is viewed as a tool to remedy the democracy deficit in employment relations since it ensures procedural fairness in dispute resolution at the workplace and creates channels for workers to be heard.[64] Collective bargaining is thus a must for the gig economy, as the host of advantages can empower gig workers to demand better working conditions from digital platform providers. However, to bargain, gig workers must be entitled to collective power such as the right to form and join a trade union, the right to organise, the right to engage in collective bargaining, and the right to embark on collective action such as strikes.

3.1 The right to form and join trade unions

Under the 1996 *Constitution of South Africa*, everyone has the right to freedom of association.[65] Stated differently, everyone, without any distinction whatsoever, is entitled to form or join or, in some cases, refrain from joining an association. The right to freedom of association is conferred on everyone but is subject to the bounds of criminal and civil laws of South Africa.[66] Freedom of association is a critical feature of liberal democracies. As Budeli points out, freedom of association is an "essential feature of (liberal or social) democratic society, protecting individuals from the vulnerability of isolation and ensuring the potential of effective participation in a society".[67] The right to freedom of association also represents the autonomy of a person to refrain from joining an association. As was explained in *Reference Re Public Service Employee Relations Act*,[68] the essence of the right to freedom of association is stated in the following manner:

> Freedom of association is most essential in those circumstances where the individual freedom is liable to be prejudiced by the action of some larger and more powerful entity, like the government or an employer. Association has always been the means by which political, cultural, and racial minorities, religious groups and workers have sought to attain their purposes and fulfil their aspirations; it has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact, and perhaps, conflict.[69]

In labour law, freedom of association confers moral and legal rights on workers to form or join trade unions and demands that those unions act in the collective and shared interest of their members, but independent from the

63 Khan-Freund 1978:6-10.

64 For a discussion on the advantages of collective bargaining, see Davidov 2004:83; Davidov 2012:130-150; Boto & Brameshuber 2022:99-115; Van Jaarsveld *et al*. 2004:10; Blanpain & Engels 2002:1; Wilkinson *et al*. 2014:227-246; Prasad 2009:195-202; Garnero 2020:185-202; King 2013:107-110.

65 1996 *Constitution of South Africa*:sec. 18.

66 Pienaar 1993:147.

67 Budeli 2010:16.

68 *Reference Re Public Service Employee Relations Act* [1987] 1 SCR 313.

69 *Reference Re Public Service Employee Relations Act* at 313.

control of employers or employer's organisation or other extraneous forces.[70] Thus, underscoring the freedom of association is the idea that trade unions must be free from interference from the governmental machinery of the state, and, in the case of employees or workers, to protect them from victimisation or ill-treatment by an employer.[71] The freedom of individuals to form or join an association serves as the foundational pillar for workers or employees to collectively bargain, organise, and engage in collective action such as strikes.[72] The right to freedom of association and the liberty of workers to form and join trade unions is a long-standing right recognised in key international instruments.[73] The right to join or form a trade union or federation is protected under the 1996 *Constitution of South Africa* and the *LRA*.

According to sec. 23(2) of the 1996 *Constitution of South Africa*, every worker has the right to form and join a trade union and participate in the activities and programmes of the trade union.[74] Sec. 23(2) of the 1996 *Constitution of South Africa* provides the category of persons entitled to form and join trade unions in South Africa. Under the 1996 *Constitution of South Africa*, the right to form and join trade unions is an entitlement of workers. The right to form or join a trade union is further consolidated in sec. 4 of the *LRA*, which outlines an employee's right to freedom of association. According to sec. 4(1) of the *LRA*, every employee has the right to participate in forming a trade union or federation of trade unions and join a trade union.[75] The right to join and form a trade union is subject to the constitution of that union.[76] Further, it is the right of a member of a trade union to participate in the lawful activities of that union, and participate in the election of any office bearer, among other organisational rights.[77] The *LRA* defines a trade union as an "association of employees whose principal purpose is to regulate relations between employees and employers, including any employer's organisations".[78]

The terminological difference in sec. 23(2) of the 1996 *Constitution of South Africa* and sec. 4 of the *LRA* is worth highlighting. While the 1996 *Constitution of South Africa* uses the term 'worker', the *LRA* employs the term 'employee'. As explained earlier, the terms do not mean the same thing, as a worker has a broader, more flexible meaning and scope than an employee. The operational ambit or scope of the term 'worker' was explained by the Constitutional Court (CC) in *South African National Defence Union v Minister*

70 Slabbert *et al.* 1999:6-60.
71 Anderman 2000:306.
72 von Potobsky 1998:195; Wedderburn 1987:244-254; Freedland *et al.* 1995:235-251; Budeli 2012:475-481; Mubangizi 2006:2-7; Kruger & Tshoose 2013:285; Woolman *et al.* 2003:1; Kujinga & Van Eck 2018:1-4.
73 The ILO Freedom of Association and the Protection of the Right to Organise Convention No. 87 of 1948; Budeli 2009:138-142; Pienaar 1993:147-171.
74 1996 *Constitution of South Africa*:sec. 23(2).
75 *LRA*:sec. 4(1).
76 *LRA*:sec. 4(3).
77 *LRA*:sec. 4(2).
78 *LRA*:sec. 213.

of Defence & Another.[79] In that case, the CC was approached to determine whether the restriction on members of the South African Defence Force from forming and joining trade unions in sec. 126B(1) of the *Defence Act* 44 of 1957 (hereinafter, the '*Defence Act*') was at variance with, and infringed on sec. 23 of the 1996 *Constitution of South Africa*, which guarantees the right to freedom of association of workers.[80] It is worth mentioning that sec. 2(a) of the *LRA* excludes members of the defence force. Hence, the labour rights and protection outlined in the *LRA* do not extend or apply to members of the defence force.[81]

Before the CC could determine the constitutionality of sec. 126B(1) of the *Defence Act*, the question of whether they were workers (within the meaning of sec. 23 of the 1996 *Constitution of South Africa*) had to be answered. The CC characterised the members of the defence force as workers. In the view of the CC, the members of the defence force were not employees in the strict sense, but their working relationship was akin to an employment relationship.[82] Accordingly, those members should be treated as workers. According to the CC, the term 'worker' should be interpreted generously to encapsulate relationships akin to employment relationships.[83] By this interpretative approach, therefore, working relationships that are not reduced to formal writing but exhibit traits akin to an employment relationship can be protected under sec. 23(2) of the 1996 *Constitution of South Africa*. The broad, flexible and liberal construction of the term 'worker' to include relationships akin to employment relationships for purposes of sec. 23(2) of the 1996 *Constitution of South Africa* is crucial because such construction can operate to extend statutory protection, atypical workers, independent contractors, and self-employed individuals whose working relationships are akin to employment relationships such as gig workers (the rubrics of the employment relationship of gig workers are discussed above). As Cheadle explains, the term 'worker' could assist those individuals in atypical employment to be protected under sec. 23(2) of the 1996 *Constitution of South Africa*.[84] If atypical workers, including gig workers, can be treated as workers within sec. 23(2) of the 1996 *Constitution of South Africa*, then the question is whether they are entitled to organise themselves and engage in collective bargaining.

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79 *South African National Defence Union v Minister of Defence & Another* 1999 (4) SA 469 (CC) (hereinafter, *SANDU*).

80 *SANDU*:paras. 2-4.

81 *LRA*:sec. 2(a).

82 *SANDU*:par. 24.

83 *SANDU*:par. 28. See also *National Education Health & Allied Workers (NEHAWU) v University of Cape Town* 2003 (3) SA *ILJ* 1 (CC), where the CC averred that "the focus of section 23(1) is, broadly speaking, the relationship between a worker and the employer and the continuation of that relationship on terms that are fair to both. In giving content to the right, it is important to bear in mind the tension between the interests of the workers and the interests of the employers which is inherent in labour relations. Care must be taken to accommodate, where possible, these interests to strive to arrive at the balance required by the concept of fair labour practices". See also Mnisi 2017:129-139; Smit 2019:275-284.

84 Cheadle & Davis 2005:Ch.18.

3.2 The right to organise

The right to organise is an essential aspect of freedom of association and collective bargaining. The right to organise is recognised in key ILO instruments.[85] In South Africa, sec. 23(4)(b) of the 1996 *Constitution of South Africa* recognises the right to organise by trade unions and employers' organisations. Under sec. 23(4)(b) of the 1996 *Constitution of South Africa*, the right to organise can only be claimed by trade unions and employers' organisations and not by individual workers.[86] Sec. 23(4)(b) is effectuated in chapter II of the *LRA*. In furtherance of the constitutional right to organise, trade unions and employers' organisations have the freedom to build their structures for purposes of representing the interests of their members, collect union dues, organise trade union meetings, permit workers or employees to be represented by trade union officials, protect workers from dismissal, and have access to the premises of an employer, among others.[87] According to Cooper, "as far as trade unions are concerned, this right embraces the recruiting of members, the granting of stop-order facilities, the right of union representatives to fulfil their duties, and access to the necessary information to ensure that bargaining is meaningful".[88] Organisational rights are not automatically conferred on trade unions. A trade union must be registered and recognised before being entitled to organisational rights. The law places the burden on the trade union to formally write to an employer to express its intention to seek organisational rights and in what workplaces.[89]

In many jurisdictions, there are measures to strike a balance between trade unions' right to organise and certain rights of employers such as the right to privacy.[90] The right to organise enables the operations of trade unions and employers' organisations. Without this right, members of trade unions are potentially exposed to employer coercion, employer's possible interference or influence on workers or employees to become members of trade unions. Exposing trade union members to such employer influence has a snowball effect on the extent to which trade union members can be protected against unfair dismissal and collective bargaining. In South Africa, organisational rights permit trade unions to access the workplace or employer's premises, elect representatives, enforce the disclosure of information, and the liberty to deduct trade union subscriptions or dues, among others.[91] Even though trade unions have the foregoing organisational rights, the *LRA* attempts to balance such freedom with other rights of employers such as the right to privacy.[92] Considering that, in South Africa, the right to organise is an exclusive right

85 The ILO Freedom of Association and Protection of the Right to Organise Convention 87 of 1948. See also von Potobsky 1998:195; Charnovitz 2008:90-107; Ewing 2021:308-311.
86 See, for instance, The Right to Organise and Collective Bargaining Convention 98 of 1949:Art .1.
87 *LRA*:Ch. III.
88 Du Toit 2015:Ch. 53.
89 Grogan 2014:384.
90 See, for instance, *LRA*:secs. 7, 12, 16.
91 *LRA*:secs. 12 and 16.
92 *LRA*:Ch. III.

of trade unions and employer's organisations, the critical question is whether gig workers can collectively organise themselves within the framework of the *LRA*. The right of gig workers to join or form a trade union is a condition precedent to having the right for the said trade union to collectively organise. Since the right to organise is exclusively conferred on trade unions and employers' organisations, for gig workers to qualify for the right to organise, their employment status must first be determined in accordance with sec. 23(2) of the 1996 *Constitution of South Africa*. It is based on such classification that a trade union comprising gig workers can collectively organise themselves under South African law.

3.3 The right to engage in collective bargaining

Collective bargaining is an essential tool used by trade unions to ensure that workers can effectively challenge the powers of employers and advance the interests of workers.[93] According to the CC, fair industrial relations are predicated on effective collective bargaining.[94] The right to collective bargaining is constitutionally guaranteed under sec. 23(5) of the 1996 *Constitution of South Africa*. Sec. 23(5) provides that: "every trade union, employers' organisation and employer have the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1)". The import of sec. 23(5) is that individual workers do not have the right to engage in collective bargaining. Accordingly, the right can only be exercised collectively.[95] The nature of the right to engage in collective bargaining remains contentious. At the centre of the debate is whether the right to collective bargaining imposes negative and positive duties on parties to bargain. The positive duty refers to the duty of the state or employers (in this case, digital platform providers) to bargain. If a positive duty exists, whether such duty to bargain is legally enforceable. The negative duty mainly deals with the idea that the decision to bargain rests on the parties. Such a decision must be voluntary, autonomous, and devoid of interference.[96]

93 Grogan 2014:370-372; Botha 2015:329-330.

94 *National Union of Metalworkers of South Africa (NUMSA) and others v Bader Bop (Pty) Ltd and another* 2003 (3) SA 513 (CC) (hereinafter, *Bader Bop*):par.13.

95 Brassey & Abraham 1998:45.

96 In *South African National Defence Union v Minister of Defence & Others* 2004 (4) SA 10 (T) (*SANDU* III), the court held that the right to collective bargaining imposed a duty on the state as the employer to bargain collectively. According to the court, if the minister was not obligated to negotiate in good faith, the union would be deprived of any method of enforcing its right to engage in collective bargaining. For further assessment of the notion of a general duty to bargain, see *Buthelezi v Labour for Africa* (1991) 12 *ILJ* 588; *RTEAWU v Tedelex (Pty) Ltd* (1990) 11 *ILJ* 995 (LAC); *Bpk v FAWU* (1989) 10 ILJ 712 (IC); *SACTWU v Maroc Carpets and Textiles Mills (Pty) Ltd* (1990) 11 *ILJ* 1101 (IC). See also, Cheadle *et al*. 2002:18-27; Du Toit 2015:Ch. 53, p. 34; Cheadle & Davis 2005:147-155.

Proponents who favour the existence of a legally enforceable duty to bargain argue that a constitutional right must be interpreted broadly and generously.[97] They argue that, subject to certain limitations, the constitutional right to engage in collective bargaining should be interpreted in a way that protects all workers.[98] Adherents of this approach suggest that the broad and generous interpretation of the right to engage in collective bargaining ensures that workers who fall under the *LRA* and those who fall within the scope of other regulatory regimes will be protected.[99] Hence, interpreting the right to collective bargaining to impose a correlative duty on employers, the state or employer's organisation to bargain creates a springboard for a higher degree of protection for workers in both the public and private sectors to determine their conditions of employment. The *LRA* provides specific frameworks whereby collective bargaining can be effectively organised.

The *LRA* prescribes that trade unions, employers, and employers' organisations collectively bargain on matters of mutual interest.[100] It does not impose a positive or legally enforceable duty on an employer to bargain or negotiate. However, where an employer fails or refuses to bargain on matters of mutual interest, trade unions have recourse to embark on collective action such as strike action. The *LRA* requires that collective bargaining be orderly at sectoral levels.[101] In support of collective bargaining, the *LRA* provides for the establishment of bargaining councils and statutory councils, as well as the procedures for making collective bargaining outcomes binding on the parties.[102] Most significantly, the *LRA* provides for the advisory arbitration (before workers embark on strike), which can be used in situations where there is a dispute over the refusal of parties to bargain.[103] However, the nature of the award being advisory, parties are not under a legal obligation to abide by the arbitration award.[104]

However, compelling arguments have been advanced against the existence of a legally enforceable duty to bargain. Proponents in support of this argument suggest that sec. 23 of the 1996 *Constitution of South Africa* does not impose a legal obligation to bargain. According to the adherents against the existence of a legal duty to bargain, imposing such a duty will not conform with international standards and the possible rigidities that may be occasioned in the South African labour market. They argue that art. 4 of the ILO Right to Organise and Collective Bargaining Convention 98 of 1949 (hereinafter, the 'Collective Bargaining Convention') does not impose such legal duty and promotes the voluntariness of collective bargaining.

97 Du Toit 2015:Ch. 53, p. 36.
98 Du Toit 2015:Ch. 53, p. 36.
99 Du Toit 2015:Ch. 53, p. 36.
100 *LRA*:sec. 1(c)(i).
101 *LRA*:sec. 1(d)(ii).
102 *LRA*:secs. 27-39.
103 *LRA*:sec. 64(2).
104 Grogan 2014:413-414. See also *FAWU v Sam's Food (Grabouw)* (1991) 12 *ILJ* 1324 (IC).

Art. 4 of the Collective Bargaining Convention requires that "measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers/employer's organisations, and worker's organisations, with a view to the regulation of terms and conditions of employment by means of collective agreement".[105] The Collective Bargaining Convention is informed by two principles, namely bargaining must be voluntary and autonomous and without compulsion, and institutions of state or public institutions must implement measures that promote collective bargaining.[106] These two principles imply that the mechanisms instituted by public authorities must promote voluntary and free bargaining among the parties.[107] The freedom to voluntarily bargain reinforces the liberty of the parties to determine bargaining levels and topics without interference by government institutions or the law.[108] Other strands of arguments advanced by proponents against the legal duty to bargain are that determining the appropriate regime for collective bargaining is a matter of policy that the legislature should best determine.[109]

It is noteworthy that the *LRA* does not impose a positive duty on trade unions, employers, and employer's organisations to bargain.[110] This is because the *LRA* positively promotes collective bargaining at the industry level.[111] Imposing a positive duty to bargain largely undermines the industry-level bargaining, which is a critical policy underlying the *LRA*.[112] Generally, the point worth stressing is that there are compelling views against interpreting the right to collective bargaining as imposing a positive duty to bargain. Imposing a positive duty to bargain has the propensity of creating rigidities in the South African labour market. This, according to Cooper, has negative consequences on South Africa's ability to compete internationally.[113] Hence, a legal regime that enables the parties to determine the parameters of the bargaining and its outcomes is essential to obviate the rigidities in the South African labour market, which may become obsolete depending on prevailing social and economic conditions.[114]

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105 Collective Bargaining Convention:art. 4. See von Potobsky 1998:98; Gernigon *et al.* 2000:36; Boonstra 2004:445-464; Vettori 2005:382. According to Davis *et al.*, the duty or obligation to bargain is not an aspect of the right to collective bargaining under key international instruments of the ILO. According to the authors, "[t]his obligation has been glossed by the Committee on Freedom of Association. The Committee states, in its digest of decisions, that collective bargaining if it is to be effective, must assume a voluntary character and not entail a recourse to measures of compulsion which would alter the voluntary nature of such bargaining." See Davis *et al.* 1997:390.

106 ILO 1994:235.

107 ILO 1994:235.

108 ILO 1994:235.

109 Du Toit 2015: Ch. 53, p. 41.

110 Molusi 2010:156-161.

111 Molusi 2010:156-161.

112 Cheadle & Davis 2005:18-29. For a general discussion on industry-level bargaining and its effects, see Vettori 2001:342; Magruder 2012:138-166.

113 Du Toit 2015:Ch. 53, p. 42.

114 Du Toit 2015:Ch. 53, p. 42.

From the foregoing, the preponderant view in South Africa regarding the right to collective bargaining is that such a right does not impose a correlative positive duty on an employer or employer's organisation to bargain. This accord with international standards promotes autonomy and freedom of parties to bargain collectively. The voluntary recognition of collective bargaining means that parties must be free to organise their affairs without interference. The voluntary dimension of collective bargaining implies that negotiating parties are not compelled to negotiate or bargain. An employer or employer's organisation is, therefore not under any legal duty to bargain. Suffice it to say where the party is a registered and representative union and there is refusal to bargain, a bargaining dispute may arise.[115] A dispute arising from a refusal to bargain must be referred to the CCMA and, if such negotiation fails, the dispute must be referred for advisory arbitration.[116] The advisory arbitration is not binding on a party. However, depending on the market forces and the strength of the union in terms of its numbers, the claims against an employer can be pressed through collective action such as strikes.

3.4 The right to strike

The right to strike is an essential tool used by workers and worker's organisations to protect, defend, and advance their interests.[117] One of the practical manifestations of freedom of association and collective bargaining is through collective action such as strikes. The right to strike is "one of the essential means through which workers and their organisations may promote and defend their economic and social interests".[118] These interests include workers or trade unions seeking better working conditions and pursuing demands that relate to the occupation of their members, social and economic concerns, and labour market problems that directly impact on workers.[119] Strike action is also essential in advancing the dignity of employees.[120] In *National Union of Metal Workers of South Africa (NUMSA) and others v Bader Bop (Pty) Ltd and others*,[121] the CC averred that the right to strike is

> both of historical and contemporaneous significance. In the first place, it is of importance for the dignity of workers who, in our constitutional order, may not be treated as coerced employees. Secondly, it is through industrial action that workers are able to assert their bargaining power in industrial relations. The right to strike is an important component of a successful bargaining system.[122]

115 *LRA*:sec. 64(2).
116 *LRA*:sec. 64(2).
117 Wass 2014:Ch. 25; Chicktay 2012:260-262; Tenza 2015:212-214; Subramanien & Joseph 2019:1-6; Hepple *et al.* 2015:67-84; Manamela & Budeli 2013:308-310.
118 International Labour Organisation Committee of Experts 1992:208. See also Hepple *et al.* 2015: 45-48; Bales & Garden 2020:270-279; Weiss 2009:262.
119 Manamela 2015:794-797.
120 Mufamadi & Letsiri 2022:116-117; Kalitz & Conradie 2013:128; Le Roux 2008:32.
121 *Bader Bop*. See also Van Eck & Newaj 2020:331.
122 *Bader Bop*:par. 13.

In terms of the scope of application of the right to strike, sec. 23(2)(c) of the 1996 *Constitution of South Africa* provides that "every worker has the right to strike".[123] The right to strike is individualised in the context that a strike action need not be in concert with other workers. The right to strike need not be for collective bargaining, as was the case in sec. 27(4) of the 1994 *Interim Constitution of South Africa*.[124] According to South African courts, fundamental human rights contained in the 1996 *Constitution of South Africa* should be construed broadly, unless there are express limitations to the same.[125] Hence, subject to some constitutional and legislative restrictions, the right to strike must be construed broadly. The right to strike operates within certain substantive and procedural bounds or parameters. Substantively, the *LRA* limits strike action if a collective agreement regulates the issues in contention.[126] Procedurally, the *LRA* requires that specific procedures be followed before workers can embark on a legitimate strike. The *LRA* requires that prior conciliation and a 48-hour warning be provided.[127] This procedural requirement ensures that a strike action becomes a weapon of last resort. For instance, workers can resort to a strike action in situations where an employer or an employer's organisation fails to agree to bargain over matters of mutual interests.

Flowing from the above, the question is whether the scope and meaning of the constitutional right to strike under sec. 23(2)(c) can be extended to gig workers in South Africa. That is, whether gig workers in South Africa can embark on strike action within the meaning of sec. 23(2)(c) of the 1996 *Constitution of South Africa*. The authors submit that the right to strike under sec. 23(2)(c) of the 1996 *Constitution of South Africa* is a weapon that gig workers can use to advance their social and economic interests, especially in terms of demanding better working conditions from digital platform providers. Since it has been established that the term 'worker' in the 1996 *Constitution of South Africa* is an all-encompassing term to capture working relationships that are akin to employment relationships, the very nature of gig employment mirrors or is akin to the employment relationship (discussed in the previous sections). Hence, gig workers are, as a matter of right, entitled to use the lever of strike to demand better working conditions. Even though gig workers have the right to strike, the said industrial action must comply with the substantive and procedural requirements.

123 1996 *Constitution of the Republic of South Africa*:sec. 23(2)(c).
124 *Interim Constitution of the Republic of South Africa* of 1994, Act 200/1993:sec. 27(4).
125 *Chemical Workers Industrial Union* (1999) 20 ILJ 321 (LAC). In *S v Zuma and others* 1995 (2) SA 642, the CC highlighted the need to interpret fundamental rights generously or broadly rather than legalistically.
126 *LRA*:sec. 65(1).
127 *LRA*:sec. 64(1).

4. ACCOMMODATING GIG WORKERS IN SOUTH AFRICA'S COLLECTIVE LABOUR LAW REGIME

The 1996 *Constitution of South Africa*'s adoption of the term 'worker' in sec. 23, coupled with the broad and purposive construction by the CC, gives room for statutory labour rights to be conferred on individuals whose working relationships are akin to the employment relationship. The purposive and broad construction of workers to encapsulate persons in working relationships akin to employment relationships serves as a conveyor belt in ensuring that persons in precarious and vulnerable employment are protected within the contours of the law. Ascertaining whether a person is in a working relationship akin to an employment relationship is to determine whether the said working relationship exudes certain critical features such as economic dependence, subordination, control by an employer, integration of the worker into the business of an employer, mutuality of obligations in the context that the employer is under a duty to provide work and remunerate the worker, among other tests developed under common law to determine and distinguish an employee from an independent contractor. Gig workers, by their working contract, are designated as independent contractors by digital platform providers.

However, as discussed earlier, courts in many jurisdictions are adopting a broad and purposive approach to construe working contracts in a manner that the mere designation of a person as an independent contractor does not detract them from ascertaining the actualities surrounding the said contract. Ascertaining the actual realities or working relationship shows that, even though gig workers in many jurisdictions have been contractually designated as independent contractors, their working relationship can be characterised by control by digital platform providers. Accordingly, the working arrangement of gig workers is akin or analogous to an employment relationship. Again, the purposive and broad construction is very important since gig workers need not necessarily be pronounced as employees under the laws of South Africa to enjoy collective labour rights. The enjoyment of collective labour rights should be predicated on whether a particular working relationship mirrors an employment relationship, for all intent and purposes, and not necessarily about whether gig workers are employees under South African law.

A purposive construction of the working relationship of gig workers as an employee-like relationship is significant, as it serves as a legal basis for some categories of self-employed persons and independent contractors to enjoy statutory labour rights, particularly collective labour rights. The broad construction of the term 'worker' is a vital propellor to ensure that contractual mischaracterisation does not deprive certain categories of workers of enjoying statutory labour rights, particularly the right to join and form a trade union, the right to engage in collective bargaining, trade union's right to enjoy organisational rights, and the right to use the levers of collective action such as strikes to demand better working conditions. Considering that gig workers can enjoy collective labour rights under sec. 23 of the 1996 *Constitution of South Africa*, the obvious question is how much such construction will

impact on the bounds of collective bargaining under South African law. This article submits that extending collective labour rights to include persons in employee-like relationships meets the original intention of the framers of the 1996 *Constitution of South Africa* to ensure that persons, whose working relationship may be precarious and vulnerable, can find solace in the collective labour rights to demand higher protection from an employer.

The article argues that the broad and purposive interpretation ascribed to sec. 23 of the 1996 *Constitution of South Africa* by the CC is fit of addressing any potential gap that may be created by the emerging forms of employment to enjoy collective labour rights. Any gap created by emerging forms of employment, particularly those working relationships that can be construed as akin to employment relationships can be addressed under sec. 23 of the 1996 *Constitution of South Africa*. Hence, extending collective labour rights to gig workers does not alter the current legal framework in South Africa but only fulfils the intention of the framers of the 1996 *Constitution of South Africa* and pronouncements by the CC that contractual mischaracterisation must not deprive certain categories of workers of enjoying collective labour rights, and thereby plunge their working relationship into a circus of precarity and vulnerability.

Extending collective labour rights to include self-employment individuals such as gig workers does not impact on the parameters of collective bargaining. Writing in the context of the UK and European law, Bogg avers that extending collective labour rights to include self-employed individuals does not disrupt the bounds of collective bargaining but only ensures that labour protection is extended to include employee-like relationships. Bogg avers that

> the extension of the boundary of collective labour law through employee-like intermediate categories does not disrupt the basic parameters of labour law as protecting subordinate and dependent labour. Rather, it is realigning the boundaries to ensure that new forms of employee-like self-employment are brought within the scope of existing collective bargaining protections. This scope of boundary re-alignment is a smarter fit with the standard normative justifications for an autonomous discipline of labour law.[128]

Contextually, in South Africa, the constitutional framework permits the laws to accommodate individuals whose working relationships are akin to an employment relationship.

5. CONCLUDING REFLECTIONS

This article sought to reflect on the collective bargaining rights of gig workers in South Africa. It briefly discussed the employment status of gig workers in South Africa. The contribution is reflected on pronouncements by courts and academic texts on the need to conceive labour arrangements purposively and not merely on the contract between the parties. This article argued that the 1996 *Constitution of South Africa* could accommodate gig workers to form

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trade unions, collectively organise, and collectively bargain. In addition, the article suggested that the current legal framework on collective labour should be construed broadly and purposively to encompass working relationships akin to the employment relationship (worker-employer relationship). The article suggested that such legal construction will go a long way to ensure that the mere contractual designation of gig workers as independent contractors does not deprive them of enjoying or claiming collective labour rights in South Africa. It suggested that the current constitutional framework is sufficient to accommodate gig workers in terms of collective bargaining, the right to organise, the liberty to form and join a trade union, and the right to embark on collective action such as strikes.

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