FACULTY OF LAW

Collective bargaining in the digital platform economy

A mini-thesis submitted in partial fulfilment of the requirements for the LLM degree

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Declaration

I declare that Collective bargaining in the digital platform economy, is my own work, and that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by means of complete references.

Signature: Date: 16 November 2022

LIST OF ABBREVIATIONS AND ACRONYMS

AMT	Amazon Mechanical Turk
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
CFA	Committee on Freedom of Association
Committee of Experts	Committee of Experts on the Application of Conventions and Recommendations
Competition Act	Competition Act 89 of 1998
Constitution	Constitution of the Republic of South Africa, 1996
Convention 87	Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)
Convention 98	Right to Organise and Collective Bargaining Convention, 1949 (No. 98)
Convention 154	Collective Bargaining Convention, 1981 (No. 154)
IG-Metall	German Metalworkers' Union
ILO	International Labour Organisation
IWGB	Independent Workers Union of Great Britain
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act 66 of 1995
NMWA	National Minimum Wage Act 9 of 2018
TES	Temporary employment service
UK	United Kingdom

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CHAPTER 1

INTRODUCTION

1.1 BACKGROUND TO THE PROBLEM

Collective bargaining is a process in which collective negotiation takes place between an employer and groups of employees who are represented by trade unions with conflicting interests seeking to reach an agreement.[1] Collective bargaining is 'collective' in the sense that it cannot take place on an individual basis between an employer and an individual employee but rather between an employer and groups of employees that are represented by trade unions or trade union federations.[2] The collective nature of collective bargaining is only necessary on the side of employees and a single employer can be a party to the bargaining process.[3]

Labour law has always been premised on standard employment.[4] Standard employment refers to work that is 'full time, indefinite, as well as part of a subordinate and bilateral employment relationship'.[5] There has been a shift from standard employment to non-standard employment.[6] There is no particular definition for non-standard employment.[7] According to Hendrickx, non-standard employment 'potentially encompassed all kinds of work situations falling outside the standard reference'.[8] The reasons for the development of the different forms of non-standard employment are diverse, including factors such as globalisation and technological advancements which resulted in employers restructuring their businesses by establishing flexible work arrangements to remain competitive.[9]

[1] Godfrey S, Maree J, Du Toit D et al *Collective Bargaining in South Africa: Past, Present and Future?* (2010) 1.
[2] Anstey M, Grogan J & Ngcukaitobi T *Collective Bargaining in the Workplace* (2011) 50.
[3] Anstey M, Grogan J & Ngcukaitobi T (2011) 48.
[4] Du Toit D & Howson K 'Protecting platform workers: Options and challenges' (2022) 43 *ILJ* 721.
[5] International Labour Organisation *Non-standard Employment Around the World: Understanding Challenges, Shaping Prospects* (2016) 7.
[6] Holzapfel V & van Staden M 'The protection of employees in fixed-term contracts in South Africa and Germany' (2020) 1 *TSAR* 49.
[7] International Labour Organisation *Non-standard Employment Around the World: Understanding Challenges, Shaping Prospects* (2016) 7; De Stefano V 'The rise of the "just-in-time workforce": On-demand work, crowdwork and labour protection in the "gig-economy"' (2016) International Labour Office Part 71 of the Conditions of Work and Employment Series 7.
[8] Hendrickx F 'Regulating new ways of working: From the new 'wow' to the new 'how'' (2018) 9 *European Labour Law Journal* 201.
[9] Holzapfel V & van Staden M (2020) 49.

Platform work is part of the changing world of work.[10] Technological advances are the reason for the emergence of platform work.[11] Platform work is not performed the same way as work in standard employment.[12] It is against this brief background that the study investigates to what extent platform workers can bargain collectively in South Africa.

1.2 PROBLEM STATEMENT

South Africa like many other countries, has been confronted by globalisation and technological advancements.[13] The advancement of technology has changed how labour is executed.[14] The global COVID-19 pandemic has resulted in the increased usage of technology for purposes such as studying, working, purchasing and selling of goods and services.[15]

The digital platform economy creates work for people globally and in South Africa.[16] Platform workers are excluded from the protection of labour law due to being classified as independent contractors or self-employed workers.[17] Self-employed workers are defined as 'individuals who enter into an individual relationship with clients'.[18] Platform workers find it difficult to bargain collectively.[19] Platform workers are deprived of decent working conditions.[20] In light of these realities, the mini-thesis examines to what extent platform workers can bargain collectively in South Africa.

[10] Mokofe WM & van Eck S 'Reflections on marginalised workers and the role of trade unions in the changing world of work' (2021) 42 *ILJ* 1365.
[11] Berg J, Furrer M, Harmon E et al *Digital Labour Platforms and the Future of Work: Towards Decent Work in the Online World* (2018) International Labour Office 1.
[12] Hendrickx F (2018) 198.
[13] Malherbe K, Mokoena K & Du Toit D '"Revolutionary change in technology" must be translated into labour law' (2019) 4 *International Association of Labour Law Journals* 182.
[14] Cherry MA 'Beyond misclassification: The digital transformation of work' (2016) 37 *Comp. Lab. L. & Pol'y J.* 577.
[15] International Labour Organisation *Global Employment Trends for Youth 2022: Investing in Transforming Futures for Young People* (2022) 118.
[16] Du Toit D, Fredman S, Bhatia G et al *Code of Good Practice for the Regulation of Platform Work in South Africa* (2020) Fairwork 12.
[17] Mokofe WM & van Eck S (2021) 1373.
[18] Heiland H *Workers' voice in platform labour- an overview* (2020) Institute of Economic and Social Research (WSI) of the Hans-Bockler-Foundation 18.
[19] De Stefano V 'The rise of the "just-in-time workforce": On-demand work, crowdwork and labour protection in the "gig-economy"' (2016) International Labour Office Part 71 of the Conditions of Work and Employment Series 11.
[20] Du Toit D, Fredman S, Bhatia G et al *Code of Good Practice for the Regulation of Platform Work in South Africa* (2020) Fairwork 5.

1.3 SIGNIFICANCE OF THE PROBLEM

Collective bargaining is an important process that employers and groups of employees with competing interests use to reach an agreement.[21] Trade unions play an essential part in helping employees engage collectively with employers in the workplace.[22] The institution of collective bargaining promotes human dignity and democracy.[23]

Given the significance of collective bargaining and that platform work is a new way of working, this mini-thesis examines the functions of collective bargaining in the digital platform economy and whether collective bargaining can be a useful tool to promote decent working conditions for platform workers.

1.4 RESEARCH QUESTION

The research question of the mini-thesis is: What is the appropriate legislative framework in South Africa to promote and regulate collective bargaining rights of digital platform workers?

1.5 OBJECTIVES OF THE MINI-THESIS

The objectives of the mini-thesis are to:

a) Provide a theoretical framework on traditional collective bargaining.
b) Examine the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) to determine whether platform workers can fall within the scope of these conventions and to determine whether the International Labour Organisation's (ILO) Decent Work Agenda can apply to platform workers. If so, to examine the regulation of collective bargaining in South African to establish whether national law promotes and protects collective bargaining rights of platform workers.
c) Analyse to what extent the prerequisites of collective bargaining are eroded by platform work.
d) Investigate some of the strategies that have been adopted to improve the working conditions of platform workers, to identify which of the strategies are feasible in

[21] Grogan J *Collective Labour Law* 2 ed (2014) 126.
[22] Barnard J & Botha MM 'Trade unions as suppliers of goods and services' (2018) 30 *SA Merc LJ* 218; Atzeni M 'Workers' organisation in precarious times: Abandoning trade union fetishism, rediscovering class' (2020) 11 *Global Labour Journal* 311.
[23] Report of the Director-General *Organising for Social Justice: Global Report Under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* (2004) Report I (B) International Labour Conference, 92nd Session para 2.

protecting and promoting the collective bargaining rights of platform workers and to determine whether any of these strategies are compatible with the international legislative framework for collective bargaining and the legislative framework for collective bargaining in South Africa.

e) Provide recommendations for legal reforms of South African labour legislation that may promote and regulate collective bargaining rights of platform workers.

1.6 LITERATURE SURVEY

Berg, Furrer, Harmon et al in *Digital Labour Platforms and the Future of Work: Towards Decent Work in the Online World*[24] analyse crowdwork, in particular microtask work. Berg, Furrer, Harmon et al examine the opportunities and disadvantages associated with crowdwork. The reasons for undertaking crowdwork and the various initiatives taken to improve the working conditions for crowdworkers are explored. However, the research is not focused on the impact of the digital platform economy in South African labour law.

De Stefano in 'The rise of the "just-in-time workforce": On-demand work, crowdwork and labour protection in the "gig-economy"'[25] examines platform work. De Stefano analyses the disadvantages of platform work. De Stefano addresses the risks associated with platform work in relation to fundamental rights such as collective bargaining; however, not specific to South African legislative framework.

Grogan in *Collective Labour Law*[26] analyses the regulation of collective bargaining in South Africa. Grogan examines the collective relationship between employers and trade unions and uses case law to interpret the law. The digital platform economy is not examined in the book.

Heiland in *Workers' voice in platform labour- an overview*[27] explores platform work. Heiland examines the difficulties of platform workers' voice and representation in the digital platform economy. Heiland investigates the alternative forms of workers' voice in the digital platform economy. The study examines the legal frameworks in Europe regarding the classification status of platform workers.

[24] Berg J, Furrer M, Harmon E et al (2018).
[25] De Stefano V 'The rise of the "just-in-time workforce": On-demand work, crowdwork and labour protection in the "gig-economy"' (2016) International Labour Office Part 71 of the Conditions of Work and Employment Series.
[26] Grogan J (2014).
[27] Heiland H (2020).

Johnston and Land-Kazlauskas in 'Organising on-demand: Representation, voice, and collective bargaining in the gig economy'[28] examine collective bargaining rights in the context of the digital platform economy. Johnston and Land-Kazlauskas address the problems platform workers face with regards to collective bargaining. The strategies that have been adopted to form collective representation in the digital platform economy are examined. The focus of the research is not on collective labour law in South Africa.

Katsabian in 'Collective action in the digital reality: The case of platform-based workers'[29] analyses platform work and the challenges of organising collectively in the digital platform economy. Katsabian explores new ways of organising collectively and the right of platform workers to join trade unions in terms of United Kingdom (UK) law.

The literature referred to above only focuses on collective bargaining in South Africa and not on the impact that the digital platform economy has on the collective bargaining rights of platform workers in South Africa. The literature addresses the transformation of work as a result of technological advancements but does not address the impact that platform work has on the collective bargaining rights of platform workers in South Africa. The mini-thesis aims to make a contribution towards the existing literature on collective bargaining and platform work. In doing so, the study focuses on collective bargaining in the digital platform economy and whether South African law promotes and protects collective bargaining rights of platform workers.

1.7 STRUCTURE OF THE MINI-THESIS

Chapter 2 provides a theoretical framework on traditional collective bargaining. The chapter establishes why collective bargaining is necessary in labour relations and defines collective bargaining. The functions of collective bargaining are analysed. The bargaining styles are explored. The nature and the legal effect of collective agreements are examined. In the chapter, the prerequisites for collective bargaining are analysed.

Chapter 3 examines the international legal framework for collective bargaining and the regulation of collective bargaining in South Africa. The chapter provides an overview of the ILO and analyses the ILO Declaration of Philadelphia and the Declaration on Fundamental Principles and Rights at Work. Conventions 87 and 98 are analysed. Benchmarks are drawn

[28] Johnston H & Land-Kazlauskas C 'Organising on-demand: Representation, voice, and collective bargaining in the gig economy' (2019) International Labour Office Part 94 of the Conditions of Work and Employment Series.
[29] Katsabian T 'Collective action in the digital reality: The case of platform-based workers' (2021) 84 *Modern Law Review*.

from the interpretation of Conventions 87 and 98 by the ILO supervisory bodies which are the Committee of Experts on the Application of Conventions and Recommendations (Committee of Experts) and the Committee on Freedom of Association (CFA). The recommendations of the CFA have only persuasive authority. The ILO's Decent Work Agenda is examined.

The chapter analyses the sections in the Constitution of the Republic of South Africa, 1996 (the Constitution) and the Labour Relations Act 66 of 1995 (LRA) relating to collective bargaining to determine whether national law promotes and protects collective bargaining rights of platform workers.

Chapter 4 analyses the erosion of collective bargaining by digital platform work. The chapter provides a conceptualisation of platform work and examines the advantages and disadvantages associated with platform work. An overview of the effect of non-standard employment on collective bargaining in the context of externalisation of work is provided. An examination of the obstacles to the representation of platform workers is presented and an investigation of the rights in the LRA that could potentially apply to platform workers is provided.

Chapter 5 explores some of the strategies that have been adopted to improve the working conditions for platform workers. The chapter examines which of the strategies that have been adopted are feasible in protecting and promoting the collective bargaining rights of platform workers and determines whether any of these strategies are compatible with the international legislative framework for collective bargaining and the legislative framework for collective bargaining in South Africa.

Chapter 6 provides the key research findings of the study. The chapter provides recommendations for legal reforms of South African labour legislation that may promote and regulate collective bargaining rights of platform workers.

1.8 METHODOLOGY

The mini-thesis adopts a desktop study research method. It consists of primary and secondary sources. The primary sources include cases, the Constitution and ILO Constitution, declarations, legislation, and treaties and conventions. The secondary sources consist of books, chapters in books, conference proceedings, discussion and working papers, internet references, ILO reports, journal articles and research reports.

1.9 DEFINITIONS

Platform worker: Throughout the mini-thesis reference is made to platform worker and platform work.[30] A platform worker can be defined as

> 'a person selected online from a pool of workers through the intermediation of a platform to perform personally on-demand short-term tasks for different persons or companies in exchange for income'.[31]

The term 'platform worker' is used irrespective of the nature and status of a platform worker's contract.[32] The term 'platform worker' is preferred over the term 'gig economy workers' because it is to avoid the idea that platform work is only created when it is necessary to provide a service to a random customer.[33]

[30] See 4.2 below.

[31] Schoukens P, Barrio A & Montebovi S 'The EU social pillar: An answer to the challenge of the social protection of platform workers?' (2018) 20 *European Journal of Social Security* 223.

[32] Graham M, Woodcock J, Heeks R et al 'The Fairwork Foundation: Strategies for improving platform work in a global context' (2020) 112 *Geoforum* 102.

[33] Fredman S & Du Toit D 'One small step towards decent work: *Uber v Aslam* in the Court of Appeal' (2019) 48 *ILJ* 260.

CHAPTER 2

THEORETICAL FRAMEWORK ON TRADITIONAL COLLECTIVE BARGAINING

2.1 INTRODUCTION

The objective of this chapter is to provide a theoretical framework on traditional collective bargaining. The research question is: What is the appropriate legislative framework in South Africa to promote and regulate collective bargaining rights of digital platform workers?

The chapter defines collective bargaining and examines why collective bargaining is an important part of labour relations. The functions of collective bargaining are examined. The two primary bargaining styles of collective bargaining are discussed. The nature and the legal effect of collective agreements are analysed. The prerequisites for a functioning collective bargaining system are examined.

2.2 THE UNEQUAL EMPLOYMENT RELATIONSHIP BETWEEN THE EMPLOYER AND THE INDIVIDUAL EMPLOYEE

The rationale for collective bargaining existing in labour relations is examined in this part. The individual employment relationship is between the employer and an individual employee and it is based on the common law contract of employment.[34] The law that regulates the individual employment relationship is known as 'individual labour law' or 'employment law'.[35] Individual labour law provides the rights of the parties and the duties that the parties to the employment relationship must fulfil.[36] Parties who enter into a commercial contract are understood to be equals in which they can negotiate their terms and come to an agreement.[37] However, this is not the case with an employment relationship for the reason that 'the relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power'.[38]

The inequality of power that exists in the individual employment relationship is a result of the employer's economic power and the fact that the individual employee is subordinate to the

[34] Rycroft A & Jordaan B *A Guide to South African Labour Law* 2 ed (1992) 8; Du Toit D 'Oil on troubled waters? The slippery interface between the contract of employment and statutory labour law' (2008) 125 *SALJ* 95.
[35] Grogan J *Workplace Law* 13 ed (2020) 321.
[36] Grogan J (2014) 2.
[37] Fenwick C, Kalula E & Landau I 'Labour law: A Southern African perspective' (2007) International Institute for Labour Studies Part 180 of the Discussion Paper Series 22.
[38] Davies P & Freeland M *Kahn-Freund's Labour and the Law* 3 ed (1983) 18.

authority of the employer.[39] The employer has the power to provide lawful and reasonable instructions to an employee and if the employee fails to carry out such instructions, he or she may be guilty of insubordination.[40] The employer's authority to command and the subordination of employees to such authority is inherent in the employment relationship and without it the employment relationship cannot exist.[41]

Employers can determine who they want to hire to work for them and can decide how much they are willing to pay for the labour of employees.[42] There are instances where individual employees such as highly skilled persons are able to negotiate their own terms with an employer.[43] However, individual employees usually do not enjoy bargaining power and either have to accept or reject the terms offered.[44]

The primary objective of labour law is understood to be 'a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship'.[45] In doing so, labour law provides a legal framework for employees to organise and bargain collectively.[46] The law that regulates the collective employment relationship is known as 'collective labour law'.[47] The rules of collective labour law are based on the fact that the employer and employees have different interests and goals even though they are connected by the business.[48] Therefore, it is submitted that collective bargaining is an important part of labour relations.

It is against this background that the next part defines collective bargaining as conceptual clarity is required for this chapter and the remaining chapters.

2.3 THE DEFINITION OF COLLECTIVE BARGAINING

Collective bargaining is a process that involves negotiation between an employer and groups of employees who are represented by a trade union organisation to reach an agreement on

[39] Rycroft A & Jordaan B (1992) 25; Du Toit D 'The right to equality versus employer 'control' and employee 'subordination': Are some more equal than others?' (2016) 37 *ILJ* 1; Grogan J *Employment Rights* 2 ed (2014) 76-7.
[40] Bosch C 'The implied term of trust and confidence in South African labour law' (2006) 27 *ILJ* 31.
[41] Davies P & Freeland M (1983) 18; Van Jaarsveld F & Van Eck S *Principles of Labour Law* 2 ed (2002) 21; Hendrickx F (2018) 200.
[42] Grogan J (2020) 36.
[43] Benjamin P 'Labour law beyond employment' 2012 *Acta Juridica* 22-3.
[44] Basson A, Christianson M, Garbers C et al *Essential Labour Law* 2 ed (2000) 2.
[45] Davies P & Freeland M (1983) 18.
[46] Du Toit D (2016) 19.
[47] Grogan J (2020) 321.
[48] Grogan J (2014) 2.

conflicting interests.[49] The Collective Bargaining Convention, 1981 (No. 154) defines collective bargaining as 'all negotiations which take place between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more workers' organisations, on the other, for-

a) determining working conditions and terms of employment; and/or
b) regulating relations between employers and workers; and/or
c) regulating relations between employers or their organisations and a workers' organisation or workers' organisations'.[50]

The collective nature of collective bargaining does not allow an individual employee to bargain collectively.[51] The term 'collective' in collective bargaining means that trade union organisations are the voice for employees.[52] Employers' organisations can act on behalf of employers in the bargaining process as they are important actors in collective bargaining.[53]

The part has defined collective bargaining as it contributes to understanding the concept for purposes of this mini-thesis. The next part examines the functions of collective bargaining.

2.4 THE FUNCTIONS OF COLLECTIVE BARGAINING

One of the main functions of collective bargaining is to regulate the terms and conditions of employment.[54] The institution of collective bargaining is mainly based on self-regulation as minimal interference by the law is required.[55] By engaging in the process of collective bargaining, the parties can negotiate their own terms and conditions of employment and come to an agreement that will govern their relationship.[56] As a self-regulatory process, there is a better chance for parties to adhere to the terms they have reached and to observe compliance at the workplace.[57] Collective bargaining allows for conformity and predictability of rules when collective agreements are established.[58]

[49] Anstey M, Grogan J & Ngcukaitobi T (2011) 47.
[50] Art 2, Convention 154.
[51] Basson AC, Christianson MA, Garbers C et al *The New Essential Labour Law Handbook* 6 ed (2017) 300.
[52] Nel PS, Kirsten M, Swanepoel BJ et al *South African Employment Relations: Theory and Practice* 8 ed (2016) 258-9.
[53] Anstey M, Grogan J & Ngcukaitobi T (2011) 47.
[54] Manamela ME 'Regulating workplace forums in South Africa' (2002) 14 *SA Merc LJ* 731.
[55] Albertyn CJ 'Freedom of association and the morality of the closed shop' (1989) 10 *ILJ* 986.
[56] Albertyn CJ (1989) 986.
[57] Hayter S & Ebisui M 'Negotiating parity for precarious workers' (2013) 5 *International Journal of Labour Research* 92.
[58] Finnemore M & Koekemoer GM *Introduction to Labour Relations in South Africa* 12 ed (2018) 234.

Collective bargaining aims to resolve labour disputes.[59] The parties can agree on institutionalised structures and processes through which conflict can be dealt with in a constructive and effective way to avoid unnecessary disputes.[60] The processes create the opportunity for negotiation to take place.[61] With negotiation comes a balance of power which is necessary in order to resolve disputes that occur in the workplace.[62]

Collective bargaining advances employee participation in the workplace regarding matters that affect employees' working lives.[63] It promotes 'democracy, labour peace and economic development'.[64]

As illustrated above, employers' organisations can be parties to the bargaining process.[65] Sectoral bargaining plays an important role in South African labour law.[66] It promotes fair competition by establishing comparable labour costs.[67]

The part has illustrated that collective bargaining fulfils various functions. The next part briefly addresses two bargaining styles.

2.5 BARGAINING STYLES

The two main bargaining styles are distributive and integrative bargaining.[68] Distributive bargaining occurs when employers and organised employees are in conflicting positions. The result of distributive bargaining is that one party's loss is regarded as a win for the other.[69] The unequal bargaining power in the employment relationship and the change in bargaining power is the essence of distributive bargaining.[70] The parties use a variety of power tactics in order to ensure that the result is in their favour for example, bluffing, or threats.[71] It involves

[59] Basson AC, Christianson MA, Garbers C et al (2017) 300; Cordova E 'A comparative view of collective bargaining in industrialised countries' (1978) 117 *International Labour Review* 426.
[60] Finnemore M & Koekemoer GM (2018) 233-4.
[61] Anstey M, Grogan J & Ngcukaitobi T (2011) 69.
[62] Cordova E (1978) 426.
[63] Finnemore M & Koekemoer GM (2018) 234.
[64] Finnemore M & Koekemoer GM (2018) 234.
[65] See 2.3 above.
[66] See 3.3.2 below.
[67] Godfrey S 'Multi-employer collective bargaining in South Africa' (2018) International Labour Office Part 97 of the Conditions of Work and Employment Series 1.
[68] Venter R 'Collective bargaining and organisational rights' in Venter R, Levy A, Bendeman H et al (eds) *Labour Relations in South Africa* 5 ed (2014) 422.
[69] Bendix S *Labour Relations: A Southern African Perspective* 6 ed (2015) 196.
[70] Venter R 'Collective bargaining and organisational rights' in Venter R, Levy A, Bendeman H et al (eds) *Labour Relations in South Africa* 5 ed (2014) 422.
[71] Bendix S (2015) 196 and 481; Lewicki RJ, Saunders DM & Minton JW *Essentials of Negotiation* 2 ed (2001) 54.

bargaining collectively about terms and conditions of employment such as wages. Distributive bargaining is common in South Africa.[72]

Integrative bargaining involves the parties finding joint solutions to solve their conflicting objectives. The parties strive for their opposing objectives to be integrated.[73] The fundamental purpose of integrative bargaining is that all parties win.[74]

As stated earlier in the chapter, collective bargaining is a process and the goal is to reach a collective agreement.[75] In this regard, the next part examines the nature and the legal effect of collective agreements concluded at different bargaining levels.

2.6 THE NATURE OF COLLECTIVE AGREEMENTS

The main purpose of bargain collectively is to conclude a collective agreement.[76] Collective bargaining can take place at different levels.[77] Plant level bargaining occurs between a single employer and a trade union or trade unions.[78] A trade union first has to approach an employer for recognition in order to bargain collectively on behalf of employees in particular bargaining unit.[79] A bargaining unit consists of groups of employees that a trade union bargains on behalf of with an employer.[80]

Once an employer recognises a trade union, the agreement reached between an employer and a trade union at a plant level is referred to as a recognition agreement.[81] A recognition agreement formalises the relationship between an employer and a trade union.[82] The parties have the freedom to structure their agreement as they see fit.[83] However, a recognition agreement usually contains bargaining rights, a negotiation procedure and a grievance procedure.[84] Recognition agreements generally 'do not regulate terms and conditions of employment but contain a procedure in terms of which terms and conditions of employment

[72] Nel PS, Kirsten M, Swanepoel BJ et al (2016) 266.
[73] Nel PS, Kirsten M, Swanepoel BJ et al (2016) 266.
[74] Lewicki RJ, Saunders DM & Minton JW (2001) 89.
[75] See 2.3 above.
[76] Van Jaarsveld F & Van Eck S (2002) 342.
[77] Finnemore M & Van Rensburg R *Contemporary Labour Relations* 2 ed (2002) 223.
[78] Grogan J (2014) 98.
[79] Bendix S (2015) 229; Grogan J (2020) 362.
[80] Bendix S *Labour Relations in Practice: A Hands-On Approach* 2 ed (2015) 75.
[81] Van Jaarsveld F & Van Eck S (2002) 349.
[82] Grogan J (2020) 362.
[83] Bendix S (2015) 229.
[84] Finnemore M & Koekemoer GM (2018) 273 and 276.

will be negotiated at a later date'.[85] Therefore, a recognition agreement may be regarded as a procedural agreement.[86] After a recognition agreement has been reached, negotiations regarding substantive matters may take place.[87] Substantive matters generally include terms and conditions of employment such as wages.[88] An agreement reached at a plant level can easily be change if changes need to be made.[89] Plant level bargaining allows for quick resolution of disputes.[90]

The aim of collective bargaining is to conclude a legal binding collective agreement.[91] Collective agreements can bind various parties.[92] A collective agreement is binding on the parties to the collective agreement and each party to the collective agreement and the members of every other party to the collective agreement to the extent that the provisions apply between such parties.[93] Furthermore, a collective agreement is binding on the members of a trade union and employers who are members of an employers' organisation that are party to the collective agreement if the collective agreement governs the terms and conditions of employment or if the collective agreement governs the conduct of employers and employees towards each other.[94] It is not required that every member of a trade union or every employer who is a member of an employers' organisation signs the collective agreement for it to be legally binding.[95]

Employees who are not members of a trade union or trade unions that are party to the collective agreement are bound by a collective agreement if the employees are identified in the collective agreement and if there are provisions in the collective agreement that expressly bind them and the trade union or trade unions represent the majority of employees in the

[85] Basson AC, Christianson MA, Garbers C et al (2017) 303.
[86] Nel PS, Kirsten M, Swanepoel BJ et al (2016) 272.
[87] Bendix S (2015) 230.
[88] Collier D, Fergus E, Cohen T et al *Labour Law in South Africa: Context and Principles* (2018) 346.
[89] Finnemore M & Van Rensburg R (2002) 231.
[90] Bendix S *Labour Relations in Practice* (2015) 76.
[91] Venter R 'Collective bargaining and organisational rights' in Venter R, Levy A, Bendeman H et al (eds) *Labour Relations in South Africa* 5 ed (2014) 424.
[92] Collier D, Fergus E, Cohen T et al (2018) 347.
[93] Section 23(1)*(a)-(b)*, LRA.
[94] Section 23(1)*(c)*(i)-(ii), LRA.
[95] Todd C *Collective Bargaining Law* (2004) 84.

workplace.[96] The extension of a collective agreement provided in section 23(1)*(d)* of the LRA only applies to plant level bargaining.[97]

A collective agreement is binding on the members of a trade union and employers who are members of an employers' organisation that are party to the collective agreement for the whole period of the collective agreement. It applies to each individual who was a member at the time the collective agreement became binding or who becomes a member after the collective agreement became binding whether or not such an individual continues to be a member of the trade union or a member of an employers' organisation for the whole period of the collective agreement.[98] Even if an employer who is a member of an employers' organisation resigns from the employer's organisation or an employee who is a member of a trade union resigns from the trade union, the collective agreement will still be legally binding on such an employer or employee until the collective agreement ends.[99] The purpose of collective bargaining would be undermined if every person who is a member of a trade union or employer's organisation decides not to be bound by the collective agreement.[100]

Sectoral level bargaining involves negotiation between one or more trade unions and employers' organisations from a certain industry.[101] Once a trade union's membership grows in a particular industry, a trade union may want to bargain at a sectoral level.[102] The reason for bargaining at a sectoral level is to ensure uniform terms and conditions of employment in a certain industry.[103] The primary bargaining forum at a sectoral level is a bargaining council.[104] A substantive agreement is concluded by a bargaining council and is usually detailed as it applies to a whole industry.[105]

There are certain provisions that apply to collective agreements concluded in bargaining councils.[106] A collective agreement reached by a bargaining council, subject to the extension

[96] Section 23(1)*(d)*(i)-(iii), LRA.
[97] Khumalo B 'Extension of collective agreements in terms of section 23 (1) (d) of the LRA and the "knock on effect" on the right to strike: *AMCU v Chamber of Mines of South Africa* CCT87/16 [2017]' (2018) 51 *De Jure* 329.
[98] Section 23(2), LRA.
[99] Du Toit D, Godfrey S, Cooper C et al *Labour Relations Law: A Comprehensive Guide* 6 ed (2015) 314.
[100] Todd C (2004) 84.
[101] Grogan J (2020) 368.
[102] Basson AC, Christianson MA, Garbers C et al (2017) 303.
[103] Venter R 'Collective bargaining and organisational rights' in Venter R, Levy A, Bendeman H et al (eds) *Labour Relations in South Africa* 5 ed (2014) 422.
[104] Grogan J (2014) 150.
[105] Bendix S (2015) 230.
[106] Du Toit D, Godfrey S, Cooper C et al (2015) 319.

of a collective agreement and the constitution of a bargaining council, binds the parties to the bargaining council who are parties to the collective agreement.[107] It binds every party to the collective agreement and the members of every other party to the collective agreement to the extent that the provisions of the collective agreement apply between every party and the members of every other party.[108] A collective agreement concluded by a bargaining council binds the members of a trade union and the employers who are members of an employers' organisation that are party to the collective agreement if the collective agreement governs the terms and conditions of employment or if the collective agreement governs the conduct of the employers and employees towards each other.[109]

The purpose of extending a collective agreement at a sectoral level is mainly to avoid unfair competition in a sector. The collective bargaining process will be undermined if employers are permitted to provide different terms and conditions at a sectoral level.[110] If a bargaining council wants to extend a collective agreement reached by it to a non-party that falls within its registered scope, the bargaining council may ask the Minister in writing to extend the collective agreement to such a non-party.[111] A request for an extension may be made if one or more trade unions whose members constitute the majority of the members of the trade unions that are party to the bargaining council and one or more employers' organisations whose members employ the majority of the employees employed by the members of the employers' organisations that are party to the bargaining council vote in favour of the extension.[112]

The nature and the scope of application of collective agreements at different bargaining levels were discussed. The main agents that are required for collective bargaining to be functional are employers or employers' organisations and trade unions or trade union federations.[113] The following part examines freedom of association, organisational rights, and strike action as prerequisites for the effective functioning of a collective bargaining system.[114]

2.7 THE PREREQUISITES FOR COLLECTIVE BARGAINING

Grant states that freedom of association involves 'the notion that individuals will be free to convene with others who have similar goals, free from unwarranted interference to achieve

[107] Section 31*(a)*, LRA.
[108] Section 31*(b)*, LRA.
[109] Section 31*(c)*(i)-(ii), LRA.
[110] Du Toit D, Godfrey S, Cooper C et al (2015) 320.
[111] Section 32(1), LRA.
[112] Section 32(1)*(a)-(b)*, LRA.
[113] Grogan J (2014) 37.
[114] Barnard J & Botha MM (2018) 220.

these common goals'.[115] Freedom of association enables employees and employers to form or join any organisation to act on their behalf and promote their interests.[116] The concept of freedom of association involves the choice of an individual not to associate with anyone or any organisation.[117] Katsabian is of the view that freedom of association is related to human dignity, equality and democracy which is a crucial tool in giving employees a voice in matters that concern their working lives.[118] Therefore, in order to bargain collectively freedom of association is required.[119]

Traditionally, the Industrial Court in South Africa placed a duty on employers to bargain in good faith.[120] It meant that employers were obliged to bargain collectively and had to confer organisational rights to trade unions.[121] The duty to bargain provided support to trade unions who were in a weaker position.[122] In certain instances it was deemed unfair labour practices for employers to refuse to bargain collectively with organised labour. In the event that an employer refused to bargain collectively, trade unions had the option to approach the Industrial Court for a court order to demand an employer to bargain.[123]

There is no longer a duty on an employer to bargain collectively.[124] Currently, there are various organisational rights for trade unions to help them gain sufficient bargaining power to convince an employer to bargain collectively.[125] The law only provides a legal framework for collective bargaining rights and it is up to the parties to decide how the bargaining process should be concluded.[126] Snyman notes that, 'organisational rights are not an end in themselves but a means to an end'.[127] Trade unions need organisational rights to exist.[128]

[115] Grant B 'In defence of majoritarianism: Part 2- majoritarianism and freedom of association' (1993) 14 *ILJ* 1147.
[116] ILO *Quick Guide on Sources and Uses of Collective Bargaining Statistics* (2018) 5; Theron J 'Non-standard work arrangements in the public sector: The case of South Africa' (2014) International Labour Office Working Paper 302 17; Du Plessis JV & Fouche MA *A Practical Guide to Labour Law* 9 ed (2019) 255.
[117] Todd C (2004) 13.
[118] Katsabian T (2021) 1008.
[119] Mokofe WM & van Eck S (2021) 1375-6.
[120] Du Toit D, Godfrey S, Cooper C et al (2015) 250.
[121] Steenkamp A, Stelzner S & Badenhorst N 'The right to bargain collectively' (2004) 25 *ILJ* 951.
[122] Du Toit D 'Industrial democracy in South Africa's transition' (1997) 1 *Law, Democracy & Development* 44.
[123] Du Toit D (1997) 44.
[124] Godfrey S, Maree J, Du Toit D et al (2010) 20-1.
[125] Du Toit D, Godfrey S, Cooper C et al (2015) 250; Fergus E 'The disorganisation of organisational rights- recent case law and outstanding questions' (2019) 40 *ILJ* 689.
[126] Grogan J (2020) 324-5.
[127] Snyman S 'The principle of majoritarianism in the case of organisational rights for trade unions- is it necessary for stability in the workplace or simply a recipe for discord?' (2016) 37 *ILJ* 868.
[128] Van Eck S & Newaj K 'The Constitutional Court on the rights of minority trade unions in a majoritarian collective bargaining system' (2020) 10 *Constitutional Court Review* 336.

Strike action is a means to balance the power in labour relations.[129] Du Plessis and Fouche regard strike action as the ultimate weapon organised employees can use against their employer.[130] It usually is the last resort when employees force an employer to concede to their demands by withholding their labour.[131] Collective bargaining without the ability to take strike action amounts to collective begging.[132] Therefore, strike action is essential and is a prerequisite for the institution of collective bargaining.[133]

2.8 CONCLUSION

The chapter has shown that the rationale for collective bargaining existing stems from the need to address the inequality in the individual employment relationship.[134] The nature and the legal effect of collective agreements were examined. The collective bargaining process requires an employer or an employers' organisation and a trade union to work.[135] It was shown that collective bargaining cannot function without freedom of association, organisational rights, and strike action.[136]

An examination regarding the regulation of the prerequisites for collective bargaining is required. In this regard, the following chapter examines the international legal framework regarding collective bargaining and the regulation of collective bargaining in South Africa.

[129] Finnemore M & Koekemoer GM (2018) 339.
[130] Du Plessis JV & Fouche MA (2019) 291.
[131] Levy A 'Industrial action' in Venter R, Levy A, Bendeman H et al (eds) *Labour Relations in South Africa* 5 ed (2014) 532.
[132] Du Toit D 'Corporatism and collective bargaining in a democratic South Africa' (1995) 16 *ILJ* 790.
[133] Khumalo B (2018) 329.
[134] See 2.2 above.
[135] See 2.6 above.
[136] See 2.7 above.

CHAPTER 3

THE INTERNATIONAL LEGAL FRAMEWORK FOR COLLECTIVE BARGAINING AND THE REGULATION OF COLLECTIVE BARGAINING IN SOUTH AFRICA

3.1 INTRODUCTION

Chapter 2 provided a theoretical framework on collective bargaining as it provides a foundation for understanding the discussion on collective bargaining in chapter 3 and the following chapters. The chapter addresses the international legal framework for collective bargaining.[137] The chapter briefly introduces the ILO and addresses the ILO Declaration of Philadelphia and the Declaration on Fundamental Principles and Rights at Work.

Thereafter, two of the ILO standards which are Conventions 87 and 98 are discussed. South Africa is a member state of the ILO, and has ratified Conventions 87 and 98 on 19 February 1996.[138] The interpretations of Conventions 87 and 98 by two of the ILO supervisory bodies namely the Committee of Experts and the CFA are incorporated into the discussion. Although the recommendations of the CFA have only persuasive authority, it is necessary to refer to the Committee of Experts and CFA's interpretations of Conventions 87 and 98 to illustrate the relevance of the two conventions to new forms of work. In addition, certain benchmarks are drawn from the interpretation of collective bargaining rights by the ILO committees.

A brief discussion on the ILO's Decent Work Agenda is included as it demonstrates the importance of ensuring decent work for all workers including workers in new forms of work such as platform workers particularly in relation to collective bargaining.

The chapter focuses on the regulation of collective bargaining in South Africa.[139] The research question of the mini-thesis is: What is the appropriate legislative framework in South Africa to promote and regulate collective bargaining rights of digital platform workers? In order to answer the research question, the objective of part 3.3 of this chapter is to examine the sections in the Constitution and the sections in the LRA to determine whether national law promotes and protects collective bargaining rights of platform workers. The objective is

[137] See 3.2 below.

[138] ILO 'Member states' https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/member-states/lang--en/index.htm (accessed 30 June 2021) and ILO 'Ratifications for South Africa' https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102888 (accessed 30 June 2021).

[139] See 3.3 below.

achieved by stating and interpreting the law that regulates collective bargaining in general. Whether the collective bargaining rights as stated in LRA can apply to platform workers is discussed in chapter 4.

3.2 THE INTERNATIONAL LEGAL FRAMEWORK FOR COLLECTIVE BARGAINING

International law plays an important role in South African law.[140] It is reflected in section 39(1)*(b)* of the Constitution which stipulates that courts must take international law into account when interpreting the Bill of Rights.[141] In addition, section 233 of the Constitution provides that:

> 'When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.'[142]

Public international law consists of binding and non-binding law and courts in South Africa may use international labour standards as 'tools of interpretation'.[143]

3.2.1 The International Labour Organisation

The ILO was established in 1919 and is tripartite in nature.[144] The ILO aims to advance social justice and humane working conditions globally.[145] In regard to social justice, the ILO states that:

> 'The aspiration for social justice, through which every working man and woman can claim freely and on the basis of equality of opportunity their fair share of the wealth that they have helped to generate, is as great today as it was when the ILO was created in 1919. …[T]he importance of achieving social

[140] *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) para 97.
[141] Section 39(1)*(b)*, Constitution.
[142] Section 233, Constitution.
[143] *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC) para 35.
[144] ILO 'History of the ILO' https://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm (accessed 12 February 2021). The ILO consists of representatives of member states, employers, and workers; see Dahan Y, Lerner H & Milman-Sivan F 'Shared responsibility and the International Labour Organisation' (2013) 34 *Michigan Journal of International Law* 693.
[145] ILO Constitution.

> justice is ever more pressing, with the rise in inequality and exclusion, which is a threat to social cohesion, economic growth and human progress.'[146]

The ILO's primary function is to establish international labour standards which can occur through conventions or recommendations.[147] Conventions are binding international treaties that may or may not be ratified by member states of the ILO.[148] When a member state ratifies a convention, the member state has an obligation to ensure that the provisions of the convention are applied in national law.[149]

With regards to South Africa, the national executive has the responsibility to negotiate and sign international agreements.[150] The President is the head of state and the head of the national executive which may be granted the power to conclude international agreements.[151] However, the President has a duty to 'act in a collaborative manner' when exercising such power.[152] According to section 231(2) of the Constitution, an international agreement only becomes binding upon South Africa after the international agreement has been accepted by the National Assembly and the National Council of Provinces subject to section 231(3) of the Constitution.[153] Section 231(3) of the Constitution provides that

> '[a]n international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time'.[154]

Once an international agreement has been enacted into law by way of national legislation, the international agreement becomes law in South Africa.[155] Section 231(4) of the Constitution further provides that in regard to an international agreement that has a 'self-executing provision' which has been approved by Parliament, is law in South Africa except if the 'self-

[146] ILO 'The need for social justice' https://www.ilo.org/global/standards/introduction-to-international-labour-standards/need-for-social-justice/lang--en/index.htm (accessed 22 July 2021).
[147] Kahn-Nisser S 'The ripple effect: peer ILO treaty ratification, regional socialisation, and collective labor standards' (2016) 22 *Global Governance* 516.
[148] ILO *Collective Bargaining: A Policy Guide* (2015) 11.
[149] Art 19(5)*(d)*, ILO Constitution.
[150] Section 231(1), Constitution.
[151] Dugard J, Du Plessis M, Maluwa T et al Dugard's *International Law: A South African Perspective* 5 ed (2018) 86.
[152] Dugard J, Du Plessis M, Maluwa T et al (2018) 86.
[153] Section 231(2), Constitution.
[154] Section 231(3), Constitution.
[155] Section 231(4), Constitution.

executing provision' is incompatible with the Constitution or national legislation.[156] Section 231(5) of the Constitution provides that South Africa has a duty to fulfil South Africa's obligations in respect of international agreements which were binding on South Africa when the Constitution became operative.[157] Section 232 of the Constitution provides that '[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'.[158] It should be noted that ILO standards do not simply become part of South African law when ratified.[159] It is necessary that provision is made for ILO standards in national legislation.[160]

Recommendations are non-binding and aim to guide member states on the implementation of conventions in a member state's country.[161]

The ILO also adopts declarations. A declaration is regarded as a 'formal statement of principles, policies and aspirations' that applies to all member states of the ILO.[162] The ILO's Declaration of Philadelphia which was adopted in 1944 reiterates the fundamental principles of the ILO. It provides that 'freedom of expression and of association are essential to sustained progress'.[163] The ILO's Declaration of Philadelphia aims to advance 'the effective recognition of the right of collective bargaining'.[164]

The ILO Declaration on Fundamental Principles and Rights at Work was adopted by the International Labour Conference in 1998 which stipulates that:

> '[A]ll Members, even if they have not ratified the [c]onventions in question, have an obligation, arising from the very fact of membership in the Organisation, to respect, to promote and to realise, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those [c]onventions, namely: freedom of

[156] Section 231(4), Constitution.
[157] Section 231(5), Constitution.
[158] Section 232, Constitution.
[159] Du Toit D, Godfrey S, Cooper C et al (2015) 77.
[160] Du Toit D, Godfrey S, Cooper C et al (2015) 77.
[161] Collier D & Godfrey S 'Labour standards and foreign direct investment: A perspective on the export-oriented garment sectors in selected sub-Saharan African countries' 2018 *Acta Juridica* 187.
[162] ILO *Collective Bargaining: A Policy Guide* (2015) 10.
[163] Art I*(b)*, ILO Declaration of Philadelphia 1944.
[164] Art III*(e)*, ILO Declaration of Philadelphia 1944.

association and the effective recognition of the right to collective bargaining.'[165]

It should be noted that ILO declarations do not have legally binding effect on member states of ILO as conventions do.[166] Conventions 87 and 98 are part of the fundamental rights at work. Members of the ILO have a duty to uphold, respect, advance and realise Conventions 87 and 98.[167] It was therefore necessary to first introduce these declarations and then to examine Conventions 87 and 98 hereafter. Reference is made to another ILO declaration after the examination of Convention 98 below. It is appropriate to discuss that declaration in the context of the ILO's Decent Work Agenda even though the declaration is not legally binding.[168]

The following part examines Convention 87. The objective is to determine whether platform workers can fall within the scope of Convention 87. In order to achieve this objective, the provisions of Convention 87 are stated and interpreted.

3.2.2 Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)

Article 2 of Convention 87 provides that:

> 'Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.'[169]

The Committee of Experts regards the right to join and establish a trade union as a leading principle of trade union rights without which other rights guaranteed in Conventions 87 and 98 cannot exist.[170] Article 10 of Convention 87 stipulates that '[i]n this [c]onvention the term *organisation* means any organisation of workers or of employers for furthering and defending the interests of workers or of employers'.[171]

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[165] Art 2*(a)*, ILO Declaration on Fundamental Principles and Rights at Work 1998.
[166] Van Eck S 'Reflections on Manfred Weiss and the regulation of platform workers' in Olivier M, Smit N & Kalula E (eds) *Liber Amicorum Manfred Weiss* (2021) 162.
[167] ILO *Collective Bargaining: A Policy Guide* (2015) 10.
[168] See 3.2.4 below.
[169] Art 2, Convention 87.
[170] Committee of Experts on the Application of Conventions and Recommendations *Freedom of association and collective bargaining* (1994) Report III (Part 4B) International Labour Conference, 81st Session para 44.
[171] Art 10, Convention 87.

The CFA has held that all workers must be able to exercise the right to freedom of association irrespective of their contractual status.[172] In this regard, the CFA has held that

> '[t]he criterion for determining the persons covered by that right, therefore, is not based on the existence of an employment relationship, which is often non-existent, for example in the case of…self-employed workers in general…who should nevertheless enjoy the right to organise'.[173]

Therefore, preventing self-employed workers who wish to join or form a trade union from doing so because self-employed workers do not conform to the notion of standard employment is in conflict with Convention 87.[174]

In terms of Article 2 of Convention 87, workers should not have to obtain previous authorisation from a member state in order to establish or join a trade union organisation.[175] The CFA has held that the principle of freedom of association would be purposeless if workers' and employers' organisations are obligated to acquire previous authorisation to be able to establish workers' and employers' organisations.[176] According to the Committee of Experts, there are certain formalities that workers' and employers' organisations must adhere to when establishing workers' and employers' organisations.[177] The CFA has held that such formalities provided by national legislation must not amount to acquiring previous authorisation or to make it difficult for workers' and employers' organisations to be established.[178]

The right to strike is not expressly referred to in Convention 87 and thus the ILO supervisory bodies had to interpret the scope and meaning of the right in relation to the convention.[179] The Committee of Experts has held that strike action is exercised by groups of workers with

[172] ILO *Freedom of Association: Compilation of Decisions of the Committee on Freedom of Association* 6 ed (2018) para 327.
[173] Para 387.
[174] Para 389.
[175] Art 2, Convention 87.
[176] ILO *Freedom of Association: Compilation of Decisions of the Committee on Freedom of Association* 6 ed (2018) para 419.
[177] Committee of Experts on the Application of Conventions and Recommendations *Freedom of association and collective bargaining* (1994) Report III (Part 4B) International Labour Conference, 81st Session para 69.
[178] ILO *Freedom of Association: Compilation of Decisions of the Committee on Freedom of Association* 6 ed (2018) para 419.
[179] Committee of Experts on the Application of Conventions and Recommendations *Freedom of association and collective bargaining* (1994) Report III (Part 4B) International Labour Conference, 81st Session para 145.

the aim of placing pressure on an employer to concede to their demands.[180] The CFA has stated that:

> '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. The right to strike is an intrinsic corollary to the right to organise protected by Convention No. 87.'[181]

Article 3(1) of Convention 87 stipulates that:

> 'Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.'[182]

The Committee of Experts has interpreted that strike action forms part of the activities of workers' organisation as provided in Article 3(1) of Convention 87. Article 3(2) of Convention 87 states that '[t]he public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof'.[183] Therefore, trade unions should be given the freedom to determine the manner in which they choose to resolve their disputes.[184]

The right to freedom of association does not exempt trade unions from the law.[185] In this regard, Article 8(1) of Convention 87 provides that '[i]n exercising the rights provided for in this [c]onvention workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land'.[186] The Committee of Experts acknowledges that the right to strike is a fundamental right; however, the right to strike is not absolute.[187] The right to strike may be restricted in particular circumstances and national legislation may make provision for the conditions in which the right to strike may be

[180] Para 148.
[181] ILO *Freedom of Association: Compilation of Decisions of the Committee on Freedom of Association* 6 ed (2018) para 753-4.
[182] Art 3(1), Convention 87.
[183] Art 3(2), Convention 87.
[184] Tajgman D & Curtis K 'Freedom of association: A user's guide' (2000) International Labour Office 20.
[185] Tajgman D & Curtis K 'Freedom of association: A user's guide' (2000) International Labour Office 28.
[186] Art 8(1), Convention 87.
[187] Committee of Experts on the Application of Conventions and Recommendations *Freedom of association and collective bargaining* (1994) Report III (Part 4B) International Labour Conference, 81st Session para 151.

exercised.[188] However, Article 8(2) of Convention 87 provides that '[t]he law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this [c]onvention'.[189] The Committee of Experts has stated that where a restriction or a prohibition of the right to strike exists in national legislation, workers who are restricted from exercising the right to strike should be granted compensatory guarantees.[190]

Article 5 of Convention 87 states that

> '[w]orkers' and employers' organisations shall have the right to establish and join federations and confederations and any such organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers'.[191]

According to Article 6 of Convention 87, Articles 2, 3, and 4 are applicable to 'federations and confederations of workers' and employers' organisation'.[192] According to the CFA, workers' organisations should have the right to join federations and confederations of their choice and without previous authorisation.[193] Furthermore, the CFA's view is that it is the choice of the federations and confederations to allow the affiliation of a trade union in line with the federation and confederations rules.[194] The Committee of Experts has held that in order to achieve international solidarity of workers and employers, there is a need that workers' and employers' national federations and confederations have the right to freely affiliate with international organisations.[195]

Article 11 of Convention 87 protects the right to organise by stating that member states commit to 'take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise'.

Based on the use of the term 'workers' in Convention 87 and the interpretation of the provisions of the convention by the CFA and the Committee of Experts, it is submitted that

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[188] Para 151.
[189] Art 8(2), Convention 87.
[190] Committee of Experts on the Application of Conventions and Recommendations *Freedom of association and collective bargaining* (1994) Report III (Part 4B) International Labour Conference, 81st Session para 164.
[191] Art 5, Convention 87.
[192] Art 6, Convention 87.
[193] ILO *Freedom of Association: Compilation of Decisions of the Committee on Freedom of Association* 6 ed (2018) para 1026.
[194] Para 1026.
[195] Committee of Experts on the Application of Conventions and Recommendations *Giving globalisation a human face* (2012) Report III (Part 1B) International Labour Conference, 101st Session para 163.

Convention 87 has been interpreted broadly to include self-employed workers such as platform workers. In this regard, it is submitted that national law should be examined to determine whether national law realises platform workers' right to freedom of association.[196]

The next part examines Convention 98 with the aim of determining whether platform workers fall within the ambit of Convention 98. The provisions of Convention 98 are stated and interpreted.

3.2.3 The Right to Organise and Collective Bargaining Convention, 1949 (No. 98)

Convention 87 is supplemented by Convention 98.[197] Article 1(1) of Convention 98 states that '[w]orkers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment'.[198] Workers are protected against acts of anti-union discrimination particularly where workers are dismissed or prejudiced as a result of their trade union membership or for taking part in trade union activities.[199]

The CFA regards anti-union discrimination as one of the most serious infringements of freedom of association because anti-union discrimination threatens the existence of trade union organisations.[200] The Committee of Experts regards the protection provided to workers and trade union representatives against acts of anti-union discrimination as a crucial part of the right to freedom of association.[201] It is important that machinery is established to ensure respect for the right to organised as stated in Articles 1 and 2 of Convention 98.[202]

The Committee of Experts' view is that member states must provide workers with sufficient protection against acts of anti-union discrimination during the hiring stage, during the period of employment and at the time of termination of employment.[203] The CFA has held that whenever acts of anti-union discrimination are present the member state should ensure that

[196] See 3.3 below.
[197] Carabetta G 'International labour law standards concerning collective bargaining in public essential services' (2014) 19 *Deakin Law Review* 278.
[198] Art 1(1), Convention 98.
[199] Art 1(2)*(a)-(b)*, Convention 98.
[200] ILO *Freedom of Association: Compilation of Decisions of the Committee on Freedom of Association* 6 ed (2018) para 1072.
[201] Committee of Experts on the Application of Conventions and Recommendations *Freedom of association and collective bargaining* (1994) Report III (Part 4B) International Labour Conference, 81st Session para 202.
[202] Art 3, Convention 98.
[203] Committee of Experts on the Application of Conventions and Recommendations *Giving globalisation a human face* (2012) Report III (Part 1B) International Labour Conference, 101st Session para 173.

the member state takes all the necessary measures to stop acts of anti-union discrimination.[204] Therefore, member states have a duty to ensure that there are procedures provided in national legislation to address complaints regarding acts of anti-union discrimination in which such procedures should be quick and unbiased.[205]

Article 2(1) of Convention 98 states that

> '[w]orkers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration'.[206]

In terms of Article 2(2) of Convention 98,

> '[i]n particular, acts which are designed to promote the establishment of workers' organisations under the domination of employers or employers' organisations, or to support workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations, shall be deemed to constitute acts of interference within the meaning of this Article'.[207]

It is therefore important for workers' and employers' organisations to operate independently to ensure that they advance the interests of their members adequately.[208] Article 3 of Convention 98 which has already been referred to above, applies to the protection against acts of interference. The CFA has held that national legislation which makes provision for the prohibition of acts of interference must be coupled with effective procedures to ensure the application of such provisions in practice.[209] The Committee of Experts has provided that national legislation must make provision for appeal procedures accompanied with dissuasive sanctions against acts of interference to ensure proper application in practice of Article 2 of Convention 98.[210]

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[204] ILO *Freedom of Association: Compilation of Decisions of the Committee on Freedom of Association* 6 ed (2018) para 1137.
[205] Para 1138.
[206] Art 2(1), Convention 98.
[207] Art 2(2), Convention 98.
[208] Committee of Experts on the Application of Conventions and Recommendations *Giving globalisation a human face* (2012) Report III (Part 1B) International Labour Conference, 101st Session para 196.
[209] ILO *Freedom of Association: Compilation of Decisions of the Committee on Freedom of Association* 6 ed (2018) para 1217.
[210] Committee of Experts on the Application of Conventions and Recommendations *Freedom of association and collective bargaining* (1994) Report III (Part 4B) International Labour Conference, 81st Session para 232.

Article 4 of Convention 98 states that

> '[m]easures 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 or employers' organisation and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements'.

The Committee of Experts has held that Article 4 of Convention 98 does not provide a duty to bargain collectively; however, the bargaining parties must bargain in good faith.[211] The Committee of Experts has further provided that where bargaining parties have reached a collective agreement, the collective agreement 'must be respected and must be able to establish conditions of work more favourable than those envisaged in law: indeed, if this were not so, there would be no reason for engaging in collective bargaining'.[212]

The CFA has interpreted that necessary mechanisms must be taken

> 'to ensure that workers who are self-employed could fully enjoy trade union rights for the purpose of furthering and defending their interest, including by the means of collective bargaining; and to identify, in consultation with the social partners concerned, the particularities of self-employed workers that have a bearing on collective bargaining so as to develop specific collective bargaining mechanisms relevant to self-employed workers, if appropriate'.[213]

The CFA has held that the primary purpose of workers exercising the right to organise is to collectively bargain the terms and conditions of employment.[214] It is important that freedom of association and collective bargaining as fundamental rights are advanced and respected irrespective of the contractual status.[215]

Based on the use of the term 'workers' in Convention 98 and the interpretation of the provisions of the convention, it is submitted that the scope of Convention 98 is broad enough

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[211] Committee of Experts on the Application of Conventions and Recommendations *Giving globalisation a human face* (2012) Report III (Part 1B) International Labour Conference, 101st Session para 198.
[212] Para 198.
[213] ILO *Freedom of Association: Compilation of Decisions of the Committee on Freedom of Association* 6 ed (2018) para 1285.
[214] Para 1234.
[215] Johnston H & Land-Kazlauskas C 'Organising on-demand: Representation, voice, and collective bargaining in the gig economy' (2019) International Labour Office Part 94 of the Conditions of Work and Employment Series 2.

to cover self-employed workers such as platform workers. In this regard, it becomes necessary to determine whether national law promotes and protects collective bargaining rights of platform workers.[216]

In addition to the legally binding conventions, there is the ILO's Decent Work Agenda. Social dialogue which need not be identical to traditional collective bargaining is an important tool that can help improve the quality of work not only for employees but for workers in new forms of work too.[217] It is in this context that the ILO's Decent Work Agenda is discussed.

3.2.4 The International Labour Organisation's Decent Work Agenda

The ILO has established a Decent Work Agenda which includes four pillars namely: job creation, rights at work, social protection, and social dialogue.[218] Although all four pillars are equally important, social dialogue is the pillar of most importance for the purposes of this mini-thesis. Social dialogue refers to

> 'all types of negotiation, consultation, or simply information exchange between representatives of the government, employers and workers on issues of common interests relating to economic and social policy'.[219]

The ILO through its Decent Work Agenda focuses on multiple challenges that the ILO has faced since the establishment of the ILO and aims to promote decent work for all workers through its four pillars.[220] Decent work is regarded as

> 'opportunities for work that is productive and delivers a fair income, security in the workplace and social protection for all, better prospects for personal development and social integration, *freedom for people to express their concerns, organise and participate in the decisions that affect their lives*'.[221]

[216] See 3.3 below.
[217] International Labour Office 'Social dialogue and the future of work' (2020) Global Deal for Decent Work and Inclusive Growth 5.
[218] ILO 'Decent work' https://www.ilo.org/global/topics/decent-work/lang--en/index.htm (accessed 7 January 2022).
[219] Moreno-Brid JC, Tovar RG, Gomez JS et al 'Trade agreements and decent work in Mexico: The case of the automotive and textile industries' (2021) ILO Working Paper 36 26.
[220] ILO 'The need for social justice' https://www.ilo.org/global/standards/introduction-to-international-labour-standards/need-for-social-justice/lang--en/index.htm (accessed 22 July 2021).
[221] ILO 'Decent work' https://www.ilo.org/global/topics/decent-work/lang--en/index.htm (accessed 7 January 2022).

The institution of collective bargaining aims to balance the unequal power between employers and workers which creates an avenue for workers to be treated with dignity and to be treated fairly.[222] Therefore, it is important for workers to organise collectively and to take part in matters that affect their lives.

The Global Commission on the Future of Work has developed a human-centred agenda ('the agenda') for the future of work.[223] One of the pillars of 'the agenda' is to develop the institutions that are the foundations of a just society which includes social dialogue.[224] Social dialogue is a key means in ensuring that all workers have a voice in matters that concern their working lives.[225] The Global Commission on the Future of Work is of the view that '[c]ollective representation and social dialogue provide the institutional capabilities needed to navigate future of work transitions' and that all workers including self-employed workers must have the right to freedom of association and the right to bargain collectively.[226]

The ILO Centenary Declaration for the Future of Work which was adopted by the International Labour Conference in 2019 provides that all member states of the ILO should

> 'work individually and collectively, on the basis of tripartism and social dialogue, and with the support of the ILO, to further develop its human-centred approach to the future of work by:…Promoting sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all through: policies and measures that ensure appropriate privacy and personal data protection, and respond to challenges and opportunities in the world of work relating to the digital transformation of work, including platform work'.[227]

In conclusion, collective bargaining and social dialogue are essential tools needed to address the existing challenges that workers face and the future challenges that workers will come to

[222] Global Commission on the Future of Work *Work for a Brighter Future* (2019) 38.
[223] Global Commission on the Future of Work (2019) 24.
[224] Global Commission on the Future of Work (2019) 28.
[225] Global Commission on the Future of Work (2019) 28.
[226] Global Commission on the Future of Work (2019) 41 and 43.
[227] Art III C*(v)*, ILO Centenary Declaration for the Future of Work 2019.

face.[228] It is important that institutions such as collective bargaining are strengthened to steer through the challenges and that all workers are allowed to access collective representation.[229]

3.3 THE REGULATION OF COLLECTIVE BARGAINING IN SOUTH AFRICA

The part of the chapter presents an overview of the regulation of collective bargaining in South Africa. The part states and interprets the sections in the Constitution and the LRA to determine whether national law promotes and protects collective bargaining rights of platform workers.

3.3.1 The Constitution of the Republic of South Africa, 1996

The Constitution is the supreme law of South Africa and any law or action which is contrary to it is invalid.[230] The Constitution contains various fundamental rights.[231] Fundamental rights include the right to equality and the right to dignity.[232] Basson, Christianson, Garbers et al are of the view that such fundamental rights play an essential role in society even in the working environment.[233]

Section 23(1) of the Constitution provides that '[e]veryone has the right to fair labour practices'.[234] The use of the word 'everyone' in section 23(1) of the Constitution has created discussions as to whether the right extends to other forms of work.[235] The right to fair labour practices as stipulated in section 23(1) of the Constitution is broad as it refers to 'everyone' but it is not applicable to workers who own and work in their businesses such as self-employed workers.[236] However, this does not apply where employers intentionally refer to workers as independent contractors to escape their legal duties.[237] Although the word 'everyone' used in section 23(1) of the Constitution seems broad, 'it is limited to the extent that the right is to fair labour practices, which implies that the right only exists between

[228] International Labour Office 'Social dialogue and the future of work' (2020) Global Deal for Decent Work and Inclusive Growth 3.
[229] International Labour Office 'Social dialogue and the future of work' (2020) Global Deal for Decent Work and Inclusive Growth 3.
[230] Section 2, Constitution.
[231] Du Toit D, Godfrey S, Cooper C et al (2015) 73.
[232] Section 9 and 10, Constitution.
[233] Basson AC, Christianson MA, Garbers C et al (2017) 268.
[234] Section 23(1), Constitution.
[235] Van Niekerk A, Smit N, Chirstianson M et al *Law@work* 5 ed (2019) 42.
[236] Cheadle H 'Labour relations' in Bannerman L (ed) *South African Constitutional Law: The Bill of Rights* 2 ed (2005) 18-3 and 18-4.
[237] Cheadle H 'Labour relations' in Bannerman L (ed) *South African Constitutional Law: The Bill of Rights* 2 ed (2005) 18-4.

parties in a relationship or an arrangement for labour or work that at least resembles an employment relationship'.[238]

Section 18 of the Constitution makes provision for a general right to freedom of association.[239] With regards to the labour rights referred to in the Constitution, workers have the right to form and join a trade union and to take part in the activities of a trade union.[240] The word 'worker' is used as opposed to the term 'everyone' which is broad or the term 'employees' which would limit the scope of these rights.[241] Cheadle states that the right to form and join a trade union is the foundation of social democracy and is important to a voluntary collective bargaining system.[242] Workers have the right to strike.[243] The right to strike is regarded as essential for the dignity of workers who in a constitutional democracy may not be forced in their employment.[244] Trade unions and every employers' organisations have the right to determine their own administration, programmes and activities, to organise and to establish and join a federation.[245]

Trade unions, employers, and employers' organisations have the right to engage in collective bargaining.[246] The words 'right to engage' suggest that there is a freedom to bargain collectively instead of a duty to bargain collectively.[247] The freedom to bargain collectively gives bargaining parties freedom from interference in the bargaining process by the state.[248] Section 23(5) of the Constitution states that national legislation may be enacted to govern collective bargaining.[249] The LRA was established to regulate collective bargaining as provided for in the Constitution.

In *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996*, the Constitutional Court (CC) held that:

> 'Collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers

[238] Collier D, Fergus E, Cohen T et al (2018) 8.
[239] Section 18, Constitution.
[240] Section 23(2)*(a)-(b)*, Constitution.
[241] Van Niekerk A, Smit N, Chirstianson M et al (2019) 46.
[242] Cheadle H 'Labour relations' in Bannerman L (ed) *South African Constitutional Law: The Bill of Rights* 2 ed (2005) 18-16.
[243] Section 23(2)*(c),* Constitution.
[244] *NUMSA & others v Bader Bop (Pty) Ltd & another* [2003] 2 BLLR 103 (CC) para 13.
[245] Section 23(4)*(a)-(c),* Constitution.
[246] Section 23(5), Constitution.
[247] Du Toit D, Godfrey S, Cooper C et al (2015) 279.
[248] Collier D, Fergus E, Cohen T (2018) 330.
[249] Section 23(5), Constitution.

> therefore need to act in concert to provide them collectively with sufficient power to bargain effectively with employers.'[250]

Collective bargaining plays an important role in advancing a fair labour relations environment.[251] When interpreting section 23 of the Constitution, it is necessary to understand the significance of the fundamental labour rights in advancing a fair labour environment.[252] Steenkamp, Stelzner and Badenhorst state that:

> 'The inclusion of the right to collective bargaining in the Bill of Rights signifies the recognition by the South African community that collective bargaining would no longer be a mere social objective, but would have the status of a fundamental right, that is, a right that is mandatory for a life worthy as a human being, a life that cannot be enjoyed without that right.'[253]

Against this background, the following part examines how the LRA regulates collective bargaining in South Africa. The examination states and interprets certain provisions of the LRA.

3.3.2 The Labour Relations Act 66 of 1995

The LRA is the cornerstone of labour relations in South Africa.[254] The objectives of the LRA are direct.[255] However, Grogan has stated that the objectives of the LRA are ambitious.[256] Section 1 of the LRA sets out the LRA's objectives which includes to promote 'economic development, social justice, labour peace and the democratisation of the workplace'.[257] The primary objectives of the LRA include to give effect to and govern the fundamental labour rights provided in section 23 of the Constitution.[258] It was designed to expand on and protect the fundamental labour rights provided in the Constitution.[259]

[250] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, *1996* (1996) 17 ILJ 821 (CC) para 66.
[251] *NUMSA & others v Bader Bop (Pty) Ltd & another* [2003] 2 BLLR 103 (CC) para 13.
[252] Para 13.
[253] Steenkamp A, Stelzner S & Badenhorst N (2004) 944.
[254] Subramanien DC & Joseph JL 'The right to strike under the Labour Relations Act 66 of 1995 (LRA) and possible factors for consideration that would promote the objectives of the LRA' (2019) 22 *PER/PELJ* 2.
[255] Du Toit D, Godfrey S, Cooper C et al (2015) 79.
[256] Grogan J (2020) 324.
[257] Section 1, LRA.
[258] Section 1*(a)*, LRA; see 3.3.1 above.
[259] Basson AC, Christianson MA, Garbers C et al (2017) 269.

The LRA aims to give effect to the obligations that South Africa is bound by as a member state of the ILO.[260] The obligations arise from the ratification of the ILO standards by South Africa.[261] Conventions 87 and 98 are important for this mini-thesis.[262]

The manner in which the LRA aims to regulate collective bargaining as provided in section 23(5) of the Constitution is according to Grogan 'deceptively simple'.[263] Collective bargaining forms a main part of the LRA.[264] The LRA gives effect to section 23(5) of the Constitution by stating that one of the primary goals of the LRA is

> 'to provide a framework within which employees and their trade unions, employers and employers' organisations can- collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest'.[265]

The promotion of orderly collective bargaining, collective bargaining at sectoral level and the effective resolution of labour disputes are part of the primary objectives of the LRA.[266] The LRA advances and encourages collective bargaining. It does this by making provision for various rights, protection of rights and procedures that must be followed.[267] Grogan states that the aforementioned objectives show that the LRA

> 'is intended to be an instrument of social change aimed, in particular, at purging the labour dispensation of past inequities and injustices, and extending democracy into the economic sector. It is in that spirit that the specific provisions of the LRA must be read'.[268]

The next part examines the regulation of freedom of association in terms of the LRA and how freedom of association has been interpreted.

3.3.2.1 Freedom of association

Collective bargaining will be undermined if employees are not granted the freedom to join a trade union of their choice. It is important that trade unions and their members are afforded

[260] Section 1*(b)*, LRA.
[261] Grogan J (2014) 17.
[262] See 3.2.2 and 3.2.3 above.
[263] Grogan J (2014) 14.
[264] Basson AC, Christianson MA, Garbers C et al (2017) 272.
[265] Section 1*(c)*(i), LRA.
[266] Section 1*(d)*(i)-(ii) and (iv), LRA.
[267] Basson AC, Christianson MA, Garbers C et al (2017) 273.
[268] Grogan J (2014) 16.

protection by the law.[269] Every employee has the right to form or join a trade union or to establish a federation of trade unions.[270] Membership to a trade union is subject to the trade union's constitution.[271] It means that a trade union may make decisions regarding the kind of employees that may become members and employees who may not become members of the trade union.[272] However, trade unions are restricted from making rules in their constitutions that exclude employees on certain grounds, for example race.[273]

Trade union members have the right to take part in the lawful activities of a trade union and to elect office-bearers, officials, or trade union representatives.[274] A member of a trade union has the right to stand for election for the position as an office-bearer or official and if elected, to hold office.[275] In *IMATU & others v Rustenburg Transitional Council*, the Labour Court (LC) held that employees who are in senior management positions have the right to join trade unions and participate in their activities including executive positions in a trade union.[276] However, the LC has ruled that such rights do not exempt senior management employees from their contractual employment duties.[277]

Members of trade unions that have joined a federation of trade unions have the right to take part in the lawful activities of the federation and to elect any office-bearers or officials.[278] Every member of a trade union that has joined a federation of trade unions has the right to stand for election for the position as an office-bearer or official and if elected, to hold office.[279] The constitution of the federation will determine who may become a member.[280]

No discrimination may take place against any employee for exercising any right that is provided by the LRA.[281] For example, in *Kroukam v SA Airlink (Pty) Ltd*, the Labour Appeal Court (LAC) held that the main reason for the employee's dismissal was as a result of his trade union activities and therefore the dismissal was automatically unfair.[282] The general

[269] Basson AC, Christianson MA, Garbers C et al *The New Essential Labour Law Handbook* 6 ed (2017) 275.
[270] Section 4(1)*(a)-(b)*, LRA.
[271] Section 4(1)*(b)*, LRA.
[272] Basson AC, Christianson MA, Garbers C et al (2017) 276.
[273] Basson AC, Christianson MA, Garbers C et al (2017) 276.
[274] Section 4(2)*(a)-(b)*, LRA.
[275] Section 4(2)*(c)*, LRA.
[276] *IMATU & others v Rustenburg Transitional Council* [1999] 12 BLLR 1299 (LC) para 17.
[277] Para 17.
[278] Section 4(3)*(a)-(b)*, LRA
[279] Section 4(3)*(c)*, LRA.
[280] Section 4(3), LRA.
[281] Section 5(1), LRA.
[282] *Kroukam v SA Airlink (Pty) Ltd* (2005) 26 ILJ 2153 (LAC) para 90 and 91.

protection of section 5(1) of the LRA is supplemented by section 5(2) of the LRA which provides specific kinds of conduct that may weaken the right to freedom of association.[283] Such protection is extended to job applicants.[284] No person may require an employee or a job applicant not to be or not to become a member of a trade union or to end his or her membership of a trade union.[285]

An employee or a job applicant may not be prejudiced for being a member of a trade union, for forming a trade union or federation of trade unions or for taking part in the lawful activities of a trade union or federation of trade unions.[286] In *Nkutha & others v Fuel Gas Installations (Pty) Ltd*, the LC found that the respondent advantaged three employees because the respondent increased their salaries and only promoted the three employees soon after they had resigned from their trade union.[287] As a result, the LC ruled that the respondent discriminated against the applicants because they were members of a trade union.[288] No one may prejudice an employee or a job applicant for his or her failure or refusal to perform unlawfully activities.[289] Nor may no person prejudice an employee or a job applicant for lawfully disclosing information to another person, for exercising any right or for taking part in the proceedings provided in the LRA.[290]

An employer may try to convince an employee not to exercise his or her rights in the LRA by promising advantages to the employee.[291] However, no employee or job applicant may be advantaged or promised to be advantaged for not exercising any right or for taking part in any proceedings stipulated in the LRA.[292] It is clear that the LRA does not only prohibit employers from committing these specific types of conduct but the prohibition applies to any person.[293] The protection against the violation of a right is enforceable against anyone who violates that right.[294] Therefore, the protection against the infringement of a right applies not only against an employer but against a trade union too.[295]

[283] Basson AC, Christianson MA, Garbers C et al (2017) 277.
[284] Du Toit D, Godfrey S, Cooper C et al (2015) 223.
[285] Section 5(2)*(a)* (i)-(iii), LRA.
[286] Section 5(2)*(c)*(i)-(iii), LRA.
[287] *Nkutha & others v Fuel Gas Installations (Pty) Ltd* (2000) 21 ILJ 218 (LC) para 21.
[288] Para 102.
[289] Section 5(2)*(c)*(iv), LRA.
[290] Section 5(2)*(c)*(v)-(vii), LRA.
[291] Basson AC, Christianson MA, Garbers C et al (2017) 278.
[292] Section 5(3), LRA.
[293] Todd C (2004) 15.
[294] *Theron & others v Food & Allied Workers Union & others* (1997) 18 ILJ 1046 (LC) 1050.
[295] *Theron & others v Food & Allied Workers Union & others* (1997) 18 ILJ 1046 (LC) 1050.

Trade unions and employers' organisations have the right to determine their own constitutions and to hold elections for office-bearers, officials, and representatives.[296] The purpose of section 8 of the LRA is to protect the independence of trade unions and employers' organisations.[297] Section 8*(b)* of the LRA provides that trade unions and employers' organisations have the right to plan and organise their administration and lawful activities.[298] Trade unions and employers' organisations have the right to take part in forming or joining a federation of trade unions or a federation of employers' organisations.[299] These organisations have the right to become affiliated with and take part in the affairs of any international workers' organisation or employers' organisation or the ILO.[300]

In the following part, the statutory organisational rights are analysed and the interpretation of the statutory organisational rights are provided.

3.3.2.2 Organisational rights

Trade unions need members to bargain collectively with an employer.[301] The right of access to the employer's premises allows trade unions to recruit new members, to communicate with their members or to serve their members' interests.[302] In this regard, serving their members' interests should not be interpreted to include functions of a trade union representative.[303] Trade unions have the right to hold meetings with employees outside their working hours at the employer's premises.[304] Members of a trade union have the right to vote at the employer's premises in any election or ballot as provided in the trade union's constitution.[305] Trade unions cannot access an employer's premises for any reason.[306] The right to access an employer's premises has its limitations.[307] The aforementioned rights are subject to 'any conditions as to time and place that are reasonable and necessary to safeguard life or property or to prevent the undue disruption of work'.[308]

[296] Section 8*(a)*(i)-(ii), LRA.
[297] Nel PS, Kirsten M, Swanepoel BJ et al (2016) 173.
[298] Section 8*(b)*, LRA.
[299] Section 8*(c)-(d)*, LRA.
[300] Section 8*(e)*, LRA.
[301] Basson AC, Christianson MA, Garbers C et al (2017) 283.
[302] Section 12(1), LRA.
[303] Todd C (2004) 27.
[304] Section 12(2), LRA.
[305] Section 12(3), LRA.
[306] Grogan J (2014) 72.
[307] Basson AC, Christianson MA, Garbers C et al (2017) 285.
[308] Section 12(4), LRA.

The main source of income for a trade union is trade union subscriptions that every member of a trade union has to pay.[309] Membership fees allow trade unions to rent offices, to pay for transport to visit members at their workplaces and to serve their members' interests.[310] An employee who is a member of a representative trade union may authorise the employer in writing to deduct his or her trade union subscriptions or levies from his or her wages.[311] A trade union's constitution should determine how membership fees will be spent.[312]

Trade union representatives are essential in the workplace.[313] Section 14(4) of the LRA sets out the functions of a trade union representative which include to help and represent employees in grievance and disciplinary proceedings.[314] Trade union representatives have the right to monitor the employer's compliance with the provisions of the LRA, any law that governs the terms and conditions of employment and any collective agreement.[315] A trade union representative has a right to report any alleged violations of the provisions of the LRA, any law that governs the terms and conditions of employment and any collective agreement to the employer, his or her trade union and any responsible agency.[316] An employer may not take any steps against a trade union representative for reporting any alleged violations to any responsible agency as doing so would infringe the rights of the trade union representative.[317] A trade union representative is entitled to exercise any other functions agreed to between the trade union and the employer.[318]

A trade union representative has the right to take reasonable time off from work with pay during working hours to perform the duties of a trade union representative, subject to reasonable conditions and to go for training that may be necessary to exercise his or her functions.[319] It is important that trade union representatives are allowed to go for training to gain knowledge about the law and their positions in order to perform their functions effectively.[320]

[309] Basson AC, Christianson MA, Garbers C et al (2017) 286.
[310] Todd C (2004) 28.
[311] Section 13(1), LRA.
[312] Grogan J (2014) 72.
[313] Esitang TG & van Eck S 'Minority trade unions and the amendments to the LRA: Reflections on thresholds, democracy and ILO conventions' (2016) 37 *ILJ* 768.
[314] Section 14(4)*(a)*, LRA.
[315] Section 14(4)*(b)*, LRA.
[316] Section 14(4)*(c)*(i)-(iii), LRA.
[317] Todd C (2004) 31.
[318] Section 14(4)*(d)*, LRA.
[319] Section 14(5)*(a)-(b)*, LRA.
[320] Todd C (2004) 32.

Section 15(1) of the LRA provides that

> '[a]n employee who is an office-bearer of a representative trade union, or of a federation of trade unions to which the representative trade union is affiliated, is entitled to take reasonable leave during working hours for the purpose of performing the functions of that office'.[321]

An employee need not be paid for taking leave for trade union activities.[322] The trade union and the employer are entitled to agree on the number of days of leave, the number of days of paid leave and any other conditions attached to any leave.[323]

An employer must disclose all relevant information to a trade union representative to enable him or her to perform his or her functions as stated in section 14(4) of the LRA effectively.[324] The relevance of the information and the purpose for which the information is needed must be connected.[325] A trade union representative cannot demand access to information that is not related to the functions he or she is entitled to perform.[326] An employer must disclose all relevant information to the representative trade union to assist the representative trade union to engage in consultation or collective bargaining effectively.[327]

The following part provides the legal definition of a strike and how the definition has been interpreted. The procedural requirements that must be met and the importance thereof are discussed.

3.3.2.3 Strike

Chapter IV of the LRA regulates the right to strike. Every employee has the right to strike.[328] It is important that a strike falls within the definition provided in the LRA because only a strike as defined must comply with the procedural and substantive requirements stipulated in the LRA and can enjoy protection provided by the LRA.[329] Section 213 of the LRA defines a strike as

[321] Section 15(1), LRA.
[322] Du Toit D, Godfrey S, Cooper C et al (2015) 264.
[323] Section 15(2), LRA.
[324] Section 16(2), LRA.
[325] Grogan J (2014) 79.
[326] Todd C (2004) 34.
[327] Section 16(3), LRA.
[328] Section 64(1), LRA.
[329] Du Toit D, Godfrey S, Cooper C et al (2015) 334.

> 'the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to "work" in this definition includes overtime work, whether it is voluntary or compulsory'.[330]

There are certain elements that must be met in order for the actions by employees to be deemed a strike.[331] The first element is that the action must constitute 'a partial or complete refusal to work'.[332] A 'complete refusal to work' means that employees refuse to perform any work that they are required to perform.[333] However, a complete refusal to work is not the only form of a strike.[334] There are various forms that a strike can take such as work-to-rule whereby 'employees work strictly according to the prescribed rules with the result that the pace of work is reduced' and go-slows whereby employees slow down the 'pace of work'.[335] The obstruction of work is another form of a strike whereby employees restrict the entrance or exit to the workplace resulting in slowing down the productivity of other employees who are on duty.[336]

It will qualify as a strike if employees collectively refuse to perform overtime work in support of a demand.[337] A refusal to work does not necessarily mean that employees are striking. For example, a refusal to work can be in response to a breach of contract on the part of the employer, a refusal to work because of an unlawful instruction given by an employer or a refusal to work because of an infringement of a statutory prohibition.[338]

The second element is that a strike must be exercised collectively by employees.[339] It is clear from the wording used in the definition of a strike in section 213 of the LRA that a strike must be 'concerted' and exercised by 'persons'.[340] Therefore, a strike cannot be exercised by

[330] Section 213, LRA.
[331] Du Plessis JV & Fouche MA (2019) 292.
[332] Van Heerden A 'Protected strikes- getting the balance right' (2011) 11 *Without Prejudice* 66.
[333] Chicktay MA 'Defining the right to strike: A comparative analysis of international labour organisation standards and South African law' (2012) 33 *Obiter* 268.
[334] Van Niekerk A, Smit N, Christianson M et al (2019) 451.
[335] Du Plessis JV & Fouche MA (2019) 292.
[336] Grogan J (2014) 198.
[337] Grogan J (2020) 384.
[338] Van Niekerk A, Smit N, Christianson M et al (2019) 452.
[339] Subramanien DC & Joseph JL (2019) 7.
[340] Section 213, LRA.

an individual employee.[341] The number of employees that decide to participate in a strike does not matter as two employees who collectively refuse to perform their work can strike.[342]

The third element involves 'remedying a grievance or resolving a dispute of mutual interest' between the employer and employees.[343] There must be a reason for a strike.[344] Employees cannot simply stop working without making a demand.[345] Therefore, a grievance or a dispute must be present before employees can be regarded to be on strike and the employees must have the intention for the strike to resolve the grievance or the issue in dispute in the workplace.[346] Grogan states that:

> 'A grievance, it would seem, must arise from some practice or policy of the employer, and a dispute arises when the employees have made some demand with which the employer has declined to comply.'[347]

When an employer has conceded to the demands made by employees, there can no longer be a strike because the strike does not serve a purpose anymore.[348] The employees will thus lose protection granted by the LRA only if they continue with the strike.[349]

The LRA does not provide a definition for the phrase 'matters of mutual interest'.[350] Mutual interest concerns 'the industrial or economic relationship between employer and employee'.[351] In this regard, it relates to terms and conditions of employment and any other matters that are relevant to the workplace.[352]

There are procedural requirements that must be met for a strike to be protected.[353] Employees are required to give an employer at least 48 hours' written notice of the commencement of the proposed strike.[354] Where the issue in dispute deals with a collective agreement to be reached

[341] Tenza M 'An evaluation of the limitation of the right to strike in terms of the law of general application in South Africa' (2018) 29 *Stellenbosch Law Review* 472.
[342] Grogan J (2014) 202.
[343] Van Heerden A (2011) 66.
[344] Chicktay MA (2012) 262; Tenza M (2018) 472.
[345] Subramanien DC & Joseph JL (2019) 9.
[346] Grogan J (2020) 386.
[347] Grogan J (2014) 204.
[348] Van Niekerk A, Smit N, Christianson M et al (2019) 456.
[349] Grogan J (2020) 389.
[350] *Vanachem Vanadium Products (Pty) Ltd v National Union of Metalworkers of SA & others* (2014) 35 ILJ 3241 (LC) para 10.
[351] Du Toit D, Godfrey S, Cooper C et al (2015) 338.
[352] Chicktay MA (2012) 263.
[353] Nel PS, Kirsten M, Swanepoel BJ et al (2016) 307.
[354] Section 64(1)*(b)*, LRA.

in a bargaining council, notice must be given to the bargaining council.[355] Du Toit, Godfrey, Cooper et al provide reasons for this exception. If notice is given to a bargaining council, it is assumed that notice has been given to every employer who falls within the scope of the bargaining council.[356] In the case where such an exception is not present, 'notice would have had to be given to large numbers of employers, thus imposing an impossible logistical hurdle to industry-wide strikes'.[357]

In the instance where an employer is a member of an employers' organisation that is a party to the dispute, notice must be given to the employers' organisation.[358] If the state is the employer, employees must give 7 days' notice of the commencement of a strike.[359] It includes all organs of state even local authorities.[360]

The reason for a strike notice is to give the employer time to prepare for the proposed strike.[361] The LRA does not provide what details must be in a strike notice.[362] The day on which the proposed strike will take must be in a strike notice. However, it is not necessary to state the exact time at which the proposed strike will take place.[363] A strike notice must contain the venue where the proposed strike will take place.[364] The duration of a strike need not be contained in a strike notice. The reason for this is that not knowing how long a strike will take contributes to the effectiveness of a strike which is the aim of the collective bargaining process.[365]

The following part discusses collective agreements because the aim of collective bargaining is to reach a collective agreement.[366]

3.3.2.4 Collective agreements

Section 213 of LRA defines a collective agreement as

> 'a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade

[355] Section 64(1)*(b)*(i), LRA.
[356] Du Toit D, Godfrey S, Cooper C et al (2015) 343.
[357] Du Toit D, Godfrey S, Cooper C et al (2015) 343.
[358] Section 64(1)*(b)*(ii), LRA.
[359] Section 64(1)*(d)*, LRA.
[360] Grogan J (2014) 225.
[361] Collier D, Fergus E, Cohen T et al (2018) 368.
[362] Basson AC, Christianson MA, Garbers C et al (2017) 344.
[363] Grogan J (2014) 226.
[364] Collier D, Fergus E, Cohen T et al (2018) 368.
[365] Du Toit D, Godfrey S, Cooper C et al (2015) 344.
[366] Du Toit D, Godfrey S, Cooper C et al (2015) 309.

unions, on the one hand and, on the other hand- one or more employers; one or more registered employers' organisations; or one or more employers and one or more registered employers' organisations'.[367]

A collective agreement overrides an individual contract of employment.[368] As provided in section 23(3) of the LRA, a collective agreement can vary the terms and conditions of an individual contract of employment.[369] The meaning of this is that the provisions of a collective agreement will be incorporated into an individual contract of employment and the individual contract of employment will be varied.[370]

Section 199(1)*(a)* of the LRA provides that an employer may not pay an employee remuneration that is less than that stipulated by a collective agreement.[371] No provision in an individual contract of employment may allow an employee to be treated in a certain manner or to be provided any benefit that is less favourable than that provided in a collective agreement.[372] An individual contract of employment may not waive the application of provisions stipulated in a collective agreement.[373] If an individual contract of employment contains such provisions, it will not be enforceable.[374] When a collective agreement provides minimum terms and conditions and an individual contract of employment provides better terms and conditions of employment, the individual contract of employment will remain unchanged.[375]

Employers and employees can waive their statutory rights by way of a collective agreement but their right to waive their statutory rights may be limited.[376] For example, an employee's right to refer disputes to the Commission for Conciliation, Mediation and Arbitration (CCMA) or LC may not be waived.[377]

The following part briefly discusses bargaining councils, particularly their functions.

[367] Section 213, LRA.
[368] Grogan J (2020) 374.
[369] Section 23(3), LRA.
[370] Basson AC, Christianson MA, Garbers C et al (2017) 307.
[371] Section 199(1)*(a)*, LRA.
[372] Section 199(1)*(b)*, LRA.
[373] Section 199(1)*(c)*, LRA.
[374] Section 199(2), LRA.
[375] Du Toit D, Godfrey S, Cooper C et al (2015) 315.
[376] Grogan J (2014) 168.
[377] Grogan J (2014) 169.

3.3.2.5 Bargaining councils

Bargaining councils are created to advance collective bargaining at a sectoral level.[378] Section 27 of the LRA makes provision for the establishment of bargaining councils.[379] The primary functions of a bargaining council are collective bargaining and dispute resolution.[380] Collective bargaining allows the parties of a bargaining council to govern their relationship and come to an agreement on matters of terms and conditions of employment such as wages.[381] A bargaining council may exercise dispute resolution functions like the CCMA.[382] Bargaining councils can extend their services and functions to workers in the 'informal sector and home workers'.[383]

3.4 CONCLUSION

The ILO promotes collective bargaining in its international labour standards, declarations, and Decent Work Agenda. Conventions 87 and 98 have been interpreted broadly to make it possible to cover self-employed workers such as platform workers. The ILO's Decent Work Agenda goes a step further by ensuring decent work for all workers including workers in new forms of work. Social dialogue is one of the pillars of the ILO's Decent Work Agenda and the most important pillar for purposes of this mini-thesis. It ensures that all workers can take part in decisions that affect their working lives. It is therefore submitted that the ILO recognises collective bargaining rights of self-employed workers such as platform workers irrespective of the status of their contracts.

The chapter has provided a brief examination of the regulation of collective bargaining in South Africa. It is clear that collective bargaining is the main process to regulate matters of the employment relationship in South Africa.[384] It was shown that the right to fair labour practices is applicable to everyone. The labour rights in section 23(1) of the Constitution applies to workers. However, it was argued that the right provided in section 23(1) of the Constitution applies to all workers provided that they are not genuinely self-employed workers and that their work should have characteristics similar to an employment relationship. Based on this interpretation, it is submitted that the Constitution guarantees the collective bargaining rights of platform workers.

[378] Nel PS, Kirsten M, Swanepoel BJ et al (2016) 184.
[379] Section 27, LRA.
[380] Du Plessis JV & Fouche MA (2019) 268.
[381] Bendix S (2015) 224.
[382] Collier D, Fergus E, Cohen T et al (2018) 107.
[383] Section 28(1)*(l)*, LRA.
[384] Bendix S (2015) 238.

The LRA regulates collective bargaining in South Africa. It is evident from the wording 'employee' used and the interpretation of the provisions of the LRA that the focus of the LRA is to promote and regulate collective bargaining rights of employees. It is submitted that the LRA does not realise the collective rights of platform workers. The LRA does not promote or protect the collective bargaining rights of platform workers. Therefore, the LRA is contrary to Conventions 87 and 98 as well as the Constitution. The following chapter determines whether the collective bargaining rights as provided in the LRA can apply to platform workers and if so, to determine the extent to which such rights can apply to platform workers.

CHAPTER 4

THE EROSION OF COLLECTIVE BARGAINING BY DIGITAL PLATFORM WORK

4.1 INTRODUCTION

Chapter 3 examined the international and South African legal framework regarding collective bargaining. Chapter 4 focuses on work in the digital platform economy. The research question of the mini-thesis is: What is the appropriate legislative framework in South Africa to promote and regulate collective bargaining rights of digital platform workers? In order to answer the research question, the chapter aims to determine to what extent the factual preconditions of collective bargaining are eroded by digital platform work.

The chapter defines 'work in the digital platform economy' as conceptual clarity is required for purposes of chapter 4 and the following chapters. The chapter briefly analyses the advantages and disadvantages of digital platform work. The effect of non-standard employment on collective bargaining in the context of externalisation of work is briefly examined in the chapter. Thereafter, the chapter examines the obstacles to the representation of platform workers. The chapter analyses which rights in the LRA as stated in chapter 3 could potentially apply to platform workers.

4.2 DIGITAL PLATFORM WORK

The part defines digital platform work as conceptual clarity is required for this chapter and the following chapters. Platform work refers to work that is available through online platforms by which platform workers are paid for the execution of work.[385] There are various terms used to describe platform work such as 'sharing economy', 'collaborative economy', 'gig economy', and 'platform economy'.[386] For purposes of the mini-thesis, the term 'digital platform economy' is used because it is a neutral term which includes various digital platform activities.[387] The digital platform economy is diverse; however, for present purposes, the

[385] Heiland H (2020) 4; Garben S 'The regulatory challenge of occupational safety and health in the online platform economy' (2019) 72 *International Social Security Review* 98; Schoukens P, Barrio A & Montebovi S (2018) 223.

[386] Du Toit D 'Platform work and social justice' (2019) 40 *ILJ* 3; Stewart A & Stanford J 'Regulating work in the gig economy: What are the options?' (2017) 28 *The Economic and Labour Relations Review* 421; Azar J 'Portable benefits in the gig economy: Understanding the nuances of the gig economy' (2020) 27 *Georgetown Journal on Poverty Law and Policy* 411; Molobi L, Kabiraj S & Siddik MNA 'Behavioural intention factors influencing sharing economy innovations: An explanatory research of Uber in South Africa' (2020) 19 *Metamorphosis* 43; Hendrickx F (2018) 197.

[387] Kenney M & Zysman J 'The rise of the platform economy' (2016) 32 *Issues in Science and Technology* 62; Du Toit D (2019) 3; Garben S (2019) 97.

discussion focuses on two forms of platform work in the digital platform economy which are 'crowdwork' and 'work-on-demand via apps'.[388]

Crowdwork refers to work that is performed through digital platforms which link customers and workers through the internet.[389] Crowdwork enables workers to conduct work globally and allows businesses to access a vast number of workers.[390] The content of crowdwork is diverse.[391] Crowdwork includes microtasks which are repetitive tasks and do not require individuals with exceptional skills to perform the work, for example photo tagging.[392] An example of a crowdwork platform that involves microtasks is Amazon Mechanical Turk (AMT).[393]

Crowdwork includes macrowork where the work is more complicated and requires workers to have specific skills to complete specific work.[394] Macrowork cannot be completed within short periods of time and the work cannot be split into pieces. Thus, the 'focus is on the quality rather than quantity of work'.[395] In this regard, an example of macrowork is the creation of a website.[396] An example of a crowdwork platform that involves macrowork is 'Upwork'.[397]

'Work-on-demand via apps' involves work that is requested through online platform apps and is then performed locally.[398] There are various 'work-on-demand apps' because the services

[388] Johnston H 'Labour geographies of the platform economy: Understanding collective organising strategies in the context of digitally mediated work' (2020) 159 *International Labour Review* 26; Tassinari A & Maccarrone V 'Riders on the storm: Workplace solidarity among gig economy couriers in Italy and the UK' (2020) 34 *Work, Employment and Society* 37.

[389] ILO *Non-standard Employment Around the World: Understanding Challenges, Shaping Prospects* (2016) 40.

[390] Berg J, Furrer M, Harmon E et al (2018) 3.

[391] ILO *Non-standard Employment Around the World: Understanding Challenges, Shaping Prospects* (2016) 40.

[392] De Stefano V 'The rise of the "just-in-time workforce": On-demand work, crowdwork and labour protection in the "gig-economy"' (2016) International Labour Office Part 71 of the Conditions of Work and Employment Series 2; Rani U & Furrer M 'Digital labour platforms and new forms of flexible work in developing countries: Algorithmic management of work and workers' (2021) 25 *Competition & Change* 214.

[393] Gol ES, Stein MK & Avital M 'Crowdwork platform governance toward organisational value creation' (2019) 28 *Journal of Strategic Information Systems* 177.

[394] Heiland H (2020) 6.

[395] Gerber C 'Community building on crowdwork platforms: Autonomy and control of online workers?' (2021) 25 *Competition & Change* 195.

[396] De Stefano V 'The rise of the "just-in-time workforce": On-demand work, crowdwork and labour protection in the "gig-economy"' (2016) International Labour Office Part 71 of the Conditions of Work and Employment Series 2.

[397] Gol ES, Stein MK & Avital M (2019) 177.

[398] ILO *Non-standard Employment Around the World: Understanding Challenges, Shaping Prospects* (2016) 40; Johnston H & Land-Kazlauskas C 'Organising on-demand: Representation, voice, and collective bargaining in the gig economy' (2019) International Labour Office Part 94 of the Conditions of Work and Employment Series 3.

that customers require are different.[399] 'Work-on-demand via apps' that is location based includes transportation services, delivery services, and domestic work.[400] In this regard, an example is Uber.[401]

Platform work provides platform workers with flexibility as they can determine their own working schedules.[402] Platform work such as crowdwork provides platform workers with the opportunity to work remotely, which assists workers with family care obligations and/or crowdworkers who must work remotely for health reasons.[403] Crowdwork can shield against discrimination on the basis of gender, race, social standing and/or disability that crowdworkers otherwise would have faced.[404]

However, there are disadvantages associated with platform work such as no skills development or lower chances of growth for platform workers.[405] Some crowdworkers may face an increased risk of discrimination as platform owners may limit the geographical area in which work is made available.[406] Graham, Lehdonvirta, Wood et al state that,

> '[c]lients may assume that workers from low- and middle-income countries provide less valuable work than workers from high-income countries, unless

[399] De Stefano V 'The rise of the "just-in-time workforce": On-demand work, crowdwork and labour protection in the "gig-economy"' (2016) International Labour Office Part 71 of the Conditions of Work and Employment Series 3.

[400] Du Toit D, Fredman S & Graham M 'Towards legal regulation of platform work: Theory and practice' (2020) 41 *ILJ* 1495; Johnston H (2020) 26; Wood AJ, Graham M, Lehdonvirta V et al 'Good gig, bad gig: Autonomy and algorithmic control in the global gig economy' (2019) 33 *Work, Employment and Society* 57; Wood AJ, Graham M, Lehdonvirta V et al 'Networked but commodified: The (dis)embeddedness of digital labour in the gig economy' (2019) 53 *Sociology* 932.

[401] Veen A, Barratt T & Goods C 'Platform-capital's 'app-etite' for control: A labour process analysis of food-delivery work in Australia' (2020) 34 *Work, Employment and Society* 389; Schoukens P, Barrio A & Montebovi S (2018) 223.

[402] Lehdonvirta V 'Flexibility in the gig economy: Managing time on three online piecework platforms' (2018) 33 *New Technology, Work and Employment* 15; Newlands G, Lutz C & Fieseler C 'Collective action and provider classification in the sharing economy' (2018) 33 *New Technology, Work and Employment* 253; Lao M 'Workers in the "gig" economy: The case for extending the antitrust labor exemption' (2018) 51 *University of California Davis Law Review* 1557; Van Eck S 'Reflections on Manfred Weiss and the regulation of platform workers' in Olivier M, Smit N & Kalula E (eds) *Liber Amicorum Manfred Weiss* (2021) 154-5.

[403] Berg J, Furrer M, Harmon E et al (2018) 67.

[404] Amuso V, Poletti G & Montibello D 'The digital economy: Opportunities and challenges' (2020) 11 *Global Policy* 124.

[405] O'Farrell R & Montagnier P 'Measuring digital platform-mediated workers' (2019) 35 *New Technology, Work and Employment* 130-1.

[406] De Stefano V 'The rise of the "just-in-time workforce": On-demand work, crowdwork and labour protection in the "gig-economy"' (2016) International Labour Office Part 71 of the Conditions of Work and Employment Series 11.

the worker has evidence such as testimonials from previous clients that attest to the high quality of their work'.[407]

Acts of discrimination can be displayed towards platform workers who make use of 'work-on-demand via apps' whereby customers can exert discriminatory behaviour towards platform workers through the rating system.[408] The rating system is discussed below.[409] Platform workers such as crowdworkers can suffer from psychosocial issues as a result of working remotely and individually.[410] Platform workers who make use of 'work-on-demand via apps' can be exposed to risks related to damage to property or even road accidents.[411]

The advantage of flexibility that platform work provides does come with its disadvantages as platform work can lead to platform workers working longer hours in order to make more money.[412] Thus, resulting in platform workers mixing their working and personal time.[413] Platform work may result in job and income insecurity.[414] The digital platform economy diminishes collective bargaining.[415] The following part briefly examines the effect of non-standard employment on collective bargaining in the context of externalisation of work.

4.3 THE EFFECT OF NON-STANDARD EMPLOYMENT ON COLLECTIVE BARGAINING

There has been a shift from standard employment to non-standard employment before digital platform work.[416] Non-standard forms of employment include work such as part-time

[407] Graham M, Lehdonvirta V, Wood AJ et al 'The uneven potential of online platform work for human development at the global margins' in Drahokoupil J & Vandaele K (eds) *A Modern Guide to Labour and the Platform Economy* (2021) 203.
[408] De Stefano V & Aloisi A 'Fundamental labour rights, platform work and human rights protection of non-standard workers' in Bellace JR & Ter Haar B (eds) *Research Handbook on Labour, Business and Human Rights Law* (2019) 366.
[409] See 4.4.2 below.
[410] Garben S (2019) 100.
[411] Heiland H (2020) 10.
[412] Marcano IJ 'E-hailing and employment rights: The case for an employment relationship between Uber and its drivers in South Africa' (2018) 51 *Cornell International Law Journal* 278-9; Mujtaba A 'Entrepreneurship and ethics in the sharing economy: A critical perspective' (2020) 161 *Journal of Business Ethics* 21.
[413] Dunn M 'Making gigs work: Digital platforms, job quality and worker motivations' (2020) 35 *New Technology, Work and Employment* 233; Valenduc G & Vendramin P 'Digitalisation, between disruption and evolution' (2017) 23 *Transfer: European Review of Labour and Research* 131; Wood AJ, Graham M, Lehdonvirta V et al (2019) 62.
[414] International Labour Office 'Social dialogue and the future of work' (2020) Global Deal for Decent Work and Inclusive Growth 4; Pfeiffer S & Kawalec S 'Justice expectations in crowd and platform-mediated work' (2020) 31 *The Economic and Labour Relations Review* 491.
[415] Amuso V, Poletti G & Montibello D (2020) 125.
[416] Hendrickx F (2018) 200.

employment, fixed-term employment, and temporary agency employment.[417] Some forms of non-standard employment are regulated in South Africa. For purposes of this mini-thesis, externalisation of work is analysed.

Externalisation of work can be explained as 'a process of economic restructuring in terms of which employment is regulated by a commercial contract rather than by a contract of employment'.[418] Through externalisation of work, businesses can obtain numerical flexibility by reducing the number of workers employed by the business.[419] The process of externalisation of work allows a business to focus on its core functions. For example, activities that a business has 'expertise' in or has 'established a competitive advantage'.[420] Externalisation of work can take place through outsourcing of work. In this regard, a business retrenches employees that perform non-core functions and externalises the non-core functions of the business.[421]

Another way of externalising work is by using labour brokers.[422] Labour brokers are referred to as temporary employment services (TESs) in South Africa.[423] Section 198(1) of the LRA defines a TES as 'any person who, for reward, procures for or provides to a client other persons-

a) who perform work for the client; and
b) who are remunerated by the temporary employment service'.[424]

A TES has a triangular employment feature.[425] Once a TES has received work from a client, the TES subcontracts the work to other persons.[426] In terms of section 198(2) of the LRA, when a TES provides the services of a person to a client, the TES is the employer of that

[417] International Labour Office *Fundamental Principles and Rights at Work: From Challenges to Opportunities* (2017) Report VI International Labour Conference, 106th Session para 109; Schoukens P, Barrio A & Montebovi S (2018) 222; Berg J 'Income security in the on-demand economy: Findings and policy lessons from a survey of crowdworkers' (2016) 37 *Comp. Lab. L. & Pol'y J.* 544.
[418] Benjamin P 'Beyond 'lean' social democracy: Labour law and the challenge of social protection' (2006) 60 *Transformation: Critical Perspectives on Southern Africa* 36.
[419] Theron J 'Employment is not what it used to be' (2003) 24 *ILJ* 1254.
[420] Fenwick C, Kalula E & Landau I 'Labour law: A Southern African perspective' (2007) International Institute for Labour Studies Part 180 of the Discussion Paper Series 20.
[421] Fenwick C, Kalula E & Landau I 'Labour law: A Southern African perspective' (2007) International Institute for Labour Studies Part 180 of the Discussion Paper Series 21.
[422] Benjamin P (2006) 37.
[423] Theron J 'Intermediary or employer? Labour brokers and the triangular employment relationship' (2005) 26 *ILJ* 620.
[424] Section 198(1)*(a)-(b)*, LRA.
[425] Botes A 'Answers to the questions? A critical analysis of the amendments to the Labour Relations Act 66 of 1995 with regard to labour brokers' (2014) 26 *SA Merc LJ* 113.
[426] Theron J (2005) 620.

person and that person is an employee of the TES.[427] The work is usually performed on the premises of the client.[428] Some examples include cleaning and security work that can be externalised.[429]

Given the triangular feature of a TES, a trade union may approach either the TES or one or more clients of the TES to acquire organisational rights to bargain collectively.[430] In this regard, employees of a TES can be included into the collective bargaining process.[431]

There are practical obstacles to the representation of employees of a TES. An obstacle to the representation of employees of a TES is that it may be difficult for trade unions to locate employees because employees of a TES usually change workplaces.[432] Another potential obstacle is that an employee of a TES may not see the purpose in joining a trade union to defend or promote his or her interests as the work is usually temporary.[433]

Platform work is regarded as a form of externalisation of work.[434] In the case of the digital platform economy, digital platforms are used to externalise work.[435] Legally, there is someone, either the TES or the client of the TES, that a trade union can bargain with. Whether there is someone that platform workers can bargain collectively with has to be determined. Therefore, the following part examines the legal and the practical obstacles to the representation of platform workers.

4.4 OBSTACLES TO THE REPRESENTATION OF PLATFORM WORKERS

There are several obstacles to the representation of platform workers in the digital platform economy.[436] In this context, the purpose of this part is to examine the extent to which collective bargaining is eroded by digital platform work.

[427] Section 198(2), LRA.
[428] Theron J 'Non-standard work arrangements in the public sector: The case of South Africa' (2014) International Labour Office Working Paper 302 18.
[429] Theron J (2005) 620.
[430] Section 21(12), LRA.
[431] Botes A (2014) 117-8.
[432] Botes A (2014) 116.
[433] International Labour Office *Fundamental Principles and Rights at Work: From Challenges to Opportunities* (2017) Report VI International Labour Conference, 106th Session para 112.
[434] Meil P & Akguc M 'Moving on, out or up: The externalisation of work to B2B platforms' in Drahokoupil J & Vandaele K (eds) *A Modern Guide to Labour and the Platform Economy* (2021) 56.
[435] Berg J, Furrer M, Harmon E et al (2018) 6.
[436] Todoli-Signes A 'The 'gig economy': Employee, self-employed or the need for a special employment regulation?' (2017) 23 *Transfer: European Review of Labour and Research* 201; Sun P & Chen JY 'Platform labour and contingent agency in China'
(2021) *China Perspectives* 20.

4.4.1 Obstacles posed by the current statutory framework

The LRA is based on the notion of the standard employment relationship.[437] The LRA regulates the employer and employee relationship and excludes independent contractors.[438] In order to have access to rights such as collective bargaining in respect of the LRA, a person must fall within the legal definition of employee.[439]

The working arrangements of platform workers display different attributes than those of employees in standard employment.[440] Platforms categorise platform workers as independent contractors or self-employed workers.[441] The current classification of platform workers as independent contractors creates obstacles to the collective representation of platform workers.[442] Although the regulatory challenges that the digital platform economy brings are not new, the growth of the digital platform economy as a form of non-standard employment evolves at a much faster pace.[443]

Disguised employment is one of the central features of the digital platform economy.[444] It is a form of non-standard employment.[445] The ILO states that a disguised employment relationship can

> 'involve masking the identity of the employer by hiring the workers through a third party, or by engaging the worker in a civil, commercial or cooperative contract instead of an employment contract and at the same time directing and

[437] Fredman S, Du Toit D, Graham M et al 'Thinking out of the box: Fair work for platform workers' (2020) 31 *King's Law Journal* 241.
[438] Section 213, LRA.
[439] Grogan J (2014) 21.
[440] Garben S (2019) 96.
[441] Aleksynska M 'Digital work in Eastern Europe: Overview of trends, outcomes and policy responses' (2021) ILO Working Paper 32 41; De Stefano V, Durri I, Stylogiannis C et al 'Platform work and the employment relationship' (2021) ILO Working Paper 27 12.
[442] Borghi P, Murgia A, Mondon-Navazo M et al 'Mind the gap between discourses and practices: Platform workers' representation in France and Italy' (2021) 27 *European Journal of Industrial Relations* 426; Tassinari A & Maccarrone V (2020) 36.
[443] Stewart A & Stanford J (2017) 422; Huws U, Spencer NH & Syrdal DS 'Online, on call: The spread of digitally organised just-in-time working and its implications for standard employment models' (2018) 33 *New Technology, Work and Employment* 113.
[444] De Stefano V 'The rise of the "just-in-time workforce": On-demand work, crowdwork and labour protection in the "gig-economy"' (2016) International Labour Office Part 71 of the Conditions of Work and Employment Series 7.
[445] ILO 'Non-standard forms of employment' *https://www.ilo.org/global/topics/non-standard-employment/lang--en/index.htm* (accessed 17 October 2022).

> monitoring the working activity in a way that is incompatible with the worker's independent status.[446]

An Uber driver is regarded to be in a disguised employment relationship.[447]

There are constant attempts to fit platform workers into the category of 'employee'.[448] The assumption is that platform workers will have access to all labour and social protection if the definition of employee is extended to platform workers.[449] In the context of collective bargaining, the assumption therefore is that classifying platform workers as employees would allow them to collectively negotiate their terms and conditions of employment with their employer. According to Fredman, Du Toit, Graham et al, this assumption is not necessarily accurate,

> 'not least because platforms are adept at reconfiguring their conditions of work to avoid the legal definition of employee, or at fragmenting their corporate structure to evade the jurisdiction of courts in the region where workers in fact find themselves'.[450]

The digital platform economy is diverse and therefore, 'one size cannot fit all'.[451] If platform workers were to be categorised as 'employees', the manner in which collective rights in the LRA are afforded to employees in standard employment may be of little or no practical use to platform workers.[452] Platform work in digital platform economy as examined above shows that the manner in which platform work is performed is different from standard employment.[453] The next parts of the chapter illustrate in more detail how platform work is performed and how platform work is different from standard employment.[454]

Competition law may pose a legal obstacle for platform workers to organise and bargain collectively.[455] Section 4(1) of the Competition Act 89 of 1998 (Competition Act) prohibits

[446] ILO *Non-standard Employment Around the World: Understanding Challenges, Shaping Prospects* (2016) 9.
[447] Fredman S & Du Toit D (2019) 260.
[448] Hendrickx F (2018) 199.
[449] Govindjee A 'Extending social protection in the digital age: The case of transportation network company drivers in South Africa' (2020) 83 *THRHR* 50.
[450] Fredman S, Du Toit D, Graham M et al (2020) 236.
[451] Du Toit D (2019) 6.
[452] Du Toit D, Fredman S & Graham M (2020) 1500.
[453] See 4.2 above.
[454] See 4.4.2, 4.4.3 and 4.4.4 below.
[455] De Stefano V 'The rise of the "just-in-time workforce": on-demand work, crowdwork and labour protection in the "gig-economy"' (2016) International Labour Office Part 71 of the Conditions of Work and Employment Series 11.

restrictive horizontal practices. Competitors are prohibited from concluding an agreement that may result in the prevention or the reduction of competition in South Africa.[456] One example of restrictive horizontal practices is price fixing.[457] Section 4(1) of the Competition Act may confine the power of trade unions from concluding collective agreements protecting self-employed workers of the digital platform economy. While, the Competition Act 'applies to all economic activity within, or having an effect within, the Republic, except-

a) collective bargaining within the meaning of section 23 of the Constitution, and the Labour Relations Act, 1995 (Act 66 of 1995)',

the question remains whether or not the term 'worker' in the sense of the Constitution and the LRA covers self-employed workers.[458]

The triangular feature of platforms[459] means that platforms are used to connect platform workers and customers.[460] The result of such a business model is that it places all the risks onto workers.[461] The triangular feature of platforms makes it difficult to determine who the actual bargaining partner can be.[462] Therefore, the triangular feature of platforms creates obstacles for platform workers to bargain collectively.[463]

4.4.2 Obstacles posed by algorithmic management and control

Traditionally, employers supervise and control how employees exercise their work.[464] The manner in which supervision over platform work is exercised is different.[465] The use of algorithms is a feature of work in the digital platform economy.[466] Algorithm management is understood as '[a] system of control where self-learning algorithms are given the responsibility for making and executing decisions affecting labour, thereby limiting human

[456] Section 4(1)*(a)* of the Competition Act 89 of 1998.
[457] Section 4(1)*(b)*(i), Competition Act.
[458] Section 3(1)*(a)*, Competition Act.
[459] Garben S (2019) 101.
[460] Veen A, Barratt T & Goods C (2020) 389; Du Toit D, Fredman S & Graham M (2020) 1495; Cini L & Goldmann B 'The worker capabilities approach: Insights from worker mobilisations in Italian logistics and food delivery' (2021) 35 *Work, Employment and Society* 949; Van Eck S 'Reflections on Manfred Weiss and the regulation of platform workers' in Olivier M, Smit N & Kalula E (eds) *Liber Amicorum Manfred Weiss* (2021) 155.
[461] Funke C & Picot G 'Platform work in a coordinated market economy' (2021) 52 *ILJ* 350; Gol ES, Stein MK & Avital M (2019) 177.
[462] Aleksynska M 'Digital work in Eastern Europe: Overview of trends, outcomes and policy responses' (2021) ILO Working Paper 32 41.
[463] Heiland H (2020) 23.
[464] Todoli-Signes A (2017) 198.
[465] Todoli-Signes A (2017) 198.
[466] Kenney M & Zysman J (2016) 64; Wood AJ, Graham M, Lehdonvirta V et al (2019) 62; Berg J, Furrer M, Harmon E et al (2018) 8.

involvement and oversight of the labour process'.[467] Uber is an example of a business that uses algorithm management.[468] Uber does not regard itself as operating in the transport industry but that Uber only provides the connection between platform workers and customers through the use of technology.[469] Thus, Uber drivers are responsible for all expenses incurred and operational equipment such as vehicles and mobile phones.[470] Uber's business model is not only based on the 'just-in-time' worker but the 'just-in-place' worker as well whereby the algorithms strategically manage platform workers to reach particular locations at specific times.[471] Thus, algorithm management can be used to track where Uber drivers are and can assign work to Uber drivers in different locations in order to prevent Uber drivers from associating with each other and organising collectively.[472]

Uber's business model revolves around distancing itself from workers using algorithm management.[473] Uber controls the amount and method of payment, no physical cash is used to pay an Uber driver as payment is done through the platform in which Uber takes a percentage and then payment is made to the Uber driver and Uber controls the rewards it gives platform workers.[474] By doing so, Uber leaves Uber drivers with minimal voice because they do not have an employer to talk to.[475]

Uber does not exercise direct control over platform workers and exercises control by transferring the power to customers through a rating system, a system which is used to monitor how platform workers are performing their work.[476] In the event that platform workers receive low ratings for their work performance, they may face obstacles in finding work on the platform which results in platform workers spending 'a lot of time building their

[467] Galiere S 'When food-delivery platform workers consent to algorithmic management: A Foucauldian perspective' (2020) 35 *New Technology, Work and Employment* 358.
[468] Schildt H 'Big data and organisational design- the brave new world of algorithmic management and computer augmented transparency' (2017) 19 *Innovation: Organisation & Management* 25.
[469] Stewart A & Stanford J (2017) 424.
[470] Stanford J 'The resurgence of gig work: Historical and theoretical perspectives' (2017) 28 *The Economic and Labour Relations Review* 387.
[471] Wells KJ, Attoh K & Cullen D '"Just-in-place" labor: Driver organising in the Uber workplace' (2021) 53 *Environment and Planning A: Economy and Space* 317.
[472] De Stefano V '"Negotiating the algorithm": Automation, artificial intelligence and labour protection' (2018) International Labour Office Working Paper 246 7.
[473] Walker M, Fleming P & Berti M ''You can't pick up a phone and talk to someone': How algorithms function as biopower in the gig economy' (2021) 28 *Organisation* 34.
[474] Mujtaba A (2020) 26; Schiek D & Gideon A 'Outsmarting the gig-economy through collective bargaining- EU competition law as a barrier to smart cities?' (2018) 32 *International Review of Law, Computers & Technology* 277; Minter K 'Negotiating labour standards in the gig economy: Airtasker and Unions New South Wales' (2017) 28 *The Economic and Labour Relations Review* 440.
[475] Mujtaba A (2020) 26.
[476] Dunn M (2020) 233.

profile on the platform'.[477] Platform workers who receive low ratings can be deactivated from the platform.[478]

Uber drivers may reject work; however, they cannot reject work too often.[479] Uber expects platform workers to accept as much rides as possible and to provide a professional service to customers.[480] In addition to the algorithm management, Uber can deactivate drivers from the platform if they provide negative opinions about the company on social media platforms.[481] Therefore, platform workers are expected to either be faithful to Uber or face the consequences of being deactivated.[482]

Competition occurs among platform workers; for instance, Uber uses the rating feedback from customers to compare various drivers' rankings which creates a 'hierarchical space'.[483] In relation to the rating system of platform work, platform workers may be hesitant to organise collectively as it may have a negative impact on future job opportunities on platforms.[484] Thus, the competitive nature of platform work results in the individualisation and isolation of platform workers which can hinder the ability of platform workers to establish trust and thus to organise collectively.[485]

Algorithms are complex in nature and platform workers do not completely understand how algorithms operate.[486] Digital platforms such as Uber are not transparent in terms of the manner in which ratings of platform workers are managed.[487] It is difficult for an algorithmic management to be held responsible for unfair deactivations.[488]

[477] Rani U & Furrer M (2021) 224.
[478] Wood AJ, Graham M, Lehdonvirta V et al (2019) 64; De Stefano V '"Negotiating the algorithm": Automation, artificial intelligence and labour protection' (2018) International Labour Office Working Paper 246 7.
[479] Zwick A 'Welcome to the gig economy: Neoliberal industrial relations and the case of Uber' (2018) 83 *GeoJournal* 685.
[480] Galiere S (2020) 359.
[481] Todoli-Signes A (2017) 195.
[482] Walker M, Fleming P & Berti M (2021) 27.
[483] Doorn van N 'Platform labor: On the gendered and racialised exploitation of low-income service work in the 'on-demand' economy' (2017) 20 *Information, Communication & Society* 903.
[484] De Stefano V 'The rise of the "just-in-time workforce": On-demand work, crowdwork and labour protection in the "gig-economy"' (2016) International Labour Office Part 71 of the Conditions of Work and Employment Series 9.
[485] Katsabian T (2021) 1018.
[486] Rani U & Furrer M (2021) 216; Woodcock J 'Towards a digital workerism: Workers' inquiry, methods, and technologies' (2021) 15 *Nanoethics* 91.
[487] De Stefano V '"Negotiating the algorithm": Automation, artificial intelligence and labour protection' (2018) International Labour Office Working Paper 246 8; Harmon E & Silberman MS 'Rating working conditions on digital labor platforms' (2019) 28 *Computer Supported Cooperative Work* 929.
[488] Walker M, Fleming P & Berti M (2021) 29.

As discussed in chapter 3, the dispute resolution system in respect of collective bargaining in the LRA is limited to employees. Platform workers do not have access to the CCMA, bargaining councils or the LC which all have the function of resolving disputes as provided for in the LRA and platform workers are subjected to the jurisdictional clauses in their contracts with platforms.[489]

In *NUPSAW obo Mostert v Uber South Africa Technology Services (Pty) Ltd & others*, the applicant, an Uber driver, lodged a claim against the second respondent, Uber BV, in which he alleged that he was unfairly dismissed.[490] The CCMA commissioner had to determine whether the CCMA has jurisdiction to hear an unfair dismissal claim lodged by the Uber driver.[491] After examining the evidence, the CCMA commissioner held that the Uber driver concluded a contract with Uber BV and that Uber BV was located in the Netherlands.[492] Therefore, the CCMA commissioner held that the CCMA 'does not have jurisdiction' and the LRA is not applicable.[493]

The CCMA's ruling therefore, goes against the notion of public policy and social justice as the CCMA's ruling means that drivers have to go to courts in the Netherlands in order to challenge disputes against Uber.[494] Du Toit, Fredman, Bhatia et al note that

> 'this opens the door to abuse by enabling foreign enterprises conducting operations in South Africa to evade South African labour law, thus leaving employees unprotected and defeating the purposes of the LRA'.[495]

In *Uber Technologies Inc. v. Heller*, an arbitration clause in a contract between the appellant and the respondent provided that the respondent and other Uber drivers in Ontario must travel to the Netherlands in order to individually proceed with a claim against Uber.[496] The Supreme Court of Canada held that there was unequal bargaining power between the appellant and the respondent as the respondent had no bargaining power to collectively negotiate the terms of the contract with the appellant.[497] The Supreme Court of Canada held

[489] Du Toit D, Fredman S & Graham M (2020) 1498.
[490] *NUPSAW obo Mostert v Uber South Africa Technology Services (Pty) Ltd & others* case no. WECT 18234-18 (2018) para 3.
[491] Para 2.
[492] Para 18.
[493] Para 20.
[494] Malherbe K, Mokoena K & Du Toit D (2019) 186.
[495] Du Toit D, Fredman S, Bhatia G et al *Code of Good Practice for the Regulation of Platform Work in South Africa* (2020) Fairwork 22.
[496] *Uber Technologies Inc. v. Heller* 2020 SCC 16 para 94.
[497] Para 93.

that the costs relating to the mediation and arbitration for administration fees is high as the amount is almost close to the annual income that the respondent earns.[498] The amount excludes other costs incurred such as legal, travel and accommodation fees.[499] Therefore, the Supreme Court of Canada held that the arbitration clause was 'unconscionable' and not enforceable.[500]

The use of algorithmic management hinders collective representation and collective voice because it is not possible to negotiate with an algorithm and platform workers cannot appeal decisions to the algorithm regarding unfair deactivations.[501] Therefore, the use of algorithms in digital platforms are designed in a manner to diminish the power of platform workers and to increase the power of platforms.[502]

4.4.3 Obstacles posed by the geographical fragmentation of platform workers

The dispersed workforce is a common feature of the digital platform economy.[503] Traditionally, the workplace has always been a place where employees can form solidarity and organise collectively; however, the idea of the workplace in platform work is non-existent.[504] In the instance of crowdworkers, crowdworkers execute their work remotely which means that they do not come into contact with customers or other platform workers.[505] Therefore, the geographical fragmentation in respect of crowdworkers contributes to the individualisation of crowdworkers who are not confined to a common workplace.[506]

Platform workers who make use of 'work-on-demand via apps' do not have a common workplace; however, such workers are locally based.[507] It is possible for platform workers who perform their work locally to organise collectively.[508] However, it may be difficult to identify other workers who perform similar work with the exception of those platform

[498] Para 94.
[499] Para 94.
[500] Para 98.
[501] Heiland H (2020) 24.
[502] Karanovic J, Berends H & Engel Y 'Regulated dependence: Platform workers' responses to new forms of organising' (2021) 58 *Journal of Management Studies* 1075; Cini L & Goldmann B (2021) 949-950.
[503] Messenger J 'Working time and the future of work' (2018) ILO 22.
[504] Walker M, Fleming P & Berti M (2021) 31.
[505] Berg J (2016) 543.
[506] Gerber C (2021) 193.
[507] Johnston H (2020) 30.
[508] Heiland H (2020) 21.

workers who have a clearly marked uniform or 'motor scooter'.[509] The geographical fragmentation of platform workers contributes to the challenges that platform workers face with regards to organising collectively.[510]

4.4.4 Obstacles posed by the different reasons for the reliance on platform work and working for multiple platforms

Some platform workers may undertake platform work as a second job.[511] Platform workers who permanently rely on platform work may want to improve their working conditions as opposed to platform workers who only work on platforms temporarily.[512] Platform workers who work on platforms temporarily may have a permanent job which already provides labour and social protection in standard employment, resulting in such workers not wanting to improve their working conditions in the digital platform economy.[513] Therefore, the different reasons for the reliance on platform work by platform workers may hinder the ability to establish collective identity and to organise collectively.[514]

Platform workers can work for multiple platforms simultaneously.[515] Some platform workers may not continue working for a platform once they have found better work and when there is an improvement in their finances.[516] The continuous entering and existing of various platforms by platform workers can make it difficult for platform workers to locate each other for purposes of organising collectively.[517]

The part has established that platform work is different from standard employment. Platform workers are faced with various obstacles to organise collectively as a result of the different features of platform work and the different reasons for the reliance on platform work. The

[509] Heiland H (2020) 21; Herr B, Schorpf P & Flecker J 'How place and space matter to union organising in the platform economy' in Drahokoupil J & Vandaele K (eds) *A Modern Guide to Labour and the Platform Economy* (2021) 118.
[510] Newlands G, Lutz C & Fieseler C (2018) 253; Howcroft D & Bergvall-Kareborn B 'A typology of crowdwork platforms' (2019) 33 *Work, Employment and Society* 31; Wood AJ, Graham M, Lehdonvirta V et al (2019) 938.
[511] O'Farrell R & Montagnier P (2019) 130; Healy J, Nicholson D & Pekarek A 'Should we take the gig economy seriously?' (2017) 27 *Labour and Industry* 237; Azar J (2020) 411.
[512] Mujtaba A (2020) 23.
[513] Aleksynska M 'Digital work in Eastern Europe: Overview of trends, outcomes and policy responses' (2021) ILO Working Paper 32 43.
[514] Tassinari A & Maccarrone V (2020) 38.
[515] Todoli-Signes A (2017) 201.
[516] Dunn M (2020) 237.
[517] Johnston H & Land-Kazlauskas C 'Organising on-demand: Representation, voice, and collective bargaining in the gig economy' (2019) International Labour Office Part 94 of the Conditions of Work and Employment Series 4.

following part examines the rights in the LRA that could potentially apply to platform workers.

4.5 THE RIGHTS IN THE LABOUR RELATIONS ACT 66 OF 1995 THAT COULD POTENTIALLY APPLY TO PLATFORM WORKERS

Chapter 3 stated the rights regarding collective bargaining in the LRA that are applicable to employees. In this part, it is necessary to analyse the extent to which the existing rights in the LRA may potentially apply to platform workers even if platform workers do not make use of trade union organisations. The difficulty in the case of platform work as part of the broader regulatory problems faced by other non-standard forms of employment is to create new means in which individual and collective rights as afforded in the LRA can perform a similar function for non-standard employees.[518]

In this regard, platform workers require protection of the right to freedom of association as platforms should not discriminate against or disadvantage platform workers by refusing platform workers access to platforms as a result of exercising the right to freedom of association.[519] In some instances, platforms incentivise platform workers with the aim of counteracting collective efforts.[520] Therefore, platforms should not advantage or promise to advantage platform workers to not exercise their right to freedom of association.

It is submitted that there are existing organisational rights provided in the LRA that can potentially be extended to platform workers.[521] As discussed above, platform workers do not have a workplace.[522] However, certain adjustments can be made to cater for platform workers with regards to the right to access to the workplace for platform workers' organisations.[523] Platform workers' organisations should be able to communicate with platform workers through a platform and the right to access to the platform should be exercised without the interference by platform owners.[524] The right to deductions of subscriptions can apply to platform workers given that digital platform work is enabled by technology and platform

[518] Malherbe K, Mokoena K & Du Toit D (2019) 188.
[519] Fredman S, Du Toit D, Graham M et al (2020) 246.
[520] Tassinari A & Maccarrone V (2020) 48.
[521] Du Toit D, Fredman S, Bhatia G et al *Code of Good Practice for the Regulation of Platform Work in South Africa* (2020) Fairwork 27.
[522] See 4.4.3 above.
[523] Du Toit D, Fredman S & Graham M (2020) 1519.
[524] Du Toit D, Fredman S & Graham M (2020) 1519.

workers can make payments electronically.[525] Thus, platform workers can pay their subscription fees regardless of the organisations that platform workers join.

The right to a trade union representative can be extended to platform workers because representatives of platform workers can assist platform workers in grievance and disciplinary proceedings and monitor whether platform owners adhere to the provisions of a collective agreement if one is concluded.[526] Platform workers should have the right to the disclosure of information.[527] There should be similar limitations on information that is privileged.[528] The disclosure of information can assist parties to effectively engage in the bargaining process and to make informative decisions.[529]

The agreements that platform workers enter are based on the rules of contract law.[530] Collective agreements are generally not applicable to platform workers because they do not have access to collective bargaining.[531] However, if the right to collective bargaining is extended to platform workers, platform workers should be able to conclude collective agreements and the parties to a collective agreement could be able to enforce the collective agreement through a suitable dispute resolution system.[532]

The isolation and individualised nature of platform work results in challenges for platform workers to unionise and thus means that platform workers do not meet the necessary precondition for collective action.[533] Platform workers should have the right to withhold labour as a last resort when there has been a breakdown in negotiations to advance their interests.[534]

Platform workers are not protected by the current rights because platform workers do not fall within the scope of the LRA. Considering how platform work is performed, this part examined which of the current rights in the LRA could potentially apply to platform workers.

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[525] Du Toit D, Fredman S, Bhatia G et al *Code of Good Practice for the Regulation of Platform Work in South Africa* (2020) Fairwork 27.
[526] Du Toit D, Fredman S, Bhatia G et al *Code of Good Practice for the Regulation of Platform Work in South Africa* (2020) Fairwork 27.
[527] Du Toit D, Fredman S, Bhatia G et al *Code of Good Practice for the Regulation of Platform Work in South Africa* (2020) Fairwork 27.
[528] Du Toit D, Fredman S, Bhatia G et al *Code of Good Practice for the Regulation of Platform Work in South Africa* (2020) Fairwork 27.
[529] ILO *Collective Bargaining: A Policy Guide* (2015) 50.
[530] Du Toit D, Fredman S & Graham M (2020) 1498.
[531] Aleksynska M 'Digital work in Eastern Europe: Overview of trends, outcomes and policy responses' (2021) ILO Working Paper 32 41.
[532] Du Toit D, Fredman S & Graham M (2020) 1519.
[533] Katsabian T (2021) 1017.
[534] Katsabian T (2021) 1039; Du Toit D, Fredman S & Graham M (2020) 1519.

4.6 CONCLUSION

The chapter has provided a conceptualisation of digital platform work and addressed the advantages and disadvantages associated with platform work. As illustrated in the chapter, platform work is not the only form of non-standard employment and is regarded as a form of externalisation of work.[535] The chapter has shown that the features of platform work create several obstacles to the representation of platform workers.

Platform workers are not protected by the current rights, as they are not covered by the LRA and the current rights are not appropriate for their situation. There is a failure to take into consideration that platform workers who do not pass through the 'gateway' of employee status have the right to decent work.[536] It was submitted that there are certain rights in the LRA that can potentially apply to platform workers irrespective of the status of their contracts.

Although platform workers face several obstacles to organise collectively, there are various strategies platform workers have adopted to form collective action.[537] In this context, the following chapter examines the alternative strategies that have been adopted to improve the working conditions of platform workers.

[535] See 4.3 above.
[536] Fredman S, Du Toit D, Graham M et al (2020) 241.
[537] Valenduc G & Vendramin P (2017) 131.

CHAPTER 5

STRATEGIES ADOPTED TO IMPROVE THE WORKING CONDITIONS OF DIGITAL PLATFORM WORKERS

5.1 INTRODUCTION

Chapter 4 provided a conceptualisation of digital platform work and the various obstacles to the representation of platform workers in the digital platform economy were explained. The various obstacles that platform workers face in digital platform work make it difficult for collective organisation and collective action to occur.[538] Some strategies have been adopted to improve the working conditions of platform workers in the digital platform economy.[539] In this regard, this chapter examines the alternative strategies that have been adopted to improve the working conditions of platform workers.

The chapter is structured as follows. First, the chapter provides an examination regarding the role that online forums and social media play in assisting platform workers to organise collectively and examines the pitfalls of online communication. Thereafter, the chapter analyses the responses of grassroots organisations to organise platform workers and identifies the drawbacks of grassroots organisations. The chapter explores platform cooperatives as an alternative form of worker organisation and a business model for platform workers in the digital platform economy. The shortcomings of platform cooperatives are briefly explored.

The chapter provides some examples of existing alternative organisations to trade unions. Turkopticon is examined to determine whether Turkopticon's rating system is effective in providing fair working conditions for platform workers. The Fair Crowd Work initiative is briefly discussed to ascertain its efficacy in promoting platform workers' voice and improving the working conditions of platform workers. The Crowdsourcing Code of Conduct which is aimed at providing guidelines to promote fairness in the digital platform economy is briefly analysed. The Ombuds Office which has been established to enforce the Crowdsourcing Code of Conduct is briefly examined to establish whether the Ombuds Office has been successful in resolving disputes between platforms operators and crowdworkers.

The Frankfurt Declaration on Platform-Based Work which is an initiative created by trade unions to respond to the disadvantages of platform work is examined. The drawbacks of the Frankfurt Declaration on Platform-Based Work are presented. The chapter explores the

[538] Tassinari A & Maccarrone V (2020) 36.
[539] Howcroft D & Bergvall-Kareborn B (2019) 32.

Fairwork project, an initiative to improve the working conditions of platform workers in the digital platform economy. The downsides of the Fairwork project are examined.

The chapter concludes by stating which of the strategies that have been adopted to improve the working conditions of platform workers are feasible in protecting and promoting the collective bargaining rights of platform workers. The chapter determines whether any of these strategies are compatible with the international legislative framework for collective bargaining and the legislative framework for collective bargaining in South Africa.

5.2 ONLINE COMMUNICATION

The part examines the role that online forums and social media play in assisting platform workers to organise collectively. Platform workers create online communication through social media groups and online forums to share work information in the digital platform economy.[540] The purpose of online communities is for platform workers to 'seek emotional support, to vent complaints and form oppositional networks'.[541] The exchange of information by platform workers is regarded as mutual aid which may create the opportunity for collective organisation.[542] Mutual aid allows workers to support each other in their personal and professional lives.[543]

Social media platforms such as Whatsapp and Facebook are used by platform workers to interact with each other.[544] Platform workers communicate through email too.[545] Kaine and Josserand are of the view that social media is beneficial to platform workers because platforms generally do not provide the option for platform workers to share information and communicate with each other.[546] Newlands, Lutz and Fieseler note that online support groups

[540] Chan NK '"Becoming an expert in driving for Uber": Uber driver/bloggers' performance of expertise and self-presentation on Youtube' (2019) 21 *New Media & Society* 2049; Tassinari A & Maccarrone V (2020) 40; Du Toit D 'Collective labour rights in the platform economy: Looking back, looking forward' in Olivier M, Smit N & Kalula E (eds) *Liber Amicorum Manfred Weiss* (2021) 88.

[541] Gerber C (2021) 194.

[542] Healy J, Pekarek A & Vromen A 'Sceptics or supporters? Consumers' views of work in the gig economy' (2020) 35 *New Technology, Work and Employment* 3.

[543] Ford M & Honan V 'The limits of mutual aid: Emerging forms of collectivity among app-based transport workers in Indonesia' (2019) 61 *Journal of Industrial Relations* 530.

[544] Katsabian T (2021) 1020; Anwar MA & Graham M 'Hidden transcripts of the gig economy: Labour agency and the new art of resistance among African gig workers' (2020) 52 *Environment and Planning A: Economy and Space* 1273.

[545] Wood AJ, Lehdonvirta V & Graham M 'Workers of the internet unite? Online freelancer organisation among remote gig economy workers in six Asian and African countries' (2018) 33 *New Technology, Work and Employment* 101.

[546] Kaine S & Josserand E 'The organisation and experience of work in the gig economy' (2019) 61 *Journal of Industrial Relations* 493.

can be beneficial to platform workers even in the case where there is not constant interaction.[547] Online forums and social media platforms can assist platform workers to quickly organise a strike and protests.[548] For example, in May 2019, Uber drivers around the world took part in collective action to challenge Uber's bad working conditions. Uber drivers from different places were able to organise collectively through the assistance of social media platforms and emails.[549]

Although online forums and social media can assist platform workers to communicate with each other, online forums and social media have their pitfalls. Online forums are dispersed based on 'platform, work nationality, worker seniority and type of task'.[550] The internet reduces opportunities for platform workers to communicate with each other in person.[551] In order for collective organisation to occur, trust must exist between workers.[552] Heiland argues that online communities make it challenging to establish trust as well as commitment amongst platform workers which restricts platform workers from establishing a collective voice.[553]

The part has demonstrated that it is possible for technology to help workers to communicate with each other where workers do not have a workplace.[554] The following part examines the responses of grassroots organisations to organise platform workers.

5.3 GRASSROOTS ORGANISATIONS

Grassroots organisations are an alternative form of worker organisation.[555] They are focused on 'community-based' rather than 'workplace-centred' organisation.[556] Article 10 of Convention 87 provides that the word organisation includes any workers' organisation that advances and defends the interests of workers.[557] Workers' organisations referred to in

[547] Newlands G, Lutz C & Fieseler C (2018) 252.
[548] Chesta RE, Zamponi L & Caciagli C 'Labour activism and social movement unionism in the gig economy. Food delivery workers' struggles in Italy' (2019) 12 *Partecipazione e conflitto* 833.
[549] Wells KJ, Attoh K & Cullen D (2021) 316.
[550] Wood AJ, Lehdonvirta V & Graham M (2018) 97.
[551] Katsabian T (2021) 1021.
[552] Borghi P, Murgia A, Mondon-Navazo M et al (2021) 427.
[553] Heiland H (2020) 29.
[554] Global Commission on the Future of Work (2019) 42.
[555] Katsabian T (2021) 1020; De Stefano V 'The rise of the "just-in-time workforce": On-demand work, crowdwork and labour protection in the "gig-economy"' (2016) International Labour Office Part 71 of the Conditions of Work and Employment Series 23.
[556] Report of the Director-General *Organising for Social Justice: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* (2004) Report I (B) International Labour Conference, 92nd Session para 346.
[557] See 3.2.2 above.

Conventions 87 and 98 are broad enough to include different types of organisations. However, the objective of such organisations must be to advance and defend workers' interests.[558] There are different grassroot unions that have assisted platform workers, specifically those who are food delivery riders, which include the Independent Workers Union of Great Britain (IWGB), SI-COBAS, Deliverance Milano and Riders Union Bologna.[559]

There are different ways in which grassroots organisations organise and take collective action which include combining traditional and new ways of organising.[560] Platform workers who perform their work locally, in the instance of food delivery riders, have the opportunity to get together at locations close to restaurants which can be in the street or in 'a square'.[561] Cini and Goldmann regard the 'square' as 'a space where the virtual and the physical are merged' and where they wait to pick up food orders for delivery. The 'square' is a space that creates the opportunity for workers to develop collective identity.[562] According to Tassinari and Maccarrone, it is important for 'collective identity and shared interests' to be established amongst platform workers for collective action to take place.[563] For example, food delivery riders of the Deliveroo platform in the UK and food delivery riders of the platform Foodora in Turin, Italy, took part in protests as a result of the change in the payment system that went from a hourly wage to a per work payment.[564] The food delivery riders of the Deliveroo platform in the UK gathered outside Deliveroo's offices.[565] Public protests can have a negative impact on platforms reputations and public protests add to public awareness.[566]

A new way of collective action can occur where platform workers log-off from digital platforms and refuse to perform work.[567] The functioning of platforms can be negatively affected when platform workers log-off from platforms for example, there can be a delay in

[558] Report of the Director-General *Organising for Social Justice: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* (2004) Report I (B) International Labour Conference, 92nd Session para 346.
[559] Tassinari A & Maccarrone V (2020) 42 and 43; Borghi P, Murgia A, Mondon-Navazo M et al (2021) 430.
[560] Joyce S & Stuart M 'Trade union responses to platform work: An evolving tension between mainstream and grassroots approahes' in Drahokoupil J & Vandaele K (eds) *A Modern Guide to Labour and the Platform Economy* (2021) 183.
[561] Chesta RE, Zamponi L & Caciagli C (2019) 829.
[562] Cini L & Goldmann B (2021) 956.
[563] Tassinari A & Maccarrone V (2020) 45.
[564] Heiland H (2020) 30, 31 and 34.
[565] Tassinari A & Maccarrone V (2020) 42.
[566] Chesta RE, Zamponi L & Caciagli C (2019) 835.
[567] Joyce S & Stuart M 'Trade union responses to platform work: An evolving tension between mainstream and grassroots approahes' in Drahokoupil J & Vandaele K (eds) *A Modern Guide to Labour and the Platform Economy* (2021) 184-5.

food deliveries, reduced volume of orders being made and food not being collected by riders to deliver it to customers.[568] For example, the food delivery riders of the Deliveroo platform in the UK logged-off from the Deliveroo app which resulted in the 'on-and-off' stoppage of work for six days.[569]

Healy, Nicholson and Pekarek are of the view that traditional trade unions can learn from the initiatives taken by grassroots organisations regarding how to make use of digital technology and establish alternative ways to organise platform workers who are fragmented.[570]

Notwithstanding some of the efforts taken by grassroots organisations, the drawbacks of grassroots organisations should be noted. Unlike trade unions who rely on memberships for their survival, grassroots organisations focus on broader mobilisation of workers.[571] Thus, grassroots organisations may not be a long-term solution.[572] The efforts taken by grassroots organisations are mainly focused on platform workers in food delivery services that are visible to the public. Grassroots organisations are not focused on other platform workers in the digital platform economy that are affected by the disadvantages associated with work in the digital platform economy such as crowdworkers and domestic workers.[573]

The part has illustrated that grassroots organisations incorporate traditional strike action and create new ways of organising workers. However, the efforts taken by grassroots organisations have mainly been focused on platform workers in food delivery services. It is within this context that the next part analyses platform cooperatives as an alternative form of worker organisation and a business model for all platform workers in the digital platform economy.

[568] Joyce S & Stuart M 'Trade union responses to platform work: An evolving tension between mainstream and grassroots approahes' in Drahokoupil J & Vandaele K (eds) *A Modern Guide to Labour and the Platform Economy* (2021) 185.
[569] Tassinari A & Maccarrone V (2020) 42.
[570] Healy J, Nicholson D & Pekarek A (2017) 237.
[571] Joyce S & Stuart M 'Trade union responses to platform work: An evolving tension between mainstream and grassroots approahes' in Drahokoupil J & Vandaele K (eds) *A Modern Guide to Labour and the Platform Economy* (2021) 185.
[572] Joyce S & Stuart M 'Trade union responses to platform work: An evolving tension between mainstream and grassroots approahes' in Drahokoupil J & Vandaele K (eds) *A Modern Guide to Labour and the Platform Economy* (2021) 187.
[573] Gurumurthy A, Chami N & Bharthur D *Platform Labour in Search of Value: A Study of Workers' Organising Practices and Business Models in the Digital Economy* (2021) 54.

5.4 PLATFORM COOPERATIVES

Platform cooperatives are an alternative form of worker organisation that can represent platform workers in collective bargaining.[574] According to Scholz, platform cooperatives focus on 'technological, cultural, political, and social changes' to benefit all workers.[575] Profits are not the main objective of platform cooperatives.[576] The objective of platform cooperatives is to change the structure of power in the digital platform economy by focusing on democracy, collective organisation and social benefit.[577] Platform cooperatives promote a 'People's Internet' which allows platform workers to develop a platform, to interact with each other, to be owners of platforms and to make decisions on how platform cooperatives organisations are controlled and structured.[578] Therefore, the idea is to allow platform workers to advance their own interests when creating platforms.[579] The parties to this organisation equally enjoy the advantages and are equally liable for the risks.[580]

The liability associated with platform cooperatives is different from that of trade union organisations. A member of a trade union is not liable for any duties or liabilities of a trade union.[581] In terms of section 97(3) of the LRA,

> '[a] member, office-bearer, or official of a registered trade union…or, in the case of a trade union, a trade union representative is not personally liable for any loss suffered by any person as a result of an act performed or omitted in good faith by the member, office-bearer, official or trade union representative while performing their functions for the trade union'.[582]

[574] Du Toit D, Fredman S, Bhatia G et al *Code of Good Practice for the Regulation of Platform Work in South Africa* (2020) Fairwork 63; Du Toit D 'Collective labour rights in the platform economy: Looking back, looking forward' in Olivier M, Smit N & Kalula E (eds) *Liber Amicorum Manfred Weiss* (2021) 89.
[575] Scholz T 'Platform cooperativism: Challenging the corporate sharing economy' (2016) Rosa Luxemburg Stiftung, New York Office 14.
[576] Heiland H (2020) 51.
[577] Pazaitis A, Kostakis V & Bauwens M 'Digital economy and the rise of open cooperativism: the case of the Enspiral Network' (2017) 23 *Transfer: European Review of Labour and Research* 180.
[578] Sandoval M 'Entrepreneurial activism? Platform cooperativism between subversion and co-optation' (2020) 46 *Critical Sociology* 802; Esim S & Katajamaki W 'Rediscovering worker cooperatives in a changing world of work' (2017) IUSLabor 1/2017 6.
[579] Johnston H & Land-Kazlauskas C 'Organising on-demand: Representation, voice, and collective bargaining in the gig economy' (2019) International Labour Office Part 94 of the Conditions of Work and Employment Series 18.
[580] Esim S & Katajamaki W 'Rediscovering worker cooperatives in a changing world of work' (2017) IUSLabor 1/2017 6.
[581] Section 97(2), LRA.
[582] Section 97(3), LRA.

A trade union is a body corporate and is liable for any loss suffered by any person.[583]

An example of a project geared towards platform cooperatives is the Digital Platform Cooperative Project in South Africa. The aims of the Digital Platform Cooperative Project are to establish a platform for domestic workers and to provide workers with the skills to operate the organisation and provide services effectively.[584]

Although platform cooperatives can serve as an alternative form of worker organisation that can improve the working conditions of platform workers in the digital platform economy, platform cooperatives are faced with impediments such financial problems and a longer decision-making processes due to the democratic nature of platform cooperatives. As a result, the growth of platform cooperatives may be unlikely.[585]

5.5 EXAMPLES OF ALTERNATIVE ORGANISATIONS

The part provides a brief overview of a selection of existing alternative organisations to trade unions to improve the working conditions of platform workers.

5.5.1 Turkopticon

Turkopticon is an online platform[586] and was developed by researchers, Irani and Silberman.[587] The online platform has been active since 2009.[588] The development of Turkopticon which has a web application and browser extension, was a response to the communication that the researchers had with crowdworkers of AMT.[589] Silberman and Irani describe the two parts:

> 'The web application lets workers review requesters. The reviews include qualitative and quantitative elements. The browser extension aggregates the quantitative elements of all reviews of a particular requester and adds them to the HIT listing next to HITs posted by that requester.'[590]

[583] Section 97(1), LRA, Grogan J (2014) 56.
[584] Du Toit D & Howson K (2022) 725.
[585] Heiland H (2020) 52.
[586] See https://turkopticon.net/.
[587] Almaatouq A, Krafft P, Dunham Y et al 'Turkers of the world unite: Multilevel in-group bias among crowdworkers on Amazon Mechanical Turk' (2020) 11 *Social Psychological and Personality Science* 152.
[588] Berg J, Furrer M, Harmon E et al (2018) 96.
[589] Irani L & Silberman MS 'From critical design to critical infrastructure: Lessons from Turkopticon' (2014) 21 *Interactions* 33-4.
[590] Silberman MS & Irani L 'Operating an employer reputation system: Lessons from Turkopticon, 2008-2015' (2016) 37 *Comp. Lab. L. & Pol'y J.* 505 and 526; HIT refers to Human Intelligence Tasks.

The qualitative rating reviews are based on how well the requester communicates or respond to workers' complaints, how well a worker is paid for the time he or she used to perform the work, how fair the requester has been with regards to the approval or rejection of work that has been completed by a worker, and how quickly the requester has approved the work and paid the worker for the work performed.[591]

Workers' ratings of requesters assist other workers to avoid accepting work from requesters who often unfairly refuse to pay workers for the work they have completed.[592] In this regard, Turkopticon enables workers to collectively engage in mutual aid.[593] According to Irani and Silberman, negative reviews have resulted in requesters questioning the reason why their tasks are rejected which then leads requesters to engage with workers through Turkopticon.[594] Therefore, Turkopticon is regarded as an 'information equalizer' because Turkopticon's purpose is to balance the unequal power between requesters and workers.[595]

Turkopticon is based on a 'volunteer-operated system with no revenue' which makes it difficult to continuously address problems such as misleading reviews, for example, 'when a requester reviews itself, or when a worker upset about poor treatment creates multiple accounts to post multiple negative reviews'.[596]

Turkopticon creates an opportunity for workers to assist each other with information through ratings of requesters. The following part briefly examines whether the Fair Crowd Work's rating system is effective to improve the working conditions of platform workers.

5.5.2 Fair Crowd Work

The Fair Crowd Work initiative was launched by German Metalworkers' Union (IG Metall) and IG Metall works in collaboration with Austrian Chamber of Labour (Arbeiterkammer), Austrian Trade Union Confederation and the Swedish white-collar union Unionen.[597] The purpose of the Fair Crowd Work initiative is to provide information about different crowdwork platforms and 'work-on-demand via apps' work from trade unions and platform

[591] Irani LC & Silberman MS 'Turkopticon: Interrupting worker invisibility in Amazon Mechanical Turk' (2013) Proceedings of the SIGCHI Conference on Human Factors in Computing Systems 616.
[592] Berg J, Furrer M, Harmon E et al (2018) 96.
[593] Irani LC & Silberman MS 'Turkopticon: Interrupting worker invisibility in Amazon Mechanical Turk' (2013) Proceedings of the SIGCHI Conference on Human Factors in Computing Systems 611.
[594] Irani L & Silberman MS (2014) 34.
[595] Heiland H (2020) 48.
[596] Berg J, Furrer M, Harmon E et al (2018) 96-7.
[597] Berg J, Furrer M, Harmon E et al (2018) 98; Gurumurthy A, Chami N & Bharthur D (2021) 30.

workers' perspectives.[598] Platform workers have to complete a 95-question survey regarding their experiences with platform operators and clients. The responses of platform workers are then converted to ratings of the different crowdwork platforms.[599]

The Fair Crowd Work initiative is a 'knowledge project'.[600] It only provides a basis for dialogue about improving working conditions of platform work for trade unions, policy-makers, platform operators and researchers.[601]

The next part briefly examines the Crowdsourcing Code of Conduct which provides guidelines to promote fairness in the digital platform economy and the Ombuds Office which has been created to enforce the Crowdsourcing Code of Conduct to establish whether the Ombuds Office has been successful in enforcing the Crowdsourcing Code of Conduct.

5.5.3 The Crowdsourcing Code of Conduct and the Ombuds Office

The Crowdsourcing Code of Conduct was established in Germany by Testbirds which is a software testing platform.[602] The purpose of the Crowdsourcing Code of Conduct is

> 'to create general guidelines about how to act in regards to crowdwork and thereby create a basis for a trusting and fair cooperation between service providers, clients and crowdworkers'.[603]

The Crowdsourcing Code of Conduct, which is voluntary and self-regulated, only applies to the signatory parties.[604]

An Ombuds Office was created in 2017 by workers' and employers' organisations with the objective of enforcing the Crowdsourcing Code of Conduct and to act as dispute resolution system.[605] There are no geographical restrictions on platform workers to lodge complaints to the Ombuds Office against platforms who are signatory parties to the Crowdsourcing Code of Conduct.[606] A platform worker who resides in a country other than Germany may lodge a complaint against a platform who is a signatory party to the Crowdsourcing Code of Conduct and a trade union from the same country as a platform worker may join a platform worker in

[598] Gurumurthy A, Chami N & Bharthur D (2021) 30.
[599] Berg J, Furrer M, Harmon E et al (2018) 98.
[600] Gurumurthy A, Chami N & Bharthur D (2021) 30.
[601] Berg J, Furrer M, Harmon E et al (2018) 99.
[602] Berg J, Furrer M, Harmon E et al (2018) 99.
[603] Heiland H (2020) 45-6.
[604] Johnston H (2020) 39.
[605] Heiland H (2020) 46.
[606] Johnston H (2020) 38.

an advisory capacity.[607] One of the functions of a trade union representative is to represent members in grievance proceedings.[608] However, a worker can only lodge a complaint to the Ombuds Office individually.[609]

In 2021, the Ombuds Office received 61 cases which were lodged by crowdworkers.[610] The complaints that were lodged came from 13 countries.[611] According to the Annual Report on the Activities of the Ombuds Office of Code of Conduct for Paid Crowdworking for the Year of 2021, 13 disputes were resolved peacefully through mediation of the Ombuds Office.[612] However, 15 cases were not pursued further.[613]

The Ombuds Office has been effective in resolving some of the disputes between workers and platforms. However, the functions of the Ombuds Office only apply to signatory platforms of the Crowdsourcing Code of Conduct.[614] The following part investigates what legal effect the Frankfurt Declaration on Platform-Based Work has in promoting and protecting platform workers' rights.

5.6 THE FRANKFURT DECLARATION ON PLATFORM-BASED WORK

The Frankfurt Declaration on Platform-Based Work is a proposal that was created by trade unions to improve the working conditions of platform workers in the digital platform economy.[615] In 2016, various organisations and legal and technical experts from Asia, Europe and North America came together to find strategies to improve the working conditions of platform workers.[616] Some of the participating organisations include the IG Metall, Austrian Chamber of Labour (Arbeiterkammer) and Austrian Trade Union Federation

[607] Johnston H (2020) 39.
[608] See 3.3.2.2 above.
[609] Johnston H (2020) 39.
[610] Ombuds Office 'Annual Report on the Activities of the Ombuds Office of the Code of Conduct for Paid Crowdworking for the Year of 2021' *https://ombudsstelle.crowdwork-igmetall.de/uploads/annual-report-on-the-activities-of-the-ombuds-office-2021-english.pdf* (accessed 02 September 2022).
[611] Ombuds Office 'Annual Report on the Activities of the Ombuds Office of the Code of Conduct for Paid Crowdworking for the Year of 2021' *https://ombudsstelle.crowdwork-igmetall.de/uploads/annual-report-on-the-activities-of-the-ombuds-office-2021-english.pdf* (accessed 02 September 2022).
[612] Ombuds Office 'Annual Report on the Activities of the Ombuds Office of the Code of Conduct for Paid Crowdworking for the Year of 2021' *https://ombudsstelle.crowdwork-igmetall.de/uploads/annual-report-on-the-activities-of-the-ombuds-office-2021-english.pdf* (accessed 02 September 2022).
[613] Ombuds Office 'Annual Report on the Activities of the Ombuds Office of the Code of Conduct for Paid Crowdworking for the Year of 2021' *https://ombudsstelle.crowdwork-igmetall.de/uploads/annual-report-on-the-activities-of-the-ombuds-office-2021-english.pdf* (accessed 02 September 2022).
[614] Heiland H (2020) 47.
[615] Heiland H (2020) 47.
[616] Frankfurt Paper on Platform-Based Work: 'Proposals for platform operators, clients, policy makers, workers, and worker organisations' (2016) 2.

(OGB).[617] The participating organisations aim to ensure decent working conditions and that platform workers have a voice in the digital platform economy.[618]

The Frankfurt Declaration on Platform-Based Work proposes that platform workers should have the right to organise, the right to collective bargaining, the right to collective action, and have access to a dispute resolution system.[619] The Frankfurt Declaration on Platform-Based Work recognises that it is important for platform workers to exercise the right to organise in terms of the international legal framework such as the ILO the Declaration on Fundamental Principles and Rights at Work.[620] The Frankfurt Declaration on Platform-Based Work calls for the re-examination of laws which prevent platform workers classified as independent contractors from organising collectively and bargaining collectively.[621]

There has not been an effective strategy to implement the Frankfurt Declaration on Platform-Based Work.[622] Platforms have not responded to or were unconvinced by the Frankfurt Declaration on Platform-Based Work.[623] It is in this context that the Fairwork project is examined to establish whether the Fairwork project can promote and protect platform workers' rights.

5.7 FAIRWORK PROJECT

The Fairwork project was established by various social scientists and lawyers.[624] The aim of the Fairwork project is to address the various challenges platform workers face by establishing effective methods to bring change to the working conditions of platform workers.[625] The inspiration for the Fairwork project came from the Fairtrade and Living Wage campaigns. The Fairwork project intends to place pressure on digital platforms to

[617] Frankfurt Paper on Platform-Based Work: 'Proposals for platform operators, clients, policy makers, workers, and worker organisations' (2016) 1.
[618] Englert S, Graham M, Fredman S et al 'Workers, platforms and the state: The struggle over digital labour platform regulation' in Drahokoupil J & Vandaele K (eds) *A Modern Guide to Labour and the Platform Economy* (2021) 171.
[619] Frankfurt Paper on Platform-Based Work: 'Proposals for platform operators, clients, policy makers, workers, and worker organisations' (2016) 2, 3 and 8.
[620] Frankfurt Paper on Platform-Based Work: 'Proposals for platform operators, clients, policy makers, workers, and worker organisations' (2016) 5-6.
[621] Frankfurt Paper on Platform-Based Work: 'Proposals for platform operators, clients, policy makers, workers, and worker organisations' (2016) 5.
[622] Johnston H & Land-Kazlauskas C 'Organising on-demand: Representation, voice, and collective bargaining in the gig economy' (2019) International Labour Office Part 94 of the Conditions of Work and Employment Series 10.
[623] Heiland H (2020) 47.
[624] Du Toit D, Fredman S & Graham M (2020) 1494.
[625] Graham M, Woodcock J, Heeks R et al (2020) 101.

provide better working conditions for platform workers by way of a public rating system.[626] The working conditions of digital platforms are examined and each digital platform is ranked individually according to how well or how badly the digital platform performs.[627] Information is gathered for the Fairwork project through interviews with digital platforms, platform workers and desktop research.[628]

The five principles of the Fairwork project are fair pay, fair conditions, fair contracts, fair management and fair representation.[629] The five principles are allocated two points each whereby the first point is regarded as a 'basic point' and the second point is regarded as a 'more advanced point' which can only be granted if the first point has been achieved.[630] Each digital platform is allocated a score out of 10.[631] The failure to receive a point can either be because a digital platform has not complied with a principle or when there is insufficient information to evaluate whether a digital platform complied with a principle.[632] Van Brelle, Bezuidenhout, Heeks et al state that digital platforms are examined against these principles to demonstrate what the current working conditions of platform workers are and how work in the digital platform economy can be improved.[633] The performance ratings of digital platforms and the kind of public reputation that digital platforms may receive as a result of these ratings can be an opportunity for platform workers to bargain better working conditions.[634]

The Fairwork project aims for such decent working standards to eventually be legally enforceable.[635] Du Toit and Howson provide that 'Fairwork starts from the principle that the right to decent working conditions is a basic human right'.[636] The legal grounds are based on the ILO conventions and the Constitution.[637] The objectives of the Fairwork project are for the rating principles to be translated into standards which are designed for the 'specific needs'

[626] Fredman S, Du Toit D, Graham M et al (2020) 237.
[627] Fairwork *The Five Pillars of Fairwork Labour Standards in the Platform Economy* (2019) 12.
[628] Heiland H (2020) 49.
[629] Du Toit D, Fredman S & Graham M (2020) 1494-5; Englert S, Graham M, Fredman S et al 'Workers, platforms and the state: The struggle over digital labour platform regulation' in Drahokoupil J & Vandaele K (eds) *A Modern Guide to Labour and the Platform Economy* (2021) 171-2.
[630] Fairwork *The Five Pillars of Fairwork Labour Standards in the Platform Economy* (2019) 14.
[631] Van Brelle JP, Bezuidenhout L, Heeks R et al 'Fairwork South Africa Ratings 2021: Labour Standards in the Gig Economy' (2020) Fairwork 7.
[632] Graham M, Woodcock J, Heeks R et al (2020) 102.
[633] Van Brelle JP, Bezuidenhout L, Heeks R et al (2020) 6.
[634] Fredman S, Du Toit D, Graham M et al (2020) 237.
[635] Fredman S, Du Toit D, Graham M et al (2020) 237.
[636] Du Toit D & Howson K (2022) 718.
[637] Du Toit D & Howson K (2022) 718.

of platform workers and for the standards to be incorporated into existing labour law; thus, to ensure that all workers have access to decent working conditions regardless of the nature of their contracts.[638] Chapter 4 examined which of the existing collective bargaining rights in LRA can potentially apply to platform workers.[639]

It is important for platform workers to voice their concern for standards to be established that are appropriate for how they perform their work.[640] It can be an opportunity to advance social dialogue and a foundation for collective organisation to take place.[641] The Fairwork project calls on all stakeholders such as platform owners, the government responsible for creating the law and the judicial system responsible for applying the law to recognise the fundamental rights of platform workers.[642] The rating standards and legal regulation of the rating standards are important to promote decent work for platform workers.[643]

Not all platforms will voluntarily comply with the rating system. The compliance with the rating system is dependent on 'the perceived business interests of each platform'.[644] Therefore, a rating system on its own has limited changing power.[645]

5.8 CONCLUSION

The nature of platform work makes it difficult for collective organisation and collective representation of platform workers to occur.[646] However, some efforts have been taken to form collective organisation and to improve the working conditions of platform workers.

Platform workers have used digital technology to their advantage. Online communication allows platform workers to share information and communicate with each other irrespective of the fragmented nature of platform work.[647] Grassroots organisations have organised platform workers. Grassroots organisations use technology as a method of collective action where platform workers log-off from platforms and refuse to perform work. As shown, this method of organising can be effective in slowing down the functioning of platforms.[648]

[638] Fredman S, Du Toit D, Graham M et al (2020) 241.
[639] See 4.5 above.
[640] Du Toit D, Fredman S & Graham M (2020) 1521.
[641] Du Toit D & Howson K (2022) 724.
[642] Du Toit D, Fredman S, Bhatia G et al *Code of Good Practice for the Regulation of Platform Work in South Africa* (2020) Fairwork 13.
[643] Fredman S, Du Toit D, Graham M et al (2020) 237.
[644] Du Toit D, Fredman S & Graham M (2020) 1501.
[645] Du Toit D & Howson K (2022) 717.
[646] See 4.4 above.
[647] See 5.2 above.
[648] See 5.3 above.

Platform cooperatives are an alternative form of worker organisation that aim to promote platform workers' rights in the digital platform economy.[649]

Turkopticon allows workers to rate requesters.[650] It creates the opportunity for workers to support each other through ratings of requesters. In this way workers can decide whether they want to accept work from a requester. The Fair Crowd Work initiative rates different platforms according to surveys completed by platform workers to improve the working conditions of platform workers.[651]

The Crowdsourcing Code of Conduct provides guidelines for platforms on how to treat crowdworkers fairly. The Ombuds Office was established to enforce the Crowdsourcing Code of Conduct. It was shown that the Ombuds Office in Germany has been effective in resolving disputes between crowdworkers and platforms in 2021. Crowdworkers who reside in a country other than Germany may utilise the dispute resolution system of the Ombuds Office. The Crowdsourcing Code of Conduct only applies to platforms that have signed it. Therefore, the scope of the dispute resolution system of the Ombuds Office is restricted to the parties to the Crowdsourcing Code of Conduct.[652]

The Frankfurt Declaration on Platform-Based Work is another strategy that was adopted by trade unions to promote and encourage the right to organise, collective bargaining, collective action, and access to a dispute resolution system in the digital platform economy.[653]

The Fairwork project aims to improve the working conditions of platform workers through a public rating system. The Fairwork project examines the working conditions of digital platforms and ranks each platform individually according to how good or how bad the digital platform performs.[654]

The chapter has identified the downsides of the strategies. As stated in the introduction of this chapter, the chapter determines which of the strategies that have been adopted to improve the working conditions of platform workers are feasible in protecting and promoting the collective bargaining rights of platform workers.

[649] See 5.4 above.
[650] See 5.5.1 above.
[651] See 5.5.2 above.
[652] See 5.5.3 above.
[653] See 5.6 above.
[654] See 5.7 above.

It is submitted that the Fairwork project is a potential initiative that can promote and protect the collective bargaining rights of platform workers.[655] It is submitted that the decent working standards established by the Fairwork project align with the international legal framework regarding collective bargaining. The word 'worker' used in Convention 87 and the provisions of Convention 87 have been interpreted broadly to include self-employed workers such as platform workers.[656] The use of the word 'worker' in Convention 98 and the interpretation of the provisions of the convention create a broad scope to cover self-employed workers such as platform workers.[657] The ILO through its Decent Work Agenda aims to promote decent work for all workers.[658] Therefore, it is submitted that the Fairwork project aligns with Conventions 87 and 98 and the ILO Decent Work Agenda.

As stated, section 23(1) of the Constitution provides that '[e]veryone has the right to fair labour practices'.[659] Based on the interpretation of section 23(1) of the Constitution it was concluded that section 23(1) of the Constitution applies to all workers provided that they are not genuinely self-employed workers and that their work should have characteristics similar to an employment relationship.[660] Therefore, it is submitted that the Fairwork project is in line with the Constitution.

Unlike Turkopticon and the Fair Crowd Work rating system initiatives, the Fairwork project aims for the decent working standards to be legally enforceable.[661] The Fairwork project aims for the decent working standards to be appropriate for the needs of platform workers and for the decent working standards to be incorporated into existing labour law.[662] Workers' voices are vital in achieving legal regulation of decent working standards.[663] In this regard, social dialogue is promoted and a potential basis for collective organisation can be established.[664] The Global Commission on the Future of Work states that collective representation and social dialogue are needed to navigate the transformations in the world of work.[665] One of the decent working standards of the Fairwork project is fair representation.[666] Collective

[655] See 5.7 above.
[656] See 3.2.2 above.
[657] See 3.2.3 above.
[658] See 3.2.4 above.
[659] See 3.3.1 above.
[660] See 3.3.1 above.
[661] See 5.7 above.
[662] See 5.7 above.
[663] See 5.7 above.
[664] See 5.7 above.
[665] See 3.2.4 above.
[666] See 5.7 above.

representation is essential in achieving a fair working environment and is important to contribute towards achieving the other four decent working standards of the Fair project.[667]

To conclude the mini-thesis, the following chapter provides the key research findings of the study. Chapter 6 provides recommendations for legal reforms of South African labour legislation that may promote and regulate collective bargaining rights of platform workers.

[667] Du Toit D, Fredman S & Graham M (2020) 1518.

CHAPTER 6

CONCLUSIONS AND RECOMMENDATIONS

6.1 RESEARCH FINDINGS

The purpose of this mini-thesis was to answer the research question: What is the appropriate legislative framework in South Africa to promote and regulate collective bargaining rights of digital platform workers?[668] Each chapter has contributed towards answering the research question. In this regard, the research findings of each chapter of the mini-thesis are presented in this part of the chapter.

Collective bargaining stems from the inherent inequality of bargaining power in the individual employment relationship which makes it an important part of labour relations.[669] Freedom of association, organisational rights, and strike action are prerequisites for the effective functioning of collective bargaining.[670]

An examination regarding the regulation of collective bargaining in South Africa could not take place without examining the international legal framework for collective bargaining. The rationale for this is because international law plays an important role in South Africa.[671] The ILO aims to achieve social justice and fair working conditions for workers.[672] The ILO strives to achieve those aims by fulfilling its primary function which is to establish international labour standards.[673] Conventions 87 and 98 were analysed in this study and benchmarks were drawn from the interpretation of Conventions 87 and 98 by the CFA and the Committee of Experts.

With regards to Convention 87, it was established that the right to join and form a trade union is an important right because it provides the foundation for other rights in Conventions 87 and 98.[674] Although strike action is not expressly stated in Convention 87, the Committee of Experts has interpreted that strike action forms part of Article 3(1) of Convention 87.[675] Strike action is an integral part of the right to organise and is a means through which

[668] See 1.4 above.
[669] See 2.2 above.
[670] See 2.7 above.
[671] See 3.2 above.
[672] See 3.2.1 above.
[673] See 3.2.1 above.
[674] See 3.2.2 above.
[675] See 3.2.2 above.

workers' organisations can advance and protect the interests of their members.[676] It was argued that all workers, including self-employed workers regardless of the status of their contracts should be able to exercise the right to freedom of association.[677] As a result of the use of the term 'workers' and the interpretation of the provisions of Convention 87, it was argued that platform workers can be covered by Convention 87.[678]

Convention 98 protects workers against acts of anti-union discrimination.[679] It is an integral part of the right to freedom of association.[680] Workers' organisations are protected against acts of interference.[681] The protection against acts of interference is important because it allows workers' organisations to adequately advance and protect the interests of their members.[682] Article 4 of Convention 98 promotes collective bargaining and voluntary negotiation.[683] It was submitted that Convention 98 is broad enough to include platform workers based on the use of the word 'workers' and the interpretation of the provisions of Convention 98.

In addition to international labour standards, the ILO has created a Decent Work Agenda. The ILO's Decent Work Agenda includes four pillars. Social dialogue was identified to be the most important pillar for purposes of this mini-thesis.[684] The ILO's Decent Work Agenda not only focuses on ensuring decent work for employees in standard employment but aims to ensure decent work for workers who perform non-standard employment too. It was established that decent work can be promoted when workers can organise collectively and participate in matters that concern their working lives.[685]

The Global Commission on the Future of Work through its human-centred agenda ('the agenda') recognises social dialogue as a crucial tool in ensuring that all workers have a voice, particularly in the changing world of work.[686] The ILO Centenary Declaration for the Future

[676] See 3.2.2 above.
[677] See 3.2.2 above.
[678] See 3.2.2 above.
[679] See 3.2.3 above.
[680] See 3.2.3 above.
[681] See 3.2.3 above.
[682] See 3.2.3 above.
[683] See 3.2.3 above.
[684] See 3.2.4 above.
[685] See 3.2.4 above.
[686] See 3.2.4 above.

of Work promotes decent work for all workers including platform workers and aims to embrace the advantages and address the obstacles associated with digital platform work.[687]

It was submitted that 'the right to fair labour practices' as stipulated in section 23(1) of the Constitution applies to workers including self-employed workers provided they are not genuinely self-employed workers and their work should have characteristics similar to an employment relationship.[688] It was submitted that based on the interpretation of the Constitution, the Constitution realises the collective bargaining rights of platform workers.[689]

Some of the objectives of the LRA are democracy in the workplace, labour peace and economic development.[690] These objectives are similar to some of the functions that collective bargaining aims to promote.[691] The LRA aims to promote social justice which as mentioned is an objective of the ILO too.[692] As noted, the LRA provides a legal framework for collective bargaining in South Africa. It means that the LRA regulates the prerequisites of collective bargaining which are freedom of association, organisational rights, and strike action.[693] It was established that collective bargaining can take place at a sectoral level which is one of the primary objectives of the LRA.[694] In this regard, bargaining councils are an important part of collective bargaining. What can be drawn from the analysis of the regulation of collective bargaining by the LRA is that collective bargaining is the main process to regulate matters of the employment relationship in South Africa.[695]

Platform work is a form of non-standard employment and is regarded as a form of externalisation of work.[696] Thus, some of the disadvantages associated with platform work are not new.[697] The features of platform work create different hurdles to the representation of platform workers. Platform workers are excluded from the LRA as a result of their classification as independent contractors.[698] Competition law may pose a legal obstacle for

[687] See 3.2.4 above.
[688] See 3.3.1 above.
[689] See 3.4 above.
[690] See 3.3.2 above.
[691] See 2.4 above.
[692] See 3.3.2 above.
[693] See 3.3.2.1, 3.3.2.2 and 3.3.2.3 above.
[694] See 2.6 and 3.3.2 above.
[695] See 3.4 above.
[696] See 4.3 and 4.4.1 above.
[697] See 4.4.1 above.
[698] See 4.4.1 above.

platform workers to organise collectively. It was argued that the triangular feature of platforms contributes to the impediments of representation of platform workers.[699]

Algorithmic management and geographical fragmentation make it difficult for platform workers to associate with each other and to organise collectively.[700] Furthermore, the different reasons for the reliance on platform work and where platform workers work for multiple platforms may make it difficult for platform workers to organise collectively.[701] In this regard, the preconditions of collective bargaining are eroded by digital platform work.

Platform workers do not fall within the scope of the LRA and as a result are not protected by the rights provided in the LRA.[702] The classification of platform workers as 'employees' will not solve the obstacles to the representation of platform workers.[703] Platform work in the digital platform economy can take different forms.[704] The current rights in the LRA are not appropriate for their situation. If some of the current rights in the LRA are potentially to be applied to platform workers, there are certain adjustments that have to be made in order to accommodate platform workers given how they perform their work.[705]

Despite the difficulties platform workers face with regards to collective representation in the digital platform economy, alternative strategies and initiatives have been adopted to improve the working conditions of platform workers. The strategies and initiatives that have been adopted include online communication, grassroots organisations, and platform cooperatives.[706] Examples of a selection of existing alternative organisations to trade unions that aim to improve the working conditions of platform workers were discussed, such as Turkopticon, Fair Crowd Work and the Crowdsourcing Code of Conduct and the Ombuds Office.[707] Other initiatives that have been adopted to improve the working conditions are the Frankfurt Declaration on Platform-Based Work and the Fairwork project.[708]

The Fairwork project was identified as a potential initiative that can promote and protect the collective bargaining rights of platform workers.[709] It was submitted that the Fairwork project

[699] See 4.4.1 above.
[700] See 4.4.2 and 4.4.3 above.
[701] See 4.4.4 above.
[702] See 4.4.1 above.
[703] See 4.4.1 above.
[704] See 4.2 above.
[705] See 4.5 above.
[706] See 5.2, 5.3 and 5.4 above.
[707] See 5.5 above.
[708] See 5.6 and 5.7 above.
[709] See 5.8 above.

aligns with Conventions 87 and 98 and the ILO's Decent Work Agenda.[710] It was submitted that the Fairwork project is in line with the Constitution.[711] The Fairwork project promotes social dialogue and worker participation in decisions that affect platform workers working lives.[712] In this regard, platform workers should use their voices to achieve legal regulation of the decent working standards.[713]

An employer must first recognise a trade union as a bargaining agent and enter into a recognition agreement to formalise the relationship.[714] Collective bargaining requires an employer and a trade union for the bargaining process to work.[715] In the context of the digital platform economy, it is expected that a platform should recognise the organisation that represents platform workers and engage in collective bargaining with such an organisation.[716] However, it is 'demanding' and 'much thought still needs to be given to ways of facilitating collective representation'.[717] As a result of the different parties in platform work, it may be difficult for platform workers to determine who the bargaining partner is.[718] It may be difficult to identify whether a platform, a customer or another party is the appropriate bargaining counterpart.[719] Therefore, the initiatives that have been taken to improve the working conditions of platform workers are not functional equivalent to collective bargaining.

In conclusion, it was shown that platform work provides various advantages and disadvantages for platform workers.[720] There is a balance needed between embracing the creation of work opportunities that the digital platform economy brings and finding ways to ensure that platform work does not result in platform workers being deprived of decent working conditions.[721] The reality is that platform work is part of the future world of work

[710] See 5.8 above.
[711] See 5.8 above.
[712] See 5.7 above.
[713] See 5.7 above.
[714] See 2.6 above.
[715] See 2.6 above.
[716] Fredman S, Du Toit D, Graham M et al (2020) 246.
[717] Fredman S, Du Toit D, Graham M et al (2020) 246 and 249.
[718] De Stefano V 'The rise of the "just-in-time workforce": On-demand work, crowdwork and labour protection in the "gig-economy"' (2016) International Labour Office Part 71 of the Conditions of Work and Employment Series 8.
[719] Heiland H (2020) 23.
[720] See 4.2 above.
[721] Du Toit D & Howson K (2022) 725.

and will most likely continue to grow.[722] Trade unions have always played an important role in advancing the interests of their members.[723] It is important that trade unions adapt to the changing world of work and modernise their strategies if they want to include vulnerable workers such as platform workers in order to advance the interests of platform workers.[724] Given the power imbalance in the digital platform economy, '[w]ithout the equivalent of a union presence, it is difficult to see how any law can be effectively applied'.[725]

It is just as important for platform workers to participate in matters that affect their working lives as it is for employees in standard employment.[726] As expressed by Johnston and Land-Kazlauskas, '[w]orker organising, the development of agency, voice and representation, and its expression through collective bargaining, are the surest and most democratic way of achieving the future of work we want'.[727] All workers have the right to decent work regardless of the status of their contracts.[728]

The following part identifies legal reforms of South African labour legislation that may promote and regulate collective bargaining rights of platform workers.

6.2 RECOMMENDATIONS

The research question of this mini-thesis is: What is the appropriate legislative framework in South Africa to promote and regulate collective bargaining rights of digital platform workers? The LRA is the main labour legislation that regulates collective bargaining in South Africa.[729] Independent contractors are excluded from the LRA. It means that most platform workers are excluded from the LRA. It is submitted that there is no labour legislative framework in South Africa that promotes and regulates collective bargaining rights of platform workers. Therefore, it is necessary to identify legal reforms of South African labour legislation that may promote and regulate collective bargaining rights of platform workers.

[722] Heiland H (2020) 52; Johnston H & Land-Kazlauskas C 'Organising on-demand: Representation, voice, and collective bargaining in the gig economy' (2019) International Labour Office Part 94 of the Conditions of Work and Employment Series 33.
[723] Newlands G, Lutz C & Fieseler C (2018) 252.
[724] Mokofe WM & van Eck S (2021) 1388.
[725] Du Toit D & Howson K (2022) 724.
[726] Heiland H (2020) 56.
[727] Johnston H & Land-Kazlauskas C 'Organising on-demand: Representation, voice, and collective bargaining in the gig economy' (2019) International Labour Office Part 94 of the Conditions of Work and Employment Series 33.
[728] Du Toit D & Howson K (2022) 721.
[729] See 3.3.2 above.

There has been a trend to more inclusive labour legislation in South Africa. The word 'worker' was defined in section 1 of the National Minimum Wage Act 9 of 2018 (NMWA), 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'.[730] Section 213 of the LRA currently excludes independent contractors and thereby deleting that exclusion of independent contractors guarantees platform workers the right to bargain collectively. The legislature should take into account the manner in which platform work is performed and adapt collective bargaining rights to cater for platform workers.

[730] Section 1 of the National Minimum Wage Act 9 of 2018.

BIBLIOGRAPHY

BOOKS

Anstey M, Grogan J & Ngcukaitobi T *Collective Bargaining in the Workplace* (2011) Cape Town: Juta & Company Ltd.

Basson AC, Christianson MA, Garbers C et al *The New Essential Labour Law Handbook* 6 ed (2017) Centurion: Labour Law Publications CC.

Basson A, Christianson M, Garbers C et al *Essential Labour Law* 2 ed (2000) Groenkloof: Labour Law Publications.

Bendix S *Labour Relations: A Southern African Perspective* 6 ed (2015) Cape Town: Juta & Company (Pty) Ltd.

Bendix S *Labour Relations in Practice: A Hands-On Approach* 2 ed (2015) Cape Town: Juta & Company (Pty) Ltd.

Berg J, Furrer M, Harmon E et al *Digital Labour Platforms and the Future of Work: Towards Decent Work in the Online World* (2018) Geneva: International Labour Office.

Collier D, Fergus E, Cohen T et al *Labour Law in South Africa: Context and Principles* (2018) Cape Town: Oxford University Press Southern Africa (Pty) Limited.

Davies P & Freeland M *Kahn-Freund's Labour and the Law* 3 ed (1983) London: Stevens & Sons.

Dugard J, Du Plessis M, Maluwa T et al Dugard's *International Law: A South African Perspective* 5 ed (2018) Cape Town: Juta and Company (Pty) Ltd.

Du Plessis JV & Fouche MA *A Practical Guide to Labour Law* 9 ed (2019) Durban: LexisNexis (Pty) Ltd.

Du Toit D, Godfrey S, Cooper C et al *Labour Relations Law: A Comprehensive Guide* 6 ed (2015) Durban: LexisNexis (Pty) Ltd.

Finnemore M & Koekemoer GM *Introduction to Labour Relations in South Africa* 12 ed (2018) Durban: LexisNexis (Pty) Ltd.

Finnemore M & Van Rensburg R *Contemporary Labour Relations* 2 ed (2002) Durban: LexisNexis Butterworths.

Global Commission on the Future of Work *Work for a Brighter Future* (2019) Geneva: International Labour Office.

Godfrey S, Maree J, Du Toit D et al *Collective Bargaining in South Africa: Past, Present and Future?* (2010) Cape Town: Juta & Co, Ltd.

Grogan J *Collective Labour Law* 2 ed (2014) Cape Town: Juta and Company (Pty) Ltd.

Grogan J *Employment Rights* 2 ed (2014) Cape Town: Juta and Company (Pty) Ltd.

Grogan J *Workplace Law* 13 ed (2020) Cape Town: Juta and Company (Pty) Ltd.

Gurumurthy A, Chami N & Bharthur D *Platform Labour in Search of Value: A Study of Workers' Organising Practices and Business Models in the Digital Economy* (2021) Geneva: International Labour Office.

International Labour Organisation *Collective Bargaining: A Policy Guide* (2015) Geneva: International Labour Office.

International Labour Organisation *Freedom of Association: Compilation of Decisions of the Committee on Freedom of Association* 6 ed (2018) Geneva: International Labour Office.

International Labour Organisation *Global Employment Trends for Youth 2022: Investing in Transforming Futures for Young People* (2022) Geneva: International Labour Organisation.

International Labour Organisation *Non-standard Employment Around the World: Understanding Challenges, Shaping Prospects* (2016) Geneva: International Labour Office.

International Labour Organisation *Quick Guide on Sources and Uses of Collective Bargaining Statistics* (2018) Geneva: International Labour Office.

Lewicki RJ, Saunders DM & Minton JW *Essentials of Negotiation* 2 ed (2001) New York: Irwin/McGraw-Hill.

Nel PS, Kirsten M, Swanepoel BJ et al *South African Employment Relations: Theory and Practice* 8 ed (2016) Pretoria: Van Schaik Publishers.

Rycroft A & Jordaan B *A Guide to South African Labour Law* 2 ed (1992) Cape Town: Juta & Co, Ltd.

Todd C *Collective Bargaining Law* (2004) Cape Town: Siber Ink.

Van Jaarsveld F & Van Eck S *Principles of Labour Law* 2 ed (2002) Durban: Butterworth Publishers (Pty) Ltd.

Van Niekerk A, Smit N, Chirstianson M et al *Law@work* 5 ed (2019) Durban: LexisNexis (Pty) Ltd.

CASES

Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 (1996) 17 ILJ 821 (CC).

Glenister v President of the Republic of South Africa and Others 2011 (3) SA 347 (CC).

IMATU & others v Rustenburg Transitional Council [1999] 12 BLLR 1299 (LC).

Kroukam v SA Airlink (Pty) Ltd (2005) 26 ILJ 2153 (LAC).

Nkutha & others v Fuel Gas Installations (Pty) Ltd (2000) 21 ILJ 218 (LC).

NUMSA & others v Bader Bop (Pty) Ltd & another [2003] 2 BLLR 103 (CC).

NUPSAW obo Mostert v Uber South Africa Technology Services (Pty) Ltd & others case no. WECT 18234-18 (2018).

S v Makwanyane and Another 1995 (6) BCLR 665 (CC).

Theron & others v Food & Allied Workers Union & others (1997) 18 ILJ 1046 (LC).

Uber Technologies Inc. v. Heller 2020 SCC 16.

Vanachem Vanadium Products (Pty) Ltd v National Union of Metalworkers of SA & others (2014) 35 ILJ 3241 (LC).

CHAPTERS IN BOOKS

Cheadle H 'Labour relations' in Bannerman L (ed) *South African Constitutional Law: The Bill of Rights* 2 ed (2005) Durban: LexisNexis.

De Stefano V & Aloisi A 'Fundamental labour rights, platform work and human rights protection of non-standard workers' in Bellace JR & Ter Haar B (eds) *Research Handbook on Labour, Business and Human Rights Law* (2019) Cheltenham, United Kingdom: Edward Elgar Publishing Limited.

Du Toit D 'Collective labour rights in the platform economy: Looking back, looking forward' in Olivier M, Smit N & Kalula E (eds) *Liber Amicorum Manfred Weiss* (2021) Cape Town: Juta and Company (Pty) Ltd.

Englert S, Graham M, Fredman S et al 'Workers, platforms and the state: The struggle over digital labour platform regulation' in Drahokoupil J & Vandaele K (eds) *A Modern Guide to Labour and the Platform Economy* (2021) Cheltenham, United Kingdom: Edward Elgar Publishing Limited.

Graham M, Lehdonvirta V, Wood AJ et al 'The uneven potential of online platform work for human development at the global margins' in Drahokoupil J & Vandaele K (eds) *A Modern Guide to Labour and the Platform Economy* (2021) Cheltenham, United Kingdom: EdwarElgar Publishing Limited.

Herr B, Schorpf P & Flecker J 'How place and space matter to union organising in the platform economy' in Drahokoupil J & Vandaele K (eds) *A Modern Guide to Labour and the Platform Economy* (2021) Cheltenham, United Kingdom: Edward Elgar Publishing Limited.

Joyce S & Stuart M 'Trade union responses to platform work: An evolving tension between mainstream and grassroots approaches' in Drahokoupil J & Vandaele K (eds) *A Modern Guide to Labour and the Platform Economy* (2021) Cheltenham, United Kingdom: Edward Elgar Publishing Limited.

Levy A 'Industrial action' in Venter R, Levy A, Bendeman H et al (eds) *Labour Relations in South Africa* 5 ed (2014) Cape Town: Oxford University Press Southern Africa (Pty) Limited.

Meil P & Akguc M 'Moving on, out or up: The externalisation of work to B2B platforms' in Drahokoupil J & Vandaele K (eds) *A Modern Guide to Labour and the Platform Economy* (2021) Cheltenham, United Kingdom: Edward Elgar Publishing Limited.

Van Eck S 'Reflections on Manfred Weiss and the regulation of platform workers' in Olivier M, Smit N & Kalula E (eds) *Liber Amicorum Manfred Weiss* (2021) Cape Town: Juta and Company (Pty) Ltd.

Venter R 'Collective bargaining and organisational rights' in Venter R, Levy A, Bendeman H et al (eds) *Labour Relations in South Africa* 5 ed (2014) Cape Town: Oxford University Press Southern Africa (Pty) Limited.

CONFERENCE PROCEEDINGS

Irani LC & Silberman MS 'Turkopticon: Interrupting worker invisibility in Amazon Mechanical Turk' (2013) Proceedings of the SIGCHI Conference on Human Factors in Computing Systems 611-620.

CONSTITUTIONS

Constitution of the Republic of South Africa, 1996.

International Labour Organisation Constitution.

DECLARATIONS

International Labour Organisation Centenary Declaration for the Future of Work 2019.

International Labour Organisation Declaration of Philadelphia 1944.

International Labour Organisation Declaration on Fundamental Principles and Rights at Work 1998.

DISCUSSION AND WORKING PAPERS

Aleksynska M 'Digital work in Eastern Europe: Overview of trends, outcomes and policy responses' (2021) International Labour Organisation Working Paper 32 1-59 available at *https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_794543.pdf*.

De Stefano V, Durri I, Stylogiannis C et al 'Platform work and the employment relationship' (2021) International Labour Organisation Working Paper 27 1-58 available at *https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_777866.pdf*.

De Stefano V ''"Negotiating the algorithm": Automation, artificial intelligence and labour protection' (2018) International Labour Office Working Paper 246 1-31 available at *https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_policy/documents/publication/wcms_634157.pdf*.

De Stefano V 'The rise of the "just-in-time workforce": On-demand work, crowdwork and labour protection in the "gig-economy"' (2016) International Labour Office Part 71 of the Conditions of Work and Employment Series 1-35 available at *https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_443267.pdf*.

Fenwick C, Kalula E & Landau I 'Labour law: A Southern African perspective' (2007) International Institute for Labour Studies Part 180 of the Discussion Paper Series 1-41 available at *https://www.ilo.org/public/libdoc/ilo/2007/447221.pdf*.

Frankfurt Paper on Platform-Based Work: 'Proposals for platform operators, clients, policy makers, workers, and worker organisations' (2016) 1-10 available at *https://www.igmetall.de/download/20161214_Frankfurt_Paper_on_Platform_Based_Work_EN_b939ef89f7e5f3a639cd6a1a930feffd8f55cecb.pdf*.

Godfrey S 'Multi-employer collective bargaining in South Africa' (2018) International Labour Office Part 97 of the Conditions of Work and Employment Series 1-44 available at *https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_632263.pdf*.

International Labour Office 'Social dialogue and the future of work' (2020) Global Deal for Decent Work and Inclusive Growth 3-19 available at *https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_744465.pdf*.

Johnston H & Land-Kazlauskas C 'Organising on-demand: Representation, voice, and collective bargaining in the gig economy' (2019) International Labour Office Part 94 of the Conditions of Work and Employment Series 1-47 available at *https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_624286.pdf*.

Messenger J 'Working time and the future of work' (2018) International Labour Office 1-35 available at *https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/publication/wcms_649907.pdf*.

Moreno-Brid JC, Tovar RG, Gomez JS et al 'Trade agreements and decent work in Mexico: The case of the automotive and textile industries' (2021) International Labour Organisation Working Paper 36 1-52 available at *https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_808957.pdf*.

Scholz T 'Platform cooperativism: Challenging the corporate sharing economy' (2016) Rosa Luxemburg Stiftung, New York Office 1-29 available at *https://rosalux.nyc/wp-content/uploads/2020/11/RLS-NYC_platformcoop.pdf*.

Theron J 'Non-standard work arrangements in the public sector: The case of South Africa' (2014) International Labour Office Working Paper 302 7-25 available at *http://ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/publication/wcms_310221.pdf*.

Van Brelle JP, Bezuidenhout L, Heeks R et al 'Fairwork South Africa Ratings 2021: Labour Standards in the Gig Economy' (2020) Fairwork 1-28 available at *https://fair.work/wp-content/uploads/sites/131/2021/07/Fairwork-South-Africa-2021-report.pdf*.

INTERNATIONAL LABOUR ORGANISATION REPORTS

Committee of Experts on the Application of Conventions and Recommendations *Freedom of association and collective bargaining* (1994) Report III (Part 4B) International Labour Conference, 81st Session.

Committee of Experts on the Application of Conventions and Recommendations *Giving globalisation a human face* (2012) Report III (Part 1B) International Labour Conference, 101st Session.

Esim S & Katajamaki W 'Rediscovering worker cooperatives in a changing world of work' (2017) IUSLabor 1/2017 available at *https://www.upf.edu/documents/3885005/8337152/Esim_x_Katajamaki_editado.pdf/765a2a29-7899-5fbf-373b-20dea87cca1a*.

International Labour Office *Fundamental Principles and Rights at Work: From Challenges to Opportunities* (2017) Report VI International Labour Conference, 106th Session.

Report of the Director-General *Organising for Social Justice: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* (2004) Report I (B) International Labour Conference, 92nd Session.

INTERNET REFERENCES

International Labour Organisation 'Decent work' *https://www.ilo.org/global/topics/decent-work/lang--en/index.htm* (accessed 7 January 2022).

International Labour Organisation 'History of the ILO' *https://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm* (accessed 12 February 2021).

International Labour Organisation 'Member states' *https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/member-states/lang--en/index.htm* (accessed 30 June 2021).

International Labour Organisation 'Non-standard forms of employment' *https://www.ilo.org/global/topics/non-standard-employment/lang--en/index.htm* (accessed 17 October 2022).

International Labour Organisation 'Ratifications for South Africa' *https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102888* (accessed 30 June 2021).

International Labour Organisation 'The need for social justice' *https://www.ilo.org/global/standards/introduction-to-international-labour-standards/need-for-social-justice/lang--en/index.htm* (accessed 22 July 2021).

Ombuds Office 'Annual Report on the Activities of the Ombuds Office of the Code of Conduct for Paid Crowdworking for the Year of 2021' *https://ombudsstelle.crowdwork-igmetall.de/uploads/annual-report-on-the-activities-of-the-ombuds-office-2021-english.pdf* (accessed 02 September 2022).

JOURNAL ARTICLES

Albertyn CJ 'Freedom of association and the morality of the closed shop' (1989) 10 *ILJ* 981-1005.

Almaatouq A, Krafft P, Dunham Y et al 'Turkers of the world unite: Multilevel in-group bias among crowdworkers on Amazon Mechanical Turk' (2020) 11 *Social Psychological and Personality Science* 151-159.

Amuso V, Poletti G & Montibello D 'The digital economy: Opportunities and challenges' (2020) 11 *Global Policy* 124-127.

Anwar MA & Graham M 'Hidden transcripts of the gig economy: Labour agency and the new art of resistance among African gig workers' (2020) 52 *Environment and Planning A: Economy and Space* 1269-1291.

Atzeni M 'Workers' organisation in precarious times: Abandoning trade union fetishism, rediscovering class' (2020) 11 *Global Labour Journal* 311-314.

Azar J 'Portable benefits in the gig economy: Understanding the nuances of the gig economy' (2020) 27 *Georgetown Journal on Poverty Law and Policy* 409-427.

Barnard J & Botha MM 'Trade unions as suppliers of goods and services' (2018) 30 *SA Merc LJ* 216-250.

Benjamin P 'Beyond 'lean' social democracy: Labour law and the challenge of social protection' (2006) 60 *Transformation: Critical Perspectives on Southern Africa* 32-57.

Benjamin P 'Labour law beyond employment' 2012 *Acta Juridica* 21-40.

Berg J 'Income security in the on-demand economy: Findings and policy lessons from a survey of crowdworkers' (2016) 37 *Comp. Lab. L. & Pol'y J.* 543-576.

Borghi P, Murgia A, Mondon-Navazo M et al 'Mind the gap between discourses and practices: Platform workers' representation in France and Italy' (2021) 27 European Journal of Industrial Relations 425-443.

Bosch C 'The implied term of trust and confidence in South African labour law' (2006) 27 *ILJ* 28-52.

Botes A 'Answers to the questions? A critical analysis of the amendments to the Labour Relations Act 66 of 1995 with regard to labour brokers' (2014) 26 *SA Merc LJ* 110-137.

Carabetta G 'International labour law standards concerning collective bargaining in public essential services' (2014) 19 *Deakin Law Review* 275-310.

Chan NK '"Becoming an expert in driving for Uber": Uber driver/bloggers' performance of expertise and self-presentation on Youtube' (2019) 21 *New Media & Society* 2048-2067.

Cherry MA 'Beyond misclassification: The digital transformation of work' (2016) 37 *Comp. Lab. L. & Pol'y J.* 577-602.

Chesta RE, Zamponi L & Caciagli C 'Labour activism and social movement unionism in the gig economy. Food delivery workers' struggles in Italy' (2019) 12 *Partecipazione e conflitto* 819-844.

Chicktay MA 'Defining the right to strike: A comparative analysis of international labour organisation standards and South African law' (2012) 33 *Obiter* 260-277.

Cini L & Goldmann B 'The worker capabilities approach: Insights from worker mobilisations in Italian logistics and food delivery' (2021) 35 *Work, Employment and Society* 948-967.

Collier D & Godfrey S 'Labour standards and foreign direct investment: A perspective on the export-oriented garment sectors in selected sub-Saharan African countries' 2018 *Acta Juridica* 183-209.

Cordova E 'A comparative view of collective bargaining in industrialised countries' (1978) 117 *International Labour Review* 423-439.

Dahan Y, Lerner H & Milman-Sivan F 'Shared responsibility and the International Labour Organisation' (2013) 34 *Michigan Journal of International Law* 675-743.

Doorn van N 'Platform labor: On the gendered and racialised exploitation of low-income service work in the 'on-demand' economy' (2017) 20 *Information, Communication & Society* 898-914.

Dunn M 'Making gigs work: Digital platforms, job quality and worker motivations' (2020) 35 *New Technology, Work and Employment* 232-249.

Du Toit D 'Corporatism and collective bargaining in a democratic South Africa' (1995) 16 *ILJ* 785-806.

Du Toit D, Fredman S & Graham M 'Towards legal regulation of platform work: Theory and practice' (2020) 41 *ILJ* 1493-1523.

Du Toit D & Howson K 'Protecting platform workers: Options and challenges' (2022) 43 ILJ 711-725.

Du Toit D 'Industrial democracy in South Africa's transition' (1997) 1 *Law, Democracy & Development* 39-67.

Du Toit D 'Oil on troubled waters? The slippery interface between the contract of employment and statutory labour law' (2008) 125 *SALJ* 95-133.

Du Toit D 'Platform work and social justice' (2019) 40 *ILJ* 1-11.

Du Toit D 'The right to equality versus employer 'control' and employee 'subordination': Are some more equal than others?' (2016) 37 *ILJ* 1-27.

Esitang TG & van Eck S 'Minority trade unions and the amendments to the LRA: Reflections on thresholds, democracy and ILO conventions' (2016) 37 *ILJ* 763-778.

Fergus E 'The disorganisation of organisational rights- recent case law and outstanding questions' (2019) 40 *ILJ* 685-710.

Ford M & Honan V 'The limits of mutual aid: Emerging forms of collectivity among app-based transport workers in Indonesia' (2019) 61 *Journal of Industrial Relations* 528-548.

Fredman S, Du Toit D, Graham M et al 'Thinking out of the box: Fair work for platform workers' (2020) 31 *King's Law Journal* 236-249.

Fredman S & Du Toit D 'One small step towards decent work: *Uber v Aslam* in the Court of Appeal' (2019) 48 *ILJ* 260-277.

Funke C & Picot G 'Platform work in a coordinated market economy' (2021) 52 *ILJ* 348-363.

Galiere S 'When food-delivery platform workers consent to algorithmic management: A Foucauldian perspective' (2020) 35 *New Technology, Work and Employment* 357-370.

Garben S 'The regulatory challenge of occupational safety and health in the online platform economy' (2019) 72 *International Social Security Review* 95-112.

Gerber C 'Community building on crowdwork platforms: Autonomy and control of online workers?' (2021) 25 *Competition & Change* 190-211.

Gol ES, Stein MK & Avital M 'Crowdwork platform governance toward organisational value creation' (2019) 28 *Journal of Strategic Information Systems* 175-195.

Govindjee A 'Extending social protection in the digital age: The case of transportation network company drivers in South Africa' (2020) 83 *THRHR* 48-66.

Graham M, Woodcock J, Heeks R et al 'The Fairwork Foundation: Strategies for improving platform work in a global context' (2020) 112 *Geoforum* 100-103.

Grant B 'In defence of majoritarianism: Part 2- majoritarianism and freedom of association' (1993) 14 *ILJ* 1145-1153.

Harmon E & Silberman MS 'Rating working conditions on digital labor platforms' (2019) 28 *Computer Supported Cooperative Work* 911-960.

Hayter S & Ebisui M 'Negotiating parity for precarious workers' (2013) 5 *International Journal of Labour Research* 79-96.

Healy J, Nicholson D & Pekarek A 'Should we take the gig economy seriously?' (2017) 27 *Labour and Industry* 232-248.

Healy J, Pekarek A & Vromen A 'Sceptics or supporters? Consumers' views of work in the gig economy' (2020) 35 *New Technology, Work and Employment* 1-19.

Hendrickx F 'Regulating new ways of working: From the new 'wow' to the new 'how'' (2018) 9 *European Labour Law Journal* 195-205.

Holzapfel V & van Staden M 'The protection of employees in fixed-term contracts in South Africa and Germany' (2020) 1 *TSAR* 49-73.

Howcroft D & Bergvall-Kareborn B 'A typology of crowdwork platforms' (2019) 33 *Work, Employment and Society* 21-38.

Huws U, Spencer NH & Syrdal DS 'Online, on call: The spread of digitally organised just-in-time working and its implications for standard employment models' (2018) 33 *New Technology, Work and Employment* 113-129.

Irani L & Silberman MS 'From critical design to critical infrastructure: Lessons from Turkopticon' (2014) 21 *Interactions* 32-35.

Johnston H 'Labour geographies of the platform economy: Understanding collective organising strategies in the context of digitally mediated work' (2020) 159 *International Labour Review* 25-45.

Kahn-Nisser S 'The ripple effect: Peer ILO treaty ratification, regional socialisation, and collective labor standards' (2016) 22 *Global Governance* 513-532.

Kaine S & Josserand E 'The organisation and experience of work in the gig economy' (2019) 61 *Journal of Industrial Relations* 479-501.

Karanovic J, Berends H & Engel Y 'Regulated dependence: Platform workers' responses to new forms of organising' (2021) 58 *Journal of Management Studies* 1070-1106.

Katsabian T 'Collective action in the digital reality: The case of platform-based workers' (2021) 84 *Modern Law Review* 1005-1040.

Kenney M & Zysman J 'The rise of the platform economy' (2016) 32 *Issues in Science and Technology* 61-69.

Khumalo B 'Extension of collective agreements in terms of section 23 (1) (d) of the LRA and the "knock on effect" on the right to strike: *AMCU v Chamber of Mines of South Africa* CCT87/16 [2017]' (2018) 51 *De Jure* 328-338.

Lao M 'Workers in the "gig" economy: The case for extending the antitrust labor exemption' (2018) 51 *University of California Davis Law Review* 1543-1587.

Lehdonvirta V 'Flexibility in the gig economy: Managing time on three online piecework platforms' (2018) 33 *New Technology, Work and Employment* 13-29.

Malherbe K, Mokoena K & Du Toit D '"Revolutionary change in technology" must be translated into labour law' (2019) 4 *International Association of Labour Law Journals* 182-189.

Manamela ME 'Regulating workplace forums in South Africa' (2002) 14 *SA Merc LJ* 728-737.

Marcano IJ 'E-hailing and employment rights: The case for an employment relationship between Uber and its drivers in South Africa' (2018) 51 *Cornell International Law Journal* 273-295.

Minter K 'Negotiating labour standards in the gig economy: Airtasker and Unions New South Wales' (2017) 28 *The Economic and Labour Relations Review* 438-454.

Mokofe WM & van Eck S 'Reflections on marginalised workers and the role of trade unions in the changing world of work' (2021) 42 *ILJ* 1365-1389.

Molobi L, Kabiraj S & Siddik MNA 'Behavioural intention factors influencing sharing economy innovations: An explanatory research of Uber in South Africa' (2020) 19 *Metamorphosis* 42-58.

Mujtaba A 'Entrepreneurship and ethics in the sharing economy: A critical perspective' (2020) 161 *Journal of Business Ethics* 19-33.

Newlands G, Lutz C & Fieseler C 'Collective action and provider classification in the sharing economy' (2018) 33 *New Technology, Work and Employment* 250-267.

O'Farrell R & Montagnier P 'Measuring digital platform-mediated workers' (2019) 35 *New Technology, Work and Employment* 130-144.

Pazaitis A, Kostakis V & Bauwens M 'Digital economy and the rise of open cooperativism: The case of the Enspiral Network' (2017) 23 *Transfer: European Review of Labour and Research* 177-192.

Pfeiffer S & Kawalec S 'Justice expectations in crowd and platform-mediated work' (2020) 31 *The Economic and Labour Relations Review* 483-501.

Rani U & Furrer M 'Digital labour platforms and new forms of flexible work in developing countries: Algorithmic management of work and workers' (2021) 25 *Competition & Change* 212-236.

Sandoval M 'Entrepreneurial activism? Platform cooperativism between subversion and co-optation' (2020) 46 *Critical Sociology* 801-817.

Schiek D & Gideon A 'Outsmarting the gig-economy through collective bargaining- EU competition law as a barrier to smart cities?' (2018) 32 *International Review of Law, Computers & Technology* 275-294.

Schildt H 'Big data and organisational design- the brave new world of algorithmic management and computer augmented transparency' (2017) 19 *Innovation: Organisation & Management* 23-30.

Schoukens P, Barrio A & Montebovi S 'The EU social pillar: An answer to the challenge of the social protection of platform workers?' (2018) 20 *European Journal of Social Security* 219-241.

Silberman MS & Irani L 'Operating an employer reputation system: Lessons from Turkopticon, 2008-2015' (2016) 37 *Comp. Lab. L. & Pol'y J.* 505-541.

Snyman S 'The principle of majoritarianism in the case of organisational rights for trade unions- is it necessary for stability in the workplace or simply a recipe for discord?' (2016) 37 *ILJ* 865-879.

Stanford J 'The resurgence of gig work: Historical and theoretical perspectives' (2017) 28 *The Economic and Labour Relations Review* 382-401.

Steenkamp A, Stelzner S & Badenhorst N 'The right to bargain collectively' (2004) 25 *ILJ* 943-961.

Stewart A & Stanford J 'Regulating work in the gig economy: What are the options?' (2017) 28 *The Economic and Labour Relations Review* 420-437.

Subramanien DC & Joseph JL 'The right to strike under the Labour Relations Act 66 of 1995 (LRA) and possible factors for consideration that would promote the objectives of the LRA' (2019) 22 *PER/PELJ* 1-39.

Sun P & Chen JY 'Platform labour and contingent agency in China' (2021) *China Perspectives* 19-27.

Tassinari A & Maccarrone V 'Riders on the storm: Workplace solidarity among gig economy couriers in Italy and the UK' (2020) 34 *Work, Employment and Society* 35-54.

Tenza M 'An evaluation of the limitation of the right to strike in terms of the law of general application in South Africa' (2018) 29 *Stellenbosch Law Review* 471-492.

Theron J 'Employment is not what it used to be' (2003) 24 *ILJ* 1247-1283.

Theron J 'Intermediary or employer? Labour brokers and the triangular employment relationship' (2005) 26 *ILJ* 618-649.

Todoli-Signes A 'The 'gig economy': Employee, self-employed or the need for a special employment regulation?' (2017) 23 *Transfer: European Review of Labour and Research* 193-205.

Valenduc G & Vendramin P 'Digitalisation, between disruption and evolution' (2017) 23 *Transfer: European Review of Labour and Research* 121-134.

Van Eck S & Newaj K 'The Constitutional Court on the rights of minority trade unions in a majoritarian collective bargaining system' (2020) 10 Constitutional Court Review 331-351.

Van Heerden A 'Protected strikes- getting the balance right' (2011) 11 Without Prejudice 66-67.

Veen A, Barratt T & Goods C 'Platform-capital's 'app-etite' for control: A labour process analysis of food-delivery work in Australia' (2020) 34 *Work, Employment and Society* 388-406.

Walker M, Fleming P & Berti M ''You can't pick up a phone and talk to someone': How algorithms function as biopower in the gig economy' (2021) 28 *Organisation* 26-43.

Wells KJ, Attoh K & Cullen D '"Just-in-place" labor: Driver organising in the Uber workplace' (2021) 53 *Environment and Planning A: Economy and Space* 315-331.

Wood AJ, Graham M, Lehdonvirta V et al 'Good gig, bad gig: Autonomy and algorithmic control in the global gig economy' (2019) 33 *Work, Employment and Society* 56-75.

Wood AJ, Graham M, Lehdonvirta V et al 'Networked but commodified: The (dis)embeddedness of digital labour in the gig economy' (2019) 53 *Sociology* 931-950.

Wood AJ, Lehdonvirta V & Graham M 'Workers of the internet unite? Online freelancer organisation among remote gig economy workers in six Asian and African countries' (2018) 33 *New Technology, Work and Employment* 95-112.

Woodcock J 'Towards a digital workerism: Workers' inquiry, methods, and technologies' (2021) 15 *Nanoethics* 87-98.

Zwick A 'Welcome to the gig economy: Neoliberal industrial relations and the case of Uber' (2018) 83 *GeoJournal* 679-691.

LEGISLATION

Competition Act 89 of 1998.

Labour Relations Act 66 of 1995.

National Minimum Wage Act 9 of 2018.

RESEARCH REPORTS

Du Toit D, Fredman S, Bhatia G et al *Code of Good Practice for the Regulation of Platform Work in South Africa* (2020) Fairwork, Cape Town, Western Cape; Oxford, United Kingdom available at *https://fair.work/wp-content/uploads/sites/131/2020/11/South-Africa_Code-of-Good-Practice_Full.pdf*.

Fairwork *The Five Pillars of Fairwork Labour Standards in the Platform Economy* (2019) Fairwork-Y1-Report available at *https://fair.work/wp-content/uploads/sites/131/2020/11/Fairwork-Y1-Report.pdf*.

Heiland H *Workers' voice in platform labour- an overview* (2020) Institute of Economic and Social Research (WSI) of the Hans-Bockler-Foundation, Dusseldorf, Germany.

Tajgman D & Curtis K 'Freedom of association: A user's guide' (2000) International Labour Organisation available at *https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_087990.pdf*.

TREATIES AND CONVENTIONS

Collective Bargaining Convention, 1981 (No. 154).

Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

Right to Organise and Collective Bargaining Convention, 1949 (No. 98).