A TRADE UNION'S RIGHT TO STRIKE TO ACQUIRE ORGANISATIONAL RIGHTS

By

VITAMIN LUXOLO BEBULA

For the degree of

Magister Legum

(Labour Law)

In the Faculty of Law

at the Nelson Mandela University

Supervisor: Mr Thanduxolo Qotoyi **Date:** December 2020

Table of contents **Page**

1. BACKGROUND AND RATIONALE FOR THE STUDY

Chapter II of the Labour Relations Act (LRA)[1] entrenches the right to freedom of association.

Section 1(c)[2] of the LRA outlines the purpose of this Act as to provide a collective bargaining framework to determine wages, terms and conditions of employment, and matters of mutual interest by the employees and their unions and employers and employers organisation.

Under this chapter, section 4(1)[3] of the LRA confers the right to an employee to join a trade union, form or participate in forming a trade union or federation of trade unions.

The member of a trade union has a right to participate in the lawful activities of his or her union.[4]

With regard to freedom of association, the new government took a commitment to uphold international labour standards and promised to submit to International Labour Organisation (ILO) Conventions on freedom of association and collective bargaining to parliament for ratification. In 1992 some provision of the previous Labour Relations Act were declared by ILO's FFCC as incompatible with the freedom of association.[5]

The convention affords the workers and employers the right to establish and join organisations and federations of their own choice.[6]

The ILO also protects the right to collective bargaining.[7]

The convention also confers the right to provision of facilities to worker's representatives for prompt and effective conduction of their activities.[8]

---

[1] Labour Relations Act 66 of 1995.
[2] S 1(c) of 1995
[3] S 4(1) of 1995.
[4] S 4(2) of 1995.
[5] Du Toit, Godfrey, Cooper, Giles, Cohen, Conradie, Steenkamp, *Labour Relations Law: A Comprehensive Guide* (2015) 20.
[6] Convention, 1948 (No.87) Protection of the right to organise 1996-2018 International Labour Organisation (ILO).
[7] Convention, 1949 (No.98) right to organise and collective bargaining convention 1996-2018 International Labour Organisation (ILO).
[8] Convention, 1971 (No.135) 1996-2018 International Labour Organisation (ILO).

The principles outlined in the ILO were also considered to form part of organisational rights defined in the LRA[9] in the South African labour law jurisprudence.

The LRA[10] was enacted to give effect and regulate fundamental rights conferred in Section 23[11] of the Constitution of the Republic of South Africa (Constitution), 1996[12].

Section 23 of the Constitution provides that:

> "Every trade union, employers' organisation and employer has a right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limit must comply with section 36(1)".

The purpose of the LRA[13] is also to promote orderly collective bargaining[14].

In order to fulfil this purpose, sections 12 to 16 (Part A) of the LRA[15] came into effect to entitle each trade union organisational rights in a workplace according to the levels of representativeness which include whether the union is a sufficiently representative trade union or majority trade union.

Section 11 of the LRA[16] defines a "representative trade union as a registered trade union or two or more registered trade unions acting jointly that are sufficiently representative of the employees employed by the employer in a workplace.

The organisational rights for representative trade unions are outlined as follows:

Section 12 of the LRA[17] confers on a representative trade union or federation of trade unions a right to workplace access.

Section 13 of the LRA[18] also confers on a representative trade union or federation of trade unions a right to deduction of trade union subscription and levies.

---

[9] 1995.
[10] Ibid.
[11] S 23 of the Constitution of the Republic of South Africa 108 of 1996.
[12] S 1(a) of 1995.
[13] 1995.
[14] S 1(d)(i) of 1995.
[15] 1995.
[16] S 11of 1995.
[17] S 12 of 1995.
[18] S 13 of 1995.

Section 15[19] of the LRA as well confers on a representative trade union or federation of trade unions a right to leave for trade union activities.

The organisational rights for a majority trade union are outlined as follows:

Section 14[20] of the LRA confers on a representative trade union that has a majority of the employees employed by the employer in a workplace a right to trade union representatives.

Section 16[21] of the LRA confers on a representative trade union that has a majority of the employees employed by the employer in a workplace a right to disclosure of information.

As outlined above it is clear that a majority trade union is entitled to all the rights conferred in section 12 to 16 whereas a sufficiently representative trade unions will be only entitled to rights conferred in section 12, 13 and 15. This means therefore that section 14 and 16 are only enjoyed by a majority trade union.

However, section 21(8A)[22] of the LRA stipulates that, the commissioner may grant section 14 right to a registered trade union that does not have the majority of employees employed by the employer if such trade union is entitled to section 12, 13 and 15 rights and there is no other trade union enjoying this right.

The organisational right referred to in Section 16 may also be granted by the commissioner to a registered trade union that does not have majority of employees employed by the employer if such trade union is entitled to rights enshrined in section 12, 13, 14, and 15 and there is no other trade union entitled to that right.[23]

In the essence, my understanding in terms of section 21 above is that majoritarianism forms the basic principle required for a trade union to be entitled to rights referred to section 14 and 16. If the union does not meet the majority representation, these rights may be acquired by means of arbitration proceedings. The majoritarianisation is a fundamental principle to prevent possible chaos if all trade unions can be afforded the right to bargain for section 14 and 16 organisational right.

[19] S 15 of 1995.
[20] S 14 of 1995.
[21] S 16 of 1995.
[22] S 21(8A) of 1995.
[23] S 21(8B) of 1995.

Section 18[24] of the LRA also focuses on the same principle and states that:

> "(1) An employer and a registered trade union whose members are a majority of the employees employed by that employer in a workplace, or the parties to a bargaining council, may conclude a collective agreement establishing a threshold of representativeness required in respect of one or more of the organisational rights referred to in section 12, 13 and 15.
>
> (2) A collective agreement concluded in terms of subsection (1) is not binding unless the threshold of representativeness in the collective agreement are applied equally to any registered trade union seeking any of the organisational rights referred to in that subsection".

With regard to the same conclusion of collective agreement, section 20[25] of LRA states that:

> "Nothing in this part precludes the conclusion of a collective agreement that regulates organisational rights".

In my view conducting collective bargaining and provision of organisational rights to a trade union, the LRA[26] provided inherent inequalities in terms of union representation to acquire organisational rights.

Section 21[27] of the LRA gives the right to any trade union to notify the employer in writing, that it seeks to exercise one or more of the organisational rights in a workplace.

Having noted and acknowledged the standing and principles laid out in the LRA[28], the trade unions have a recourse or remedy to acquire the aforementioned organisational right referred to in section 14 if the employer refuses to bargain.

A person may take part in a strike, contemplation or furtherance of strike if the issue in dispute is the matter dealt with in section 12 to 15.[29]

---

[24] S 18 of 1995.
[25] S 20 of 1995.
[26] 1995.
[27] S 21 of 1995.
[28] 1995.
[29] S 65(2)(a) of 1995.

In my understanding, it therefore means that the LRA[30] does not grant a trade union right to strike on matters relating to section 16[31] of the LRA. This right remains the right entitled to a majority union.

In *ECCWUSA & others v Southern Sun Hotel Interests (Pty) Ltd*[32] the Labour Court decided that parties in a collective bargaining may advance any demands that are not outrageous or unconscionable.

In *Food Workers Council of SA v Bokomo Mills*[33] the minority union was refused bargaining rights where there is an existing bargaining relationship between the employer and the majority union.

Van Niekerk J, in *Transnet Soc Limited v National Transport Movement*[34] decided that there is nothing in Section 18 of the Labour Relations Act or in the collective agreement concluded between Transnet and other trade unions denying National Transport Movement to bargain collectively and to strike in support of a demand for organisational right.

The establishment of whether a minority union may strike for organisational rights was convoluted by the decision made in *Police and Prison Civil Rights Union (POPCRU v Ledwaba NO and Others,*[35] where the Labour Court in the interpretation of the provisions of section 20 and section 18 declared the collective agreement entered into by the Department of Correctional Services and SACOSWU, a minority trade union, invalid and was set aside.

In *SA Commercial Catering & Allied Workers Union v Metlife*[36] the commissioner confirmed that the union was not sufficiently representative to acquire the preliminary organisational rights and the union could not bargain for these rights.

In *National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd*[37] , the Labour Appeal Court decided that strike by a minority trade union in support of demand for organisational rights was unlawful and unprotected.

---

[30] 1995.
[31] Ibid.
[32] *ECCWUSA & others v Southern Sun Hotel Interests (Pty) Ltd* [2000] 4 BLLR 404(LC).
[33] *Food Workers Council of SA v Bokomo Mills* (1994) 15 ILJ 1371 (IC).
[34] *Transnet Soc Limited v National Transport Movement* (2013) 24 SALLR 845 (LC).
[35] *Police and Prison Civil Rights Union (POPCRU v Ledwaba NO and Others* [2013] ZALCJBH 224 para 68.
[36] *SA Commercial Catering & Allied Workers Union v Metlife* (1997) 18 ILJ 824 (CCMA).
[37] *National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd* (JA50/00) [2001] ZALAC 27.

In *National Union of Mineworkers of South Africa (NUMSA) v Bader Bop (Pty) Ltd,*[38] the Constitutional Court concluded that a minority trade union can conclude a collective agreement to secure organisational rights even if it is not sufficiently representatives of employees employed by the employer and as well has a right to strike in support of a demand to be granted organisational rights.

In *Transnet SOC Ltd v National Transport Movement & Others,*[39] the Labour Court held that the National Transport Movement was not a party to the collective agreement and was therefore not bound by it. In addition, the Court held that in a collective agreement there was no clause extending the provisions to the employees who are not members of unions which are parties to such collective agreement. Consequently, there was no binding collective agreement for the purpose of section 65(1) and 65(3) that would preclude them from calling a strike in support of a demand for organisational rights.

In *Police and Prison Civil Rights Union (POPCRU)*[40] the Labour Court further concluded that because of the existence of a recognition agreement between the department and POPCRU in respect of the organisational rights, made applicable and binding to non-parties, another agreement with SACOSWU would be invalid and unenforceable as it would negate the one made with POPCRU. In this case the Labour Court thus concluded that the award of the arbitrator was unsustainable and cannot be upheld and would constitute a material error of law and reviewable irregularity in terms of the review test.

In *South African Correctional Services Workers Union (SACOSWU) v Police and Prison Civil Rights Union (POPCRU) and others*[41] , the Labour Appeal Court decided otherwise and held that, Section 20 on the Labour Relations Act grants an opportunity for minority trade unions in a workplace to represent their members and challenge majority trade unions. SACOSWU as the minority trade union was then granted right to subscription fee for a limited period in accordance with applicable international standards.

POPCRU referred this matter to the Constitutional Court.

---

[38] *National Union of Mineworkers of South Africa (NUMSA) v Bader Bop (Pty) Ltd,* (2003) 24 ILJ 305 (CC) par 73-76.

[39] [2014] 1 BLLR 98 LC par 15.

[40] [2013] ZALCJHB 224.

[41] *South African Correctional Services Workers Union (SACOSWU) v Police and Prison Civil Rights Union (POPCRU) and others* [2017] ZALAC 30

The Constitutional Court judgment in *Police and Prison Civil Rights Union v South African Correctional Services Workers' Union and others*[42], Zondo DCJ made reference to acquisition of organisational rights before Labour Relations Act by trade unions which was either through contractual agreement or by judiciary. He stated that in the current Labour Relations Act, there are no provisions that this contractual acquisition of organisational rights is no longer available or was abolished. The Constitutional Court further differentiated between the organisational right dealt with in Part A of Chapter III of the Labour Relations Act referred to as statutory organisational rights and those acquire in terms of Collective Agreement referred to as contractual organisational rights. It went on to say that the provisions of section 18 of Labour Relations Act refers to statutory organisational rights conferred to sufficiently representative trade union and a trade union need not have a collective agreement to acquire those rights whereas section 20 of Labour Relations Act confers contractual organisational rights to a trade union in terms of a concluded contractual collective agreement. The Constitutional Court then decided that, SACOSWU was granted contractual rights by the employer because it would not be entitled to statutory organisational rights as it was not sufficiently representative of employees employed by the employer and such contractual organisational rights fall outside the chapter on Labour Relations Act organisational rights.

2. PROBLEM STATEMENT

Before the democratisation of South Africa, our country's labour dispensation was favouring certain individuals, the African and Indian workers were not recognised and protected by the Industrial Conciliation Act[43]. It was an offence to engage in a strike action during the existence of an agreement prohibiting such action.[44]

Strike in terms of the common law rule was regarded as a breach of the contract of employment. However, as transformation in the labour dispensation progresses, the Industrial Courts protected employees who embarked on strike

[42] *Police and Prison Civil Rights Union v South African Correctional Services Workers' Union and others* [2018] ZACC 24.
[43] Industrial Conciliation Act 11 of 1924.
[44] Du Toit, Godfrey, Cooper, Giles, Cohen, Conradie, Steenkamp: Labour Relations Law: Comprehensive Guide (2015) 6-7.

against dismissal. Such dismissal was developed to constitute unfair labour practice.[45]

In the author's view point, the decision made in *Bader Bop* was seen as decisive in South African Labour Law jurisprudence. However, there was huge criticism on the court decisions that were made after *Bader Bop*.

In *POPCRU* judgment, Snyman found that the judgment in *Bader Bop* failed to provide substantiation for the reasoning of the arbitrator.[46]

In *Transnet*, the Labour Court construed that the principle established in *Bader Bop* was that a minority union may by means of a collective agreement or strike action pursue any other organisation right reserved for the majority unions.[47]

The discussion will focus on the interpretation of contrasting judgments, in particular, the application of law in the South African legal system pertaining to the acquisition of organisational rights by minority trade unions that is not sufficiently representative. In addition, the research paper would establish what is the protection available to such trade union when they engage in a strike action when the employer refuses to grant organisational rights?

3. RESEARCH QUESTIONS

Can a right to strike be granted to a minority trade union seeking to acquire organisational rights?

The research paper intends to discuss trade union's right to strike in order to acquire organisational rights focusing mostly on different judgement of the South African Courts and the provisions of the legislation.

It is further important to reflect glaringly on the establishment of the effectiveness of the majority union's collective agreement granted in terms of section 18 of the Labour Relations Act.

The analysis of different judgments made in the South African Courts that will be discussed in this paper will play a pivotal part in defining and addressing the labour uncertainties with regard to granting of organisational rights.

---

[45] Basson, A. Christianson, M. Garbers, C. Le Roux, PAK. Mischke, C. Strydom, EML. 2005 *Essential Labour Law* 4th combined edition, Labour Law Publications, Cape Town.
[46] *(2003) 24 ILJ 305 (CC).*
[47] Ibid.

An inference will eventually be drawn to test the effectiveness of section 20, whether the existence of collective agreement made in section 18 evades the right imposed in terms of section 20 or the section 20 nullifies the provision of section 18. In the effect, what is the constitutionality status of such provisions.

This research will as well consider provisions of section 21 of the Labour Relations Act[48] which provides that any registered trade union may by way of notice to the employer in writing seek to exercise one or more organisational rights in a workplace.

4. AIMS AND OBJECTIVES OF THE STUDY

The purpose of this paper is the consideration of the development of the South African labour jurisprudence, by analysing the legal position and the protection afforded to a minority trade union to acquire organisational rights based on the preliminary judgements. The Constitutional Court judgment of *Bader Bop* as well as subsequent decisions after *Bader Bop*, would form the basis of such consideration.

5. RESEARCH METHODOLOGY

In order to accomplish the aims and objectives of this paper as outlined above, literature review will be conducted. It will, *inter alia*, include the views of the contemporary writer, legislation, articles and decided cases.

This research will be conducted by means of literature reviews. The literature review will be based but not limited on the legislative provisions, books by contemporary writers, articles and decided cases.

In this study the author intends to analyse protection of strike to acquire organisational rights by minority trade union that falls beyond the threshold agreed upon by the majority union in a workplace.

The historical overview will predominantly focus on pre-constitutional legislation and the interpretations and subsequent judgments that were applied in our law. Furthermore, the transition process which led to the promulgation of the Constitution and subsequent enactment of labour legislation will serves as authoritative law.

[48] 1995.

The main emphasis will be on the discussion and analysis of the applicable provisions with regard to the attainment of the organisational rights entrenched in the Labour Relations Act, its legal effect as well as application of threshold requirement.

The interpretation to determine the legal position in this respect reached a point where there were contrasting views by our courts. Such differences were accordingly addressed in the Constitutional Court decision of *NUMSA v Bader Bop (Pty) Ltd.*[49] This case dealt with the right to strike by a minority trade union in order to acquire organisational rights referred to in section 14.

The discussion and analysis of these cases will provide guidance to this paper in establishing the appropriate legal position that will form the basis for future development in our South African labour jurisprudence.

6. OUTLINE OF RESEARCH

The proposed table of contents are as follows:

CHAPTER 2: THE LEGISLATIVE FRAMEWORK FOR ACQUISITION OF ORGANISATIONAL RIGHTS (10 pages)

CHAPTER 3: TRADE UNION REPRESENTATIVENESS TO ACQUIRE ORGANISATIONAL RIGHTS (10 pages)

CHAPTER 4: RIGHT TO STRIKE FOR ORGANISATIONAL RIGHTS (10 pages)

CHAPTER 5: THE IMPORTANT CASE LAW PROVISIONS (10 pages)

CHAPTER 6: CONCLUSION (10 pages)

7. The projected submission of chapters is:

Whole treatise…….. 06 December 2019

[49] (2003) 24 ILJ 305 (CC).

CHAPTER 2: THE LEGISLATIVE FRAMEWORK FOR ACQUISITION OF ORGANISATIONAL RIGHTS

2 1 Introduction

The public international law is the main source of organisational rights that is incorporated in the ILO's Conventions of freedom of association.[50]

Numerous disputes that led to strike action arose from the unions in the 1980's demanding one or more of the organisational rights.[51]

In South Africa, the ILO Fact-Finding and Conciliation Commission exerted substantial influence in the drafting of the LRA. It instructed the Ministerial Legal task team vested with powers to draft the LRA that the new law should contain recognition of trade union's fundamental organisational rights in terms of Reconstruction and Development Programme(RDP), ILO Convention 87, and the findings of the ILO's Fact-Finding and Conciliation Commission and fundamental rights enshrined in the Interim Constitution.[52]

The legislature then regulated organisational rights with the intention to remove the significant cause of industrial conflict. The trade union may acquire some or all of the organisational right, using the route of collective agreement in terms of section 20 or through membership of the bargaining council or statutory council in terms of section 19 or by LRA procedure in terms of section 21.[53]

A single registered trade union or two or more registered trade unions acting together can acquire organisational rights. The organisational rights attained by a trade union in a form of agreement with the employer or by arbitration precludes such trade union to exercise such rights jointly with other trade unions unless the employer concedes.[54]

In terms of section 1 of the LRA, the purpose of the LRA is to promote orderly collective bargaining at sectoral level, employee participation in decision making at the workplace and effective resolution of labour disputes.[55]

---

[50] Du Toit, Godfrey, Cooper, Giles, Cohen, Conradie, Steenkamp: Labour Relations Law: Comprehensive Guide (2015) 252

[51] Du Toit *et al* Labour Relations Law 253.

[52] Du Toit *et al* Labour Relations Law 252-253.

[53] Du Toit *et al* Labour Relations Law 253.

[54] Du Toit *et al* Labour Relations Law 255.

[55] S 1(d)(i)-(iv) of 1995.

In this chapter, the author will discuss different types of organisational rights that can be acquired by trade unions according to their levels of representativeness as well as relevance of the principle of majoritarianism in the LRA context.

2 2 The legislative provisions relating to organisational rights

2 2 1 Right of access to the workplace

The problem faced by the trade unions is for union officials to have access to employees who are already members of the union, prospective members and employees the union wants to recruit as members. The union members and prospective members have their largest part of a working day at the workplace and that is the logical place where they can meet.[56]

The previous LRA precluded workplace access by known trade unionists on the ground that they were trespassing at the workplace. The enactment of the interim Constitution led to the decision of the Labour Appeal Court to recognise trade union's right to assemble on the employer's property.[57]

The ILO bodies of supervision and interpretation took a decision to protect the right of trade union access to employer's premises.[58]

Section 12[59] of the LRA was then enacted which stipulates that:

> "(1) An office-bearer or official of a representative trade union is entitled to enter the employer's premises in order to recruit members or communicate with members or otherwise serve their interests.
>
> (2) A representative trade union is entitled to hold meetings with employees outside their working hours at the employer's premises.
>
> (3) The members of the representative trade union are entitled to vote at the employer's premises in any election or ballot contemplated by the trade union's constitution.
>
> (4) The rights conferred by this section 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."

The trade unions that are party to a bargaining council or statutory council automatically enjoy the right to access the employer premises in all workplaces

[56] Basson, Christianson, Garbers, Le Roux, Mischke, Strydom, *Essential Labour Law*, (2005) 241.
[57] Du Toit *et al* Labour Relations Law 251.
[58] Du Toit *et al* Labour Relations Law 252.
[59] S 12 of 1995

within the registered scope of the council irrespective of their representativeness.[60]

In an unqualified sense, the union only requires sufficiently representative in order to exercise right to access. If a trade union wishes to exercise right to access workplace, the employer must grant the right if such union is sufficiently representative and registered.[61]

2 2 2 Right to deduction of trade union subscription and levies

In the previous LRA, the registered trade unions were only limited to right to stop order facilities. An agreement for stop order facilities between the employer and an unregistered trade union was prohibited unless it has been ratified by the Minister.[62] This provision was found to be incompatible to freedom of association by the ILO Fact-finding and Conciliation Commission in South Africa and recommended that it be removed. The ILO bodies of supervision and interpretation also decided to protect the right by union officials to collect dues of the union.[63]

The membership fees paid by the members of trade unions is usually the main source of income for trade unions. As a result of difficulties that the trade unions can have in collecting these fees, the stop-order facilities in which the employer will deduct membership dues from the union members' wages and pay it to the trade union as a lump-sum on regular basis was identified as a feasible option for unions.[64]

Section 13[65] of the LRA states that:

> "(1) An employee of a representative trade union may authorise the employer in writing to deduct subscription levies payable to the trade union from employee's wages.
>
> (2) An employer who receives an authorisation in terms of subsection (1) must begin making authorised deduction as soon as possible and must remit the amount deducted to the representative trade union by not later than the 15th day of the month first following the date each deduction was made."

[60] Du Toit *et al* Labour Relations Law 254.
[61] Du Toit *et al* Labour Relations Law 257.
[62] Du Toit *et al* Labour Relations Law 251.
[63] Du Toit *et al* Labour Relations Law 252.
[64] Basson *et al Essential Labour Law* 242.
[65] S 13 of 1995.

The right to stop order facility is automatically enjoyed by trade unions that are party to bargaining council or statutory council in all workplaces within the registered scope of the council regardless of its representativeness.[66]

The right to stop-order facility must be also granted by the employer to a trade union that is registered and sufficiently representative if it wishes to exercise that right.[67]

2 2 3 Right to trade union representatives

The ILO bodies of supervision and interpretation as well decided to protect the right to representation of employees by their officials of the union.[68] The trade union representatives are employees of the employer representing the interests of the trade union and its members in the workplace. They are in the best position to represent trade union in the workplace and to advance information about the workplace to the trade union as well as assist union members in the work related problems.[69]

Section 14[70] of the LRA confers the right to elect trade union representatives and states as follows:

> "(1) In this section, representative trade union means a registered trade union, or two or more registered trade unions acting jointly, that have as members the majority of the employees employed by an employer in a workplace.
>
> (2) In any workplace in which at least 10 members of a representative trade union are employed, those members are entitled to elect from among themselves -
>
> > (a) if there are 10 members of the trade union employed in the workplace, one trade union representative;
> >
> > (b) if there are more than 10 members of the trade union employed in the workplace, two trade union representatives;
> >
> > (c) if there are more than 50 members of the trade union employed in the workplace, two trade union representatives for the first 50 members, plus a further one trade union representative for every additional 50 members up to a maximum of seven trade union representatives;

[66] Du Toit *et al* Labour Relations Law 254.
[67] Du Toit *et al* Labour Relations Law 257.
[68] Du Toit *et al* Labour Relations Law 252.
[69] Basson *et al Essential Labour Law* 242.
[70] S 14 of 1995.

(d) if there are more than 300 members of the trade union employed in the workplace, seven trade union representatives for the first 300 members, plus one additional trade union representative for every 100 additional members up to a maximum of 10 trade union representatives;

(e) if there are more than 600 members of the trade union employed in the workplace, 10 trade union representatives for the first 600 members, plus one additional trade union representative for every 200 additional members up to a maximum of 12 trade union representatives; and

(f) if there are more than 1000 members of the trade union employed in the workplace, 12 trade union representatives for the first 1000 members, plus one additional trade union representative for every 500 additional members up to a maximum of 20 trade union representatives.

(3) The constitution of the representative trade union governs the nomination, election, term of office and removal from office of a trade union representative.

(4) A trade union representative has the right to perform the following functions -

(a) at the request of an employee in the workplace, to assist and represent the employee in grievance and disciplinary proceedings:

(b) to monitor the employer‘s compliance with the workplace-related provisions of this Act, any law regulating terms and conditions of employment and any collective agreement binding on the employer;

(c) to report any alleged contravention of the workplace-related provisions of this Act, any law regulating terms and conditions of employment and any collective agreement binding on the employer to -

(i) the employer;

(ii) the representative trade union; and

(iii) any responsible authority or agency; and

(d) to perform any other function agreed to between the representative trade union and the employer.

(5) Subject to reasonable conditions, a trade union representative is entitled to take reasonable time off with pay during working hours -

(a) to perform the functions of a trade union representative; and

(b) to be trained in any subject relevant to the performance of the functions of a trade union representative.”

Although this right is only conferred to a majority trade union, it may also be granted to a minority trade union in terms of section 21(8A)(a)[71] of the LRA which stipulates that:

> "Subject to the provisions of subsection (8), a commissioner may in an arbitration conducted in terms of subsection (7) grant a registered trade union that does not have as members the majority of employees employed by an employer in a workplace-
>
> (a) the rights referred to in section 14, despite any provision to the contrary in that section, if—
>
> > (i) the trade union is entitled to all of the rights referred to in sections 12, 13 and 15 in that workplace; and
> >
> > (ii) no other trade union has been granted the rights referred to in section 14 in that workplace".

2 2 4 Right to leave for trade union activities

The known trade unionists in the previous LRA were refused the right to be granted time off for union activities.[72]

Section 15[73] of the LRA was passed to envisage that:

> "(1) An 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.
>
> (2) The representative trade union and the employer may agree to the number of days of leave, the number of days of paid leave and the conditions attached to any leave.
>
> (3) An arbitration award in terms of section 21(7) regulating any of the matters referred to in subsection (2) remains in force for 12 months from the date of the award."

The right to trade union activities must be granted by the employer to a registered trade union that is sufficiently representative if such union wishes to exercise it.[74]

Sometimes a trade union representative (an employee) is also an office-bearer of the trade union who may be required to be absent at work for the purpose of attending conferences and meetings of the trade union.[75]

---

[71] S 21(8A)(a) of 1995.
[72] Du Toit *et al* Labour Relations Law 251.
[73] S 15 of 1995.
[74] Du Toit *et al* Labour Relations Law 257.
[75] Basson *et al Essential Labour Law*, (2005) 243.

2 2 5 Right to disclosure of information

Section 16[76] of the LRA confers the right to disclosure of information and states as follows:

> "(1) For the purposes of this section, representative trade union" means a registered trade union, or two or more registered trade unions acting jointly, that have as members the majority of the employees employed by an employer in a workplace.
>
> (2) Subject to subsection (5), an employer must disclose to a trade union representative all relevant information that will allow the trade union representative to perform effectively the functions referred to in section 14(4).
>
> (3) Subject to subsection (5), whenever an employer is consulting or bargaining with a representative trade union, the employer must disclose to the representative trade union all relevant information that will allow the representative trade union to engage effectively in consultation or collective bargaining.
>
> (4) The employer must notify the trade union representative or the representative trade union in writing if any information disclosed in terms of subsection (2) or (3) is confidential.
>
> (5) An employer is not required to disclose information -
>
> > (a) that is legally privileged;
> >
> > (b) that the employer cannot disclose without contravening a prohibition imposed on the employer by any law or order of any court;
> >
> > (c) that is confidential and, if disclosed, may cause substantial harm to an employee or the employer; or
> >
> > (d) that is private personal information relating to an employee, unless that employee consents to the disclosure of that information.
>
> (6) If there is a dispute about what information is required to be disclosed in terms of this section, any party to the dispute may refer the dispute in writing to the Commission.
>
> (7) The party who refers the dispute to the Commission must satisfy it that a copy of the referral has been served on all the other parties to the dispute.
>
> (8) The Commission must attempt to resolve the dispute through conciliation.
>
> (9) If the dispute remains unresolved, any party to the dispute may request that the dispute be resolved through arbitration.

[76] S 16 of 1995.

(10) In any dispute about the disclosure of information contemplated in subsection (6), the commissioner must first decide whether or not the information is relevant.

(11) If the commissioner decides that the information is relevant and if it is information contemplated in subsection (5)(c) or (d), the commissioner must balance the harm that the disclosure is likely to cause to an employee or employer against the harm that the failure to disclose the information is likely to cause to the ability of a trade union representative to perform effectively the functions referred to in section 14(4) or the ability of a representative trade union to engage effectively in consultation or collective bargaining.

(12) If the commissioner decides that the balance of harm favours the disclosure of the information, the commissioner may order the disclosure of the information on terms designed to limit the harm likely to be caused to the employee or employer.

(13) When making an order in terms of subsection (12), the commissioner must take into account any breach of confidentiality in respect of information disclosed in terms of this section at that workplace and may refuse to order the disclosure of the information or any other confidential information which might otherwise be disclosed for a period specified in the arbitration award.

(14) In any dispute about an alleged breach of confidentiality, the commissioner may order that the right to disclosure of information in that workplace be withdrawn for period specified in the arbitration award."

The disclosure of information requires that the trade union seeking to exercise this right should have a majority of employees employed by the employer at a workplace.[77] This remaining right to disclosure of information can only be enjoyed by a trade union or trade unions acting jointly, that has majority membership.[78]

The right to elect a trade union representative is only conferred to a majority trade union. However, this right may also on conditions be granted to a minority trade union in terms of section 21(8A)(b)[79] of the LRA which contemplates that:

"Subject to the provisions of subsection (8), a commissioner may in an arbitration conducted in terms of subsection (7) grant a registered trade union that does not have as members the majority of employees employed by an employer in a workplace-

(b) the rights referred to in section 16, despite any provision to the contrary in that section, if-

[77] Du Toit *et al* Labour Relations Law 257.
[78] Du Toit *et al* Labour Relations Law 260.
[79] S 21(8A)(b) of 1995.

(i) the trade union is entitled to all of the rights referred to in sections 12, 13, 14 and 15 in that workplace; and

(ii) no other trade union has been granted the rights referred to in section 16 in that workplace".

2 3 Threshold agreements

In terms of section 18[80] of the LRA, a registered trade union that has majority of employees in a workplace and also a party to a bargaining council a right to conclude a collective agreement with the employer to establishing a threshold of representativeness required to acquire one or more organisational rights referred to in section 12, 13 and 15 of the LRA.[81] This section proceeds on to say that this collective agreement is not binding unless it applies equally to any registered trade union seeking to exercise any of these organisational rights.

There is nothing in this part that precludes the conclusion of a collective agreement that regulates organisational rights in terms of section 20[82] of the LRA.

In my view, this section renders the prerequisite stated in section 18 defective in the sense that section 20 permits conclusion of a collective agreement openly without restrictions. Any trade union can therefore conclude a collective bargaining irrespective of its level of representativeness in a workplace. The principle of majoritarianism therefore loses admiration and proliferation of trade unions cannot be prevented. The purpose of promoting an orderly collective bargaining also cannot be served.

The provisions of section 21(8)(a)[83] of the LRA stipulates that, if a dispute to determine whether a trade union is a representative trade union or not is unresolved, the commissioner must seek to minimise proliferation of trade union representation in a single workplace and seek to encourage a system of trade union representativeness in a workplace.

In terms of section 19[84] of the LRA, section 12 and 13 is automatically acquired by a registered trade union which is a party a council at a workplace within the registered scope of the council regardless of workplace representativeness.

[80] S 18 of 1995.
[81] 1995.
[82] S 20 of 1995.
[83] S 21(8)(a) of 1995.
[84] S 19 of 1995.

In analysing this provision, it means if a trade union is a party to a bargaining council there is no need for state of representativeness to be determined in terms of section 18 for it to attain section 12 and 13 organisational rights. Further acquisition of section 15 organisational rights may be in terms of Section 18 or in terms of a collective agreement referred to in section 20. However, the trade union that is not a party to a bargaining council may conclude a collective agreement to acquire section 12, 13 and 15 rights in terms of section 20. Section 18 therefore has no role to play in the acquisition of organisational rights by a minority trade union and its power in serving the principle of majoritarianism has been diminished and not relevant.

Over and above the latter sentiment, the prevailing of section 18 would supress the existence and growth of emerging trade unions. The majority union would set a high percentage or number of representativeness for minority union to acquire section 12,13 and 15 organisational rights in order to prevent the minority trade unions from concluding collective agreement regulating organisational rights with the employer.

Furthermore, no employee would enjoy being a member of the minority union that has limited or no recognised organisational right to exercise in a workplace.

The following questions arises-

If the LRA is premised on principle of majoritarianism the issue would be that you have two collective agreements, one concluded by the majority union in terms of section 18, and the other one concluded by the minority union in terms of section 20.

In view of the principle of majoritarianism, should the one concluded by the majority union not trump the section 20 one?

If the section 20 agreement trumps the section 18, is it not a question of the will of the minority dominating that of the majority? What also happens to the agreement concluded in terms of section 18? What remedy is there for the breach by the section 20 agreement?

2 4 The Labour Relations Act 66 of 1995 amendment

The LRA[85] has contrasting provisions in as far as the route to attain organisational rights is concerned in my opinion. This contrast is brought in by the amendment of the LRA[86] which shifted from the requirement of being a "majority trade union" to acquire section 14 and 16 organisational rights of the LRA[87] to a principle of "most representative" trade union. Section 21(8A)(a)(i)-(ii)[88] of the LRA, authorises the commissioner to grant section 14 organisational right to the most representative trade union that does not have the majority of employees employed by the employer if such trade union is entitled to section 12, 13 and 15 rights and no other trade union enjoys this right.[89]

The LRA[90] in terms S21(8A)(b)(i)-(ii) [91] also authorises the commissioner to grant section 16 organisational right to the most representative trade union that does not have majority of employees employed by the employer if such trade union is entitled to rights enshrined in section 12, 13, 14, and 15 and no other trade union is entitled to that right.

The trade union seizes to enjoy organisational rights referred to in section 21(8A) if such trade union is no longer the most representative trade union as indicated terms of section 21(8B).[92]

2 5 Determination of a representative trade union

A representative trade union is a registered trade union or two or more registered trade unions acting jointly that are sufficiently representative of the employees employed by the employer in a workplace in terms of section 11[93] of the LRA.

An employer may refuse to grant organisational rights to a trade union challenging the trade union's state of representativeness. In terms of section 4[94] of the LRA, if a trade union or an employer fails to conclude a collective agreement, the affected party may refer a dispute to a commission. If the dispute is about whether a trade union is a representative trade union or not remains

[85] 1995.
[86] *Ibid.*
[87] *Ibid.*
[88] S21(8A)(a)(i)-(ii) of 1995.
[89] S21(8A)(a)(i)-(ii) of 66 of 1995.
[90] 1995.
[91] S21(8A)(b)(i)-(ii) of 1995.
[92] S 21(8B) of 1995.
[93] S 11 of 1995.
[94] S 4 of 1995.

unresolved, in determining state of representativeness, the commissioner must consider the following five (5) factors in terms of section 21(8)(b) of the LRA:[95]

- The nature of the workplace;
- The nature of one or more organisational right that the registered trade union seeks to exercise;
- The nature of the sector in which workplace is situated;
- The organisational history at the workplace or any other workplace of the employer; and
- The composition of the workforce in the workplace in relation to temporary employment services employees, fixed term contract employees, part-time employees and employees in other categories of non-standard employment.

2 6 Right to strike for organisational rights

In regulating the organisational rights, the legislature hoped to remove significant cause of industrial conflicts and limit unnecessary strikes as its objective.[96]

In my view, the strike action may be inevitable in a case where an employer refuses to grant organisational rights. Section 65(2)(a)[97] authorises that any person may engage in a strike action or any conduct in contemplation or furtherance of strike if the issue in dispute is about any matter dealt with in section 12 to 15.

When integrating the aforementioned provisions, an inference is drawn to say, section 65(2)(a) gives an opportunity to minority trade unions that are not the most representative trade union as outlined in terms of section 21(8A) to coerce employers to concede to their demand to be granted section 12 to 15 organisational rights. In the essence, a minority trade union may use this provision to seek organisational rights referred to in sections 12 to 15. It is unblemished that no trade union may ever engage in an industrial action seeking to be granted section 16 organisation right because it is only enjoyed by a majority trade union or the most representative trade union in terms of section 21(8A)(b).

[95] S 21(8)(b) of 1995.
[96] Du Toit *et al* Labour Relations Law 253.
[97] S 65(2)(a) of 1995.

2 7 Conclusion

The representative trade unions have organisational rights vested to them for workplace access (section 12), deduction of trade union subscription and levies (section 13), union representatives (section 14), union leave for trade union activities (section 15), and disclosure of information (section 16) granted in terms of the LRA[98].

These rights are not available to be granted to an unregistered trade union in terms of the LRA.[99]

However, not all trade unions qualify for these organisational rights by virtue of being registered and sufficiently representatives. The requirement for right to trade union representatives and disclosure have an additional requirement of being a majority trade union as a single union or two or more trade unions acting jointly. This is an indication of the fact that there is inequality in terms of acquisition of these organisational rights.

This does not mean the trade unions that do not have majority representative are not interested in acquiring right to have union representative and disclosure of information.

The acquisition of section 14 and 16 organisational rights as reflected in the LRA[100] has now shifted from only being available to a majority trade union in a workplace but also to the most representative trade union by virtue of the inception of section 21(8A) if there is no majority trade union available.

Nonetheless, this means therefore that, the spirit of majoritarianism still exists in as far as granting of organisation rights is concerned.

The following chapter will focus on the right to engage in a strike action for organisational rights.

[98] 1995.
[99] 1665.
[100] 1995.

CHAPTER 3: TRADE UNION REPRESENTATIVENESS TO ACQUIRE ORGANISATIONAL RIGHTS

3 1 Introduction

As stated by Du Toit *et al* in the previous chapter that, a trade union may acquire some or all of the organisational right, using the route of collective bargaining in terms of section 20 or through membership of the bargaining council or statutory council in terms of section 19 or by LRA procedure in terms of section 21, this chapter will discuss the interpretation in relation to trade union representativeness in order to acquire organisational rights.

The Constitutional Court in *National Union of Metal workers of South Africa and others v Bader Bop (Pty) Ltd and another*[101], stated that the Act is trying to afford a framework for participation of employers and employees and their organisations in collective bargaining and the formulation of industrial policy and the broader interpretation of the Act that does not limit fundamental rights should be preferred.

The principle of representativeness depends on the number of employees recruited by the trade union. In *Police and Prison Civil Rights Union v South African Correctional Service Workers' Union and others*[102], the Constitutional Court stated that the right of every worker to form and join trade union is critically linked to engage in collective bargaining. The principle of majoritarianism is compatible with the freedom of association.[103]

3 2 Definition of a representative trade union

In terms of Part A Chapter III of the Labour Relations Act[104], representative trade union is defined as a registered trade union, or two or more registered trade unions acting jointly, that are sufficiently representative of the employees employed by the employer in a work place.[105]

---

[101] National Union of Metal workers of South Africa and others v Bader Bop (Pty) Ltd and another (CCT14/02) [2002] ZACC 30.

[102] *Police and Prison Civil Rights Union v South African Correctional Service Workers' Union and others (CCT152/17) [2018] ZACC 24.*

[103] *[2018] ZACC 24 at Par 90*

[104] Labour Relations Act 66 of 1995.

[105] S 11 of 1995.

3 3 The principle of sufficient representation to acquire organisational rights

In *Bader Bop*[106], the Constitutional Court ascribed the meaning of sufficiently representative as meaning that the more members the union has, the more the employer accept that the trade union is sufficiently representative to acquire section 12, 13 and 15 within the meaning of the Act.

The LRA[107] demonstrates the required level of representativeness to establish a threshold for acquisition of one or more rights entrenched in section 12, 13 and 15 and states as follows:

> "(1) An employer and a registered trade union whose members are a majority of the employees employed by that employer in a workplace, or the parties to a bargaining council, may conclude a collective agreement establishing a threshold of representativeness required in respect of one or more of the organisational rights referred to in sections 12, 13 and 15.
>
> (2) A collective agreement concluded in terms of subsection (1) is not binding unless the thresholds of representativeness in the collective agreement are applied equally to any registered trade union seeking any of the organisational rights referred to in that subsection".[108]

According to the Labour Law and Employment Manual[109] a majority trade union is one that has a minimum of 50% plus 1 of the total employees employed by the employer in a workplace.

The majoritarianism system proclaimed in the Labour Law and Employment Manual and the LRA underpins the use of principle of inequality in the labour sectors in terms of distinction between the majority trade unions and minority trade unions. Kruger and Tshoose[110] proclaims that, despite the provision of equality before the law enshrined in section 9 of the Constitution, that is often not seen in practice trade unions.

In *UASA and Another v BHP Billiton Energy Coal South Africa LTD and Another*[111], the Labour Court granted an interim relief to a coalition of two trade unions acting together pending outcomes of the arbitration award in respect of

---

[106] *[2002] ZACC 30* at Par 45.
[107] 66 of 1995.
[108] S 18 of 1995
[109] Labour Law and Employment Manual, SA Labour Guide 2013
[110] Kruger and Tshoose *The impact of the labour relations action on minority trade unions*: A South African perspective 2013 289-290.
[111] *UASA and Another v BHP Billiton Energy Coal South Africa LTD and Another [2013] ZALCJHB 26*.

interpretation and application collective agreement signed between the majority trade union and the employer in terms of section 18[112] in which the threshold representativeness was raised from what was initially agreed between the coalition union and the employer.

A majority trade union may raise a recognition threshold in terms of section 18 for the ulterior purpose of preventing minority trade unions from exercising organisational rights conferred in terms in section 12, 13 and 15. The principle of majoritarianism is inconsistent with the recent Constitutional Court decisions. The Constitutional Court in *Police and Prison Civil Rights Union v South African Correctional Service Workers' Union and others,*[113] Jafta J stated that section 18 of the LRA implicates organisational rights of import. The conclusion of Section 18 collective agreement does not prohibit collective bargaining between an employer and a minority union because it would be inconsistent with the Constitution and the international law. Such clause would be also meaningless because it would be against section 20 provisions stating that nothing in Part A precludes conclusion of a collective agreement that regulates organisational rights.[114]

The 2015 amendment in the LRA[115] emancipated the trade unions that do not meet the threshold set by a majority trade union in terms of section 18. However, in this regard, the reference was made to trade unions that represent the substantial number of employees and not considering minority trade union that do not have substantial number of employees in the workplace. In terms of section 21(8C)[116], section 12, 13 and 15 organisational rights may be granted by the commissioner to a trade union or two or more trade unions acting together that does not meet section 18 threshold of representativeness if an opportunity has been given to all parties to participate in the arbitration proceedings and represent a significant interest and substantial number of employees in the workplace.

In *POPCRU*[117], Cachalia AJ in the Constitutional Court concluded that, it is not inappropriate and not in the interest of justice to interpret section 18 and 20 without regard to section 21(8C) because this will have no practical effect on a future dispute of this nature. In the same case, Jafta J pronounced that section 18

[112] S 18 of 1995.
[113] *[2018] ZACC 24* at Par 92.
[114] *[2018] ZACC 24 at Par 96*
[115] 1995.
[116] *S 21(8C) of 1995.*
[117] *[2018] ZACC 24 at Par 49.*

and 20 would benefit minority unions that do not have significant interest and substantial number of employees required by section 21(8C) but it depends on their agreement with the employer in order to be conferred organisational right in terms of a collective agreement outside the use of an arbitrator whereas section 21(8C) organisational rights are conferred by an arbitrator to a trade union that has significant interest and substantial number of employees which the minority unions does not have.[118]

The fixed percentage of membership for a trade union to be "sufficiently representative" is not specified in the Act but varies according to circumstances of a particular workplace.[119]

In respect of the above declaration, it would mean that any trade union that wishes to exercise organisational rights in a workplace may claim that it is sufficiently representative. In terms of section 21(8)(b)[120], the commissioner may where the dispute is about whether the registered trade union is a representative trade union or not, consider the following factors:

- The nature of the workplace.
- The nature of one or more organisational rights the trade union seeks to exercise.
- The nature of the sector in which the workplace is situated.
- The organisational history of the workplace.
- The composition of the workforce in the workplace

3 4 Organisational rights through collective bargaining

Section 23(5)[121] of the Constitution[122] grants the right to every trade union, employers' organisation and employers to engage in collective bargaining. This section moves on further to say a National legislation may be enacted to regulate collective bargaining.

[118] *[2018] ZACC 24 at Par 69.*
[119] Buchler, Moonsammy, Norton and Taylor Know your LRA Department of labour 2002 Obiter 14.
[120] S21(8)(b) of 1995.
[121] Constitution of the Republic of South Africa, No. 108 of 1996.
[122] 108 of 1996.

Adhering to the Constitutional calling, Section 1(d)(i)[123] was promulgated and embraced the purpose of the LRA[124] as to promote an orderly collective bargaining.

This indicates that the Constitution has considered that collective bargaining between the employer and workers is fundamental to a fair industrial relation environment.[125]

Section 20[126] of the LRA[127] envisages that:

> "Nothing in this Part precludes the conclusion of a collective agreement that regulates organisational rights".[128]

In the Constitutional Court judgment of *Bader Bop*[129], O'Regan J had a view that section 20 should be read as an express confirmation of the internationally recognised right of minority trade union to pursue access to the workplace, recognition of their shop-stewards and other organisational facility through techniques of collective bargaining. In light of section 23 of the Constitution, section 4 of the LRA and ILO Conventions, section 20 in Part A of the LRA[130] does not preclude unrepresented trade unions from obtaining organisational rights. The meaning of this section is construed to refer to agreements concluded outside the ambit of statutory rights in Part A.[131]

Ngcobo J in *Bader Bop*[132] asserted that section 20 permits representative trade unions to regulate organisational rights outside the ambit of Part A and to modify agreement concluded in terms of section 18 but subject to limitations.

In *POPCRU*[133], Cachalia AJ criticised the second judgment of the LAC in that section 20 does not mean a collective agreement may be concluded in terms of this section but it meant that nothing in section 20 prevents SACOSWU from entering in a collective agreement to represent its members in a grievance or disciplinary proceedings.

---

[123] S 1(d)(i) of 1995.
[124] 1995
[125] [2002] ZACC 30.
[126] S 20 of 1995.
[127] *Ibid*.
[128] *Ibid.*
[129] [2002] ZACC 30.
[130] 1995.
[131] [2002] ZACC 30.
[132] *Ibid*.
[133] [2018] ZACC 24.

In analysing the inference drawn by Cachalia J, he incorrectly interpreted section 20 to mean representation of trade union members in a grievance or disciplinary proceedings. This assertion was not specified at all in the context of this section except that the conclusion of a collective agreement is to regulate organisational rights. This section refers to non-prevention of trade unions to conclude any collective agreement. This sentiment is also envisaged in the judgment of Jafta J in the same *POPCRU*[134] case who concluded that section 20 does not confer rights.

In my view, section 20 collective agreement has autonomous status that has no correlation with section 18 collective agreement afforded only to a majority trade union. The regulation of the organisational rights as contemplated in section 20 refers to the terms and conditions in a collective agreement reached between the employer and any trade union interested to exercise organisational rights.

This sentiment is supported by the version of the ruling in the same Constitutional Court which concluded that:

> "Part A therefore does not preclude an unrepresentative union from obtaining organisational rights. Unlike representative trade unions that have these rights conferred on them by Part A and therefore need not bargain for them, an unrepresented union must bargain for these rights".[135]

3 5 Acquisition of organisational rights through council membership

Organisational rights in terms of section 12 and 13 are conferred automatically by a registered trade unions that are parties to a council regardless of representation in all workplaces.[136]

3 6 Acquisition of organisational rights by means of arbitration

According to section 21(8A)(a)[137], a commissioner may in an arbitration grant a registered trade union that does not have majority of employees employed by the employer section 14 organisational right if it is entitled to rights referred to in section 12, 13 and15 and no other union enjoys the same right in that workplace. The organisational rights referred to in section 16 may also be conferred to a registered trade union that does not have majority of employees employed by the employer if such trade union is entitled to section 12, 13, 14 and 15 of the

[134] *[2018] ZACC 24* at Par 80.
[135] *[2002]ZACC 30* at Par 66.
[136] S 19 of 1995.
[137] S 21(8A)(a) of 1995.

organisational rights in that workplace and no other trade union has been granted this right in terms of section 21(8A)(b)[138].

In respect of Section 21(8A) conferring section 14 and 16 organisation rights, a reference is made to a registered trade union in a workplace and one may infer that these rights may be bestowed to more than one trade unions in a workplace. In correcting that potential confusion, section 21(8B)[139] elaborated to say:

> "A right granted in terms of subsection (8A) lapses if the trade union concerned is no longer the most representative trade union in the workplace".

The wording used in the section 21(8A) above envisages that the Act[140] has shifted significantly from the principle of granting section 14 and 16 organisational rights of the LRA[141] to a trade union that has majority of employees employed by the employer as these rights may be also afforded to a registered trade union that is the most representative trade union in the workplace. Despite the afore-mentioned shifting, the purpose of the Act for promotion of an orderly collective bargaining will be protected hence these rights will still be enjoyed by the most representative trade union.

Kruger and Tshoose[142] states that, the distinction of the most representative trade union and other trade unions should not be interpreted to deprive trade union organisations that are not recognised as being most representative of the essential means for defending the occupational interests of their members, for organising their administration and activities and formulating their programmes.

3 7 Withdrawal of organisational rights

An arbitrator may erroneously grant organisational right to a trade union. In *South African Clothing & Textile Workers Union v Commission for Conciliation Mediation and Arbitration and Others*[143], the Labour Court set aside section 14 organisational right granted by the arbitrator to a trade union and asserted that the arbitrator exceeded his/her power and committed gross irregularity by granting

---

[138] S21(8A)(b) of 1995.
[139] S 21(8B) of 1995.
[140] 1995.
[141] 1995.
[142] Kruger and Tshoose 2013 Obiter 305.
[143] *South African Clothing & Textile Workers Union v Commission for Conciliation Mediation and Arbitration and Others (D217/97) [1997] ZALC 16.*

section 14 which was not an issue in dispute and had no evidence brought before the court and the arbitrator.

In a dispute whether a trade union is a sufficiently representative of the employees employed by the employer, the commissioner may consider and find out in the evidence presented that the trade union is not sufficiently representative. In that situation, the commissioner may withdraw any of the organisational rights conferred by this Part A, if that trade union has ceased to be a representative trade union in terms of section 21(8)(c).[144]

The gratification of organisational rights also lapses through condonation of application made by the other party that a trade union is no more a representative trade union. In terms of section 21(11)[145], An employer may apply to the Commission to withdraw any of the organisational rights conferred by Part A if such trade union is allegedly no longer a representative trade union. In *Federal Council of Retail & Allied Workers Union v Edgars Consolidated Stores Ltd*[146], the applicant and the respondent concluded a collective agreement in 1986 that extended certain organisational rights to the applicant. In 2002, the respondent fixed a threshold of 25% membership for a union to acquire organisational right which the applicant had to reach within a period of three months failing which the collective agreement would be terminated. When the applicant failed to reach the said threshold, indeed the respondent unilaterally terminated the agreement. The applicant referred this matter to CCMA. The applicant argued that the termination should be in terms of section 21(11) which requires the employer to apply to the commission before the organisational rights can be withdrawn. In its decision, the Labour Court ordered he respondent to restore the organisational rights to the applicant until they are withdrawn by CCMA.

In this case, the Labour Court allowed that a collective agreement concluded by two parties upon their own terms and conditions for indefinite period be terminated by means of arbitration meant for Part A organisational rights.

The respondent appealed the decision of the Labour Court to the Labour Appeal Court. The Labour Appeal Court in *Edgars Consolidated Stores Ltd v Federal Council of Retail & Allied Workers Union*[147], upheld the appeal. In this court, a differentiation was made with regard to termination of organisational rights

[144] S 21(8)(c) of 1995.
[145] S 21(11) of 1995.
[146] *Federal Council of Retail & Allied Workers Union v Edgars Consolidated Stores Ltd [2002] 11 BLLR 1069 (LC).*
[147] *Edgars Consolidated Stores Ltd v Federal Council of Retail & Allied Workers Union (2004) 25 ILJ 1051(LAC).*

conferred in terms of a collective agreement and those conferred in terms of an arbitration. It was then decided that the regulated organisational rights in terms of a collective agreement are subject for termination by means section 23(4)[148] and organisational rights in terms of arbitration award are subject to termination in terms of section 21(11).[149]

I concur with the decision reached by the Labour Appeal Court in the sense that, section 21(11) stated unequivocally that it refers to organisational rights conferred by Part A and has no mention of collective agreement as asserted in section 23(4).

Section 23(4)[150] stipulates that:

> "(4) Unless the collective agreement provides otherwise, any party to a collective agreement that is concluded for an indefinite period may terminate the agreement by giving reasonable notice in writing to the other parties."

The question that will then arise, will be, how long is the "reasonable notice" that will be sufficient to the other part for the termination of collective agreement concluded for indefinite period in terms of section 23(4)? In *TAWUSA & Alliance comprising of STEMCWU v Anglo Platinum Ltd*[151], the Labour Court confirmed that three months' notice is reasonable enough to terminate the collective agreement. The Labour Court in *South African Federation of Civil Engineering Contractors and Another v National Union of Metal Workers of South Africa and Others*[152] had a different view from *TAWUSA* and considered that six months' notice would constitute a reasonable period for cancellation of an indefinite collective agreement to afford parties an opportunity to engage in further negotiations that will sustain the collective agreement.

The status of the trade union changes unprecedentedly due to revocation of member and movement from one trade union to another and that crusade affects the level of representativeness. Except the termination of a collective agreement in terms of section 23(4), the LRA[153] has provided another principle pertaining to the position of a trade union that has lost recognised level of representativeness.

---

[148] S 23(4) of 1995.
[149] S 21(11) of 1995.
[150] S 23(4) of 1995.
[151] *TAWUSA & Alliance comprising of STEMCWU v Anglo Platinum Ltd (2009) 30 ILJ 2142 (LC).*
[152] *South African Federation of Civil Engineering Contractors and Another v National Union of Metal Workers of South Africa and Others* (2847/12) [2012] ZALCJHB 164.
[153] 1995.

In terms of section 21(8B)[154] organisational rights acquired in terms of section 21(8A) lapses if the trade union concerned is no longer the most representative trade union in the workplace.

3 8 Conclusion

The principle of majoritarianism envisaged in section 18[155] has been weakened with regard to conferring of organisational rights to a trade union.

The conclusion of a collective agreement determining a threshold representativeness to acquire section 12, 13 and 15 organisational right in terms of section 18 has no effect in precluding trade unions that do not meet the agreed threshold for acquiring the same rights due to provisions of section 19, section 20, section 21(8A), section 21(8C). This averment has been supported by the Constitutional Court judgments in *Bader Bop* and *POPCRU.*

Furthermore, the majority trade union may agree in a form of collective agreement on any threshold of representativeness with the employer but if a minority trade union becomes a member of the council in terms of section 19[156], such union will automatically acquire section 12, 13 and 15 organisational rights.

This inference therefore renders the provisions of section 18 defective and of not effect.

Organisational rights obtained by means of a collective agreement may not be terminated in terms of section 21(11). A party to a collective agreement that is concluded for an indefinite period may terminate the agreement by giving reasonable notice in writing to the other parties in accordance to section 23(4).[157]

The LRA[158] has made provision for the regulation of representative, most representative and majority trade unions but nothing has reference to a minority trade union.

No provision that seek to address the interest of a minority trade union except that the minority trade union is bound to adhere and abide by the interests of representative trade unions by means of extension of collective agreements.

[154] S 21(8B) of 1995.
[155] S 18 of 1995.
[156] S 19 of 1995.
[157] S 23(4) of 1995.
[158] 1995.

Section 32[159] stipulates that the Minister may be asked by the bargaining council to extend a collective agreement concluded in the bargaining council to non-parties.

The majoritarianism principle has an element of oppression on the newly formed unrepresentative trade unions because the minority trade union must serve the interests of a majority trade union. In the essence, that discourages the right to form and join trade union of your own choice and limits the value of competitiveness amongst other trade unions. Article 1 of the Convention 98 of the International Labour Organisation of 1949 (right to Organise and Collective Bargaining Convention) provides that workers shall enjoy protection from employment subjecting them to a condition that he shall not join a trade union or shall relinquish a trade union membership.[160]

The next chapter will then consider the principles of the right to strike as a recourse available for the minority trade union to evade this oppression.

[159] S 32 of 1995.

[160] "The International Labour Organisation-Note on Convention No. 98. Concerning right to Organise and Collective Bargaining Convention https://www.ilo.org/dyn/normlex/en

CHAPTER 4: RIGHT TO STRIKE FOR ORGANISATIONAL RIGHTS

4 1 Introduction

The Labour Relations Act 66 of 1995 (the LRA) brought the most significant change by introducing legislated organisational rights that granted the right to strike with prescribed procedure to be followed without fear of dismissal.[161]

This right had support emanating from the Constitutional provisions. In terms of section 23(2)(b) of the Constitution of the Republic of South Africa, 1996[162] (hereinafter "the Constitution"), every worker has the right to strike.[163] Every trade union, employer's organisation and employer has the right to engage in collective bargaining which will be subjected to be regulated and limited by enacted National legislation.[164]

The LRA was enacted to implement provisions of the Bill of Rights and to give effect to labour relations international law.[165]

However, section 65(3)(a)(i) states that no person may take part in a strike action or furtherance of a strike if such person is bound by a collective agreement that regulates the issue in dispute.[166]

The threat of an eventual strike forms the background to all collective bargaining.[167]

Botha[168] confirms that, the recognition of the right to strike and granting of certain organisational rights to a representative trade union is central to the collective bargaining framework.

A trade union can engage in a recognition strike if the employer grants the organisational rights but refuses to bargain.[169]

---

[161] Bendix, S. 2010. Industrial Relations in South Africa, 5th edition, Cape Town 88.
[162] 1996 Constitution.
[163] S 23(2)(b) of 1996.
[164] S 23(5) of 1996.
[165] Du Toit *et al Labour Relations Law* 77.
[166] 1995.
[167] Bendix, S. 2010, Labour Relations in Practice: An outcomes-based approach, 1st edition, Juta, Cape Town 72.
[168] Botha In search of alternatives or enhancements to collective bargaining in South Africa: Are workplace forums a viable option? 2015 volume 18 Obiter 1814.
[169] Bendix 2010 Obiter 78.

4 2 Statutory interpretation

Section 233 of the Constitution orders that the court must prefer reasonable interpretation of legislation that is consistent to international law over any alternative interpretation that is inconsistent with international law.[170]

The LRA provides that when interpreting this Act, a person must give effect to its primary provisions, comply with the Constitution and the public international law obligations of the Republic.[171]

When implementing the provisions of the LRA, there must be consistency with the Constitution. The Constitutional Court in *National Education & Allied Workers Union (NEHAWU) v University of Cape Town and Others*[172] confirmed that it has an important supervisory role to ensure that legislation giving effect to constitutional rights is properly interpreted and applied. The Labour Court like the High Court may when deciding a matter within its jurisdiction declare any law or conduct that is inconsistent with the Constitution as invalid to the extent of its inconsistence.[173]

4 3 Legislative acquisition of organisational rights

The rights contemplated in section 12 and 13 can be acquired by a trade union automatically where there is a bargaining council in operation. In terms of section 19[174] of the LRA, a trade union that is a party to a council acquires the rights contemplated in section 12 and 13 at all workplaces within the registered scope of the council irrespective of their representativeness.

An employer may grant organisational rights to a registered trade union. In terms of section 21(1)[175], a registered trade union may on written notification to the employer seek to exercise in a workplace one or more organisational rights referred to in part A. Section 21(2)[176] requires this notification to be accompanied by a certified copy of its registration certificate and must specify the workplace it seeks to exercise organisational rights, that it is a representative trade union in that workplace and the manner in which it seeks to exercise those rights in terms

[170] The Constitution of the Republic of South Africa, 1996 (the "Constitution").
[171] S 3 of 1995.
[172] National Education & Allied Workers Union (NEHAWU) v University of Cape Town and Others [2002] ZACC 27
[173] Du Toit *et al Labour Relations Law* 184.
[174] S 19 of 1996.
[175] S 21(1) of 1995.
[176] S 21(2) of 1995.

of section 21(2)(a)-(c).[177] Section 21(3)[178] in the circumstances then compels the employer to meet with the said trade union and conclude a collective agreement outlining the manner in which these organisational rights will be exercised in that workplace.

In a case where a collective agreement has not been concluded, a registered trade union or the employer may refer a dispute in writing to the Commission for Conciliation, Mediation and Arbitration in terms of section 21(4).[179] If the dispute is not resolved during conciliation in terms of section 21(6)[180], either party may refer it to be resolved through arbitration in terms of section 21(7)[181] or opt to exercise the right to strike provided the certificate stating that the dispute is unresolved has been issued or 30 day (extension as agreed by the parties) from the date of receipt of dispute by the commission or council has lapsed in terms of section 64(1)[182].

A registered trade union may acquire organisational rights through an arbitration process in a form of an award. In terms of section 21(8A)(a)[183], the commissioner in an arbitration may grant a most representative registered trade union that does not have majority of employees section 14 organisational rights if that union is entitled to section 12, 13 and 15 organisational rights in a workplace and there is no other trade union enjoying such right. The commissioner may also in an arbitration grant a most representative registered trade union that does not have majority of employees section 16 organisational rights if that union is entitled to section 12, 13, 14 and 15 organisational rights in a workplace and there is no other trade union granted such right in terms of section 21(8A)(b)[184].

4 4 Right to strike for organisational rights

The LRA defines strike as 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

[177] S 21(2) (a)-(c) of 1995.
[178] S 21(3) of 1995.
[179] S 21(4) of 1995.
[180] S 21(6) of 1995.
[181] S 21(7) of 1995.
[182] S 64(1) of 1995.
[183] S 21(8A) of 1995.
[184] S 21(8A) of 1995.

between the employer and the employees, and every reference to work in this definition includes overtime work whether it is voluntary or compulsory.[185]

Joining of a trade union is freedom of choice. It depends on an individual employee whether to join or not to join a trade union. Does it mean that the employee who is not a member of a trade union abandons the right to strike as entrenched in the Constitution[186] and LRA[187]? In *Bidvest Food Services (Pty) Ltd v NUMSA & Others*[188], the Labour Court stated that if the strike derives from a concerted refusal to work in dispute arising from a matter of a mutual interest, to be a member of a trade union is not a prerequisite and non-members can strike lawfully if they have followed the process in terms of section 64.

The LRA was not promulgated to prevent employees from being represented in grievance or disciplinary proceeding. The Constitutional Court in *Police and Prisons Civil Rights Union v South African Correctional Services Workers' Union & Others*[189] held that any statutory provision that prevents trade unions to bargain for their member or that precludes their members from being represented or forcing them to be represented by a rival trade union in a disciplinary or grievance proceedings would be limiting rights in the Bill of Right and as well undermine their right to freedom of association.

The LRA states that every employee has a right to strike.[190]

As a result of the mandatory provisions of section 23[191] of the Constitution, LRA[192] was enacted to give effect to fundamental right of fair labour practice. This right, as provided by the Constitution is subject to limitation in terms of this Act.[193]

Botha[194] states that, the employees can collectively force the employer to accede to their demands through engagement in strike activities.

---

[185] S 213 of 1995.
[186] 1996.
[187] 1995.
[188] *Bidvest Food Services (Pty) Ltd v NUMSA & Others [2014] ZALCCT 58*.
[189] [2018] ZACC 24 par 96.
[190] S 64(1)of 1995.
[191] S 23 of 1996.
[192] 66 of 1995.
[193] Nel *et al South African Employment Relations* 108.
[194] Botha *In search of alternatives or enhancements to collective bargaining in South Africa: Are workplace forums a viable option?* 2015 volume 18 Obiter 1812

In terms of section 65(1)(c)[195] of the Labour Relations Act, no person shall engage in a strike or in any conduct in contemplation or furtherance of a strike if the issue in dispute has a right to be referred to arbitration or Labour Court.

Section 65(1)(a)-(b)[196] prohibits a person from taking part in a strike or any conduct in contemplation or furtherance of strike if the person is bound by a collective agreement prohibiting strike to the issue in dispute or an agreement that requires the issue in dispute to be referred to arbitration.

These provisions therefore give two options for the workers, whether to follow arbitration or strike action. In exercising these options, the LRA lands a limitation that, should a registered trade union be issued with a strike notice proposed in terms of section 64(1), it will relinquish the arbitration action for a period of 12 months from the date of notice.[197]

The LRA further goes on to say, notwithstanding provisions of Section 65(1)(c) as stated in the latter, a person may take part in a strike or in any conduct in contemplation or in furtherance of strike if the issue in dispute is about any matter dealt with in section 12 to 15 (organisational rights).[198]

The provisions of section 20 of the LRA has caused contrasting view in as far as its interpretation is concerned regarding conclusion of a collective agreement. Section 20 of the LRA states that:

> "Nothing in this Part precludes the conclusion of a collective agreement that regulates organisational rights."[199]

The Labour Appeal Court in *Bader Bop (Pty) Ltd v National union of Metal and Allied Workers of SA and others*,[200] did not grant a right to strike that is not found in Part A of the LRA to minority unions over a demand for organisational rights and stated that this section was making a reference to the conclusion of a collective agreement which is not going to adversely affect another trade union or employees. It also went on to emphasise that the mere fact that the trade union is not precluded to conclude a collective agreement does not mean that they may resort to a strike if the employer refuses to bargain.

---

[195] S 65(1)(c) of 1995
[196] Section 65(1)(a)-(b)
[197] S 65(2)(b) of 1995.
[198] S 65(2)(a) of 1995.
[199] S 20 of 1995.
[200] *Bader Bop (Pty) Ltd v National union of Metal and Allied Workers of SA and others*, [2001] ZALAC 27.

The Constitutional Court had to consider its jurisdiction in labour matters concerning organisational rights of worker belonging to a minority union.[201] In *National Union of Metal Workers of South Africa and Others v Bader Bop (Pty) Ltd*,[202] O'Regan J stated that the intention of Section 20 in Part A of the LRA is not to deny organisational rights to unrepresentative unions by expressly conferring such rights on representative unions.

The *Bader Bop* case had deferent interpretation in terms of application in other court decisions. In *York Timbers Limited v National Union Of Metal Workers Of South Africa and others*[203]

> *"[16] accordingly*, NUMSA had on the strength of the interpretation of section 21 of the LRA read with those of section 65 (2) (a) by O'Reagan J in Bader Bop acquired the right to strike. In my view, the provisions of section 21(7) of the LRA, by virtue of its reference to 'may' further accords a party an election. To the extent that Ngcobo J nonetheless stated that a union that claimed to be representative must utilise the provisions of section 21, and on the strength of O'Reagan's interpretation that the union in such an instance has an election, it follows that by electing to embark on strike action, that strike would be lawful and protected."

A close interpretation was considered in terms reliance to section 18[204] of the LRA. *Transnet Soc Limited V National Transport Movement & Others*[205] the Labour Court rejected that the agreement concluded by the employer and the four trade unions was in terms of section 18 of the LRA[206] because section 18 requires an agreement between the employer and a majority trade union (not one or more trade unions acting jointly) and declared such collective agreement as not binding the minority trade union and granted it the right to strike. As a matter of requirement to adopt an interpretation of the LRA that is consistent with international labour standards and with the fundamental rights contained in section 23 of the Constitution[207], this court further envisaged that section 18 does not present a bar to the exercise of the right to strike nor section 64 or section 65 from seeking to bargaining collectively to acquire organisational rights.

---

[201] Currie et al 2005 Obiter 508.
[202] [2002] ZACC 30 Para 62.
[203] York Timbers Limited v National Union Of Metal Workers Of South Africa and others [2017] ZALCJHB 419.
[204] S 18 0f 1995.
[205] Transnet Soc Limited V National Transport Movement & Others [2013] ZALCJHB 272.

[206] S 18 of 1995.
[207] S 23 of 1996

This sentiment was confirmed in the recent decision in *Police and Prisons Civil Rights Union v South African Correctional Services Workers' Union & Others*[208] where the majority judgement stated that:

> "[96] It is not surprising that section 18 does not prohibit collective bargaining between an employer and a minority union where there is a collective agreement between that employer and the majority trade union. Such a prohibition would be inconsistent with the Constitution and international law. Over and above that, the prohibition if it were to exist, would be meaningless. This is because section 20 declares that nothing in Part A of Chapter III, where section 18 is located, precludes the conclusion of a collective agreement that regulates organisational rights."

4 5 Trade union's recognition

The LRA also states that if the issue in dispute concerns a refusal to recognise a trade union as a collective bargaining agent or a withdrawal of recognition of a collective agreement, an advisory award must have been made before notice is given in terms of section 64(2)(a)(i)[209] of the LRA.

A trade union may in order to acquire substantive number of employees for it to be recognised not include as members the category of employees that are not mentioned in the scope of its own constitution. The Labour Appeal Court in *Lufil*[210] upheld an appeal from the Labour Court decision, reviewed and set aside the arbitration award issued by the commissioner by refusing organisational rights to a trade union and held that the trade union acted *ultra vires* its own constitution by claiming to be sufficiently representative including as members employees that did not fall within the scope of the union in terms of its constitution.

In *Bidvest Food Services*[211], the decision of the Commissioner to grant the right to strike in demand of organisational rights was upheld and it was held that the trade union has acquired the right to strike which should not further be limited by including in the provisions of section 64 and 65(2) a provision that workers may not strike in pursuit of a demand for organisational rights for a union that is restricted in its scope by its own constitution. This court also added that although

[208] [2018] ZACC 24 par 96.
[209] S 64(2)(a)(i) of 1995.
[210] Lufil packaging (isethebe) v commission for conciliation, Mediation and arbitration and others [2019] ZALAC 39
[211] [2014] ZALCCT 58

the union may not succeed in obtaining organisational rights but the workers are not precluded from striking in pursuit of that demand.

4 6 Conclusion

The inference drawn in this chapter is that the right for the minority union to acquire organisational rights is not prohibited by the LRA. Over and above, the minority trade union is not precluded from engaging in an industrial action to force the employer to grand these rights.

The interpretation of these principles will be vitally important more especially if this study can now deal with pragmatic issues. These issues therefore can be found in a decided case at the Constitutional Court where the right to strike by a minority trade union was granted in *Bader Bop* where there was no collective agreement concluded by the minority trade union and the employer and in *POPCRU* where there was a collective agreement concluded by a minority trade union.

This constitutional development leaves the minority trade unions with no other option to enforce acquisition of organisational rights other than engaging in an industrial action in terms of section 65(2)(a) or negotiate with the employer to conclude a collective agreement in terms of section 20.

An extension of a collective agreement that is not inline or in accordance to the provisions of section 23(1)(d) as well as section 65(1)(a) and (b) of the Labour Relations Act is on the face of it not valid.

In my opinion the decision made in *Post Office* case to substitute the initial collective agreement as novation was incorrect because there are some elements that required in order for a contract to qualify as novation that were not considered. In this instance, there were changes made in terms of the collective agreement and further there is no indication of any consultation of other parties to the initial agreement to give consent. I can therefore regard the collective agreement between the employer and the majority union as section 18 collective agreement.

The following chapter is going to consider and discuss the pragmatic issues in analysing the two Constitutional Court decisions highlighting more especially common aspects and differences that were taken into consideration.

CHAPTER 5: THE IMPORTANT CASE LAW PROVISIONS

5 1 Introduction

In my view, the Labour Relations Act (LRA) created contrasting interpretation in relation to whether the majoritarianism provisions outlined in section 18 that a majority union and an employer may conclude a collective agreement establishing threshold of representativeness to acquire one or more organisational rights referred to in section 12, 13 and 15 overrule the right to collective bargaining by the minority union for acquisition of organisational rights. On the other hand section 20 provides that nothing in Part A of Chapter III precludes the conclusion of a collective agreement regulating organisational rights.

It is also in the interest of this study to know whether courts may grant the right to strike to the minority union in pursuit of these organisational rights and right to bargain for these rights.

In determining the legal position in respect of these provisions, the Labour Court (LC), Labour Appeal Court (LAC) and the Constitutional Court have taken the strides to interpret and make rulings in as far as the application of the section 18 and 20 are concerned.

The leading Constitutional Court cases in this regard will be discussed and analysed.

5 2 *NATIONAL UNION OF MINEWORKERS OF SOUTH AFRICA (NUMSA) V BADER BOP (PTY) LTD*[212]

5 2 1 The background

Bader Bop (Pty) Ltd is an automobile industry that manufactures leather products and employs approximately 1000 employees. The General Industrial Workers Union of South Africa has since 1999 representing the majority of the employees employed by *Bader Bop* and enjoyed the organisational rights regulated by Part A of Chapter III of the LRA.

On the 16th August 1999, another trade union in this industry called NUMSA which is the applicant in this case claimed to be representing the 26% of employees and claimed to be granted organisational rights contemplated in

[212] [2002] ZACC 30.

section 12 to 15 of the LRA. The employer Bader Bop granted them section 12 and 13 organisational rights and refused to grant others as claimed or bargain collectively.

NUMSA then lodged a dispute with CCMA demanding recognition of shop stewards and to bargain collectively on behalf of its members. When the matter remained unresolved, NUMSA informed the employer of their intended strike action. The employer approached the LC for an interdict. The employer's application was dismissed at the LC but was upheld by the LAC

NUMSA in reaction to the LAC decision approached the Constitutional Court challenging the constitutionality the LRA.

The key question that the Constitutional Court had to decide was whether a minority union and its members are entitled to take lawful strike action to persuade an employer to recognise its shop stewards.

5 2 2 The finding of the court

The Constitutional Court held that, the Labour Appeal Court had failed to fully consider the ILO Convention by avoiding the limitation of the constitutional right. The Constitutional Court inferred that there is nothing in Part A of Chapter III of the LRA that prevents unions not meeting the required threshold of membership to use ordinary processes of collective bargaining and industrial action to grant organisational rights.

In interpreting the provisions of section 23[213] of the Constitution, the Constitutional Court had regard to the declaration that the right to strike is essential to collective bargaining laid down by two key International Labour Organisation (ILO) Conventions which South Africa is a member and, that is, The freedom of Association and Protection of the Right to Organise[214] and the Right to Organise and Collective Bargaining[215] acting together with the Committee of Experts on the Application of Conventions and Recommendations

[213] S23 of 1996.
[214] Convention, 1948 (No.87) Protection of the right to organise 1996-2018 International Labour Organisation (ILO).
[215] Convention, 1949 (No.98) right to organise and collective bargaining convention 1996-2018 International Labour Organisation (ILO).

and the Freedom of Association Committee of the Governing Body of the ILO which play a supervisory role in the implementation of these conventions.

The Constitutional Court then inferred that based on this consideration, the enforcement committee in its jurisprudence would suggest the reading of the Act which permitted minority unions the right to strike for recognition of shop stewards to represent union member in grievances and disciplinary procedures.

It was also envisaged that the reading of the Act that should be preferred is the one capable of a broader interpretation that does not limit the organisational rights.

The Constitutional Court supported the dissenting judgment of Davis AJA and averred that, there is nothing in section 64 and 65 of the Labour Relations Act limiting the right to strike in support of being granted organisational rights.

The Constitutional Court further provided that where a union concedes as not being entitled to the right in section 12 to 15 of the Labour Relations Act, section 65(1)(c)[216] poses no bar to industrial action and section 65(2)[217] will have no application in the dispute because the arbitration procedure is not opened to it.

5 2 3 Analysis of the LAC judgment

The judgment laid by Zondo JP in the LAC was criticised in the sense that when reaching his conclusion, he interpreted the Act to deny minority trade union a right to strike for organisational rights. He used section 21(8)[218] that meant to determine whether a trade union is a representative trade union to be afforded section 12, 13 and 15 organisational rights where a commissioner must seek to minimise proliferation of trade unions in a workplace, encourage a system of representative union and minimise financial burden to the employer by granting organisational rights to more than one union. He also used section 21(11)[219] that permits an employer to apply for the withdrawal of organisational rights afforded by statute from a trade union considered to have lost representative status to the Commission for Conciliation and Arbitration (CCMA).

[216] S 65(1)(c) of 1995.
[217] S 65(2) of 1995
[218] S 21(8) of 1995.
[219] S 21(11) of 1995.

The reasoning by Du Plessis AJA in support of the majority judgment that the minority union could not use strike action to acquire organisational right where section 18[220] collective agreement exists was also criticised.

It was stated that the conclusion made by the LAC did not sufficiently take into account the considerations deliberated in the ILO Conventions and failed to avoid the limitation of the constitutional rights.

The Constitutional Court averred that, the LAC had a narrow reading of section 20[221] by viewing that this provision did not mean that minority union could conclude a collective agreement but just a clarificatory provision regulating the rights between a representative trade union and an employer. The Constitutional Court observed section 20 as confirmation of international recognised rights of minority trade unions to seek to gain access to the workplace, recognition of their shop stewards and other organisational facilities through collective agreement scheme.

The Constitutional Court analysed the provisions of section 65(1)(c)[222] and section 65(2)(a)-(c)[223]. It conceded that it is clear in the LRA that those unions that are sufficiently representative may seek to enforce their organisational rights conferred by Chapter III part A of the Act by way of conciliation, arbitration or industrial action. The question that it raised was when the non-sufficiently representative unions are going to be beneficiaries of these organisational rights or whether the Act must be interpreted to preclude non-sufficiently representative trade unions from enjoying these rights through the employer or industrial action.

5 2 4 Conclusive verdict

The Constitutional Court found that the more the union gets more members, is the more they get a sufficiently representative status from the employer for the purpose of section 12, 13, and 15. Trade unions are only entitled to have their shop stewards recognised when it has been established that they are the majority union. The recognition of a minority trade union shop stewards is a legitimate subject matter for collective bargaining and industrial action.

The Constitutional Court stated that in Part A of Chapter III there is nothing expressly preventing the unions admitting not to meet the requisite threshold

[220] S 18 of 1995.
[221] S 20 of 1995.
[222] S 65(1)(c) of 1995.
[223] S 65(2)(a)-(c) of 1995.

membership level from utilising the ordinary processes of collective bargaining and industrial action to persuade employers to grant them organisational rights in respect of access to workplace, stop order facilities and recognition of shop stewards. These are matters of mutual interest to employers and unions. This is a subject matter of collective agreements which is eligible to be referred to CCMA for conciliation as a preceding condition for a strike action.

It promoted the spirit of interpretation of the Act that is orchestrated to avoid limitation of the fundamental rights promoted by the LAC. The interpretation followed by the LAC majority was constitutionally appropriate interpretation of the relevant provisions of the Act.

The Constitutional Court then upheld the appeal and set down the order of the LAC.

5 3 *POLICE AND PRISON CIVIL RIGHTS UNION V SOUTH AFRICAN CORRECTIONAL SERVICES WORKERS' UNION AND OTHERS*[224]

5 3 1 The background

In November 2001, the Police and Prison Civil Rights Union (POPCRU) concluded a threshold agreement in terms of section 18[225] with the employer Department of Correctional Services (DCS) setting admission of a trade union into the council at 9000 members.

In February 2006, POPCRU also concluded Resolution 3 of 2006 regulating the relationship between DCS and trade unions admitted to the Public Service Collective Bargaining Council (PSCBC) to comply with the threshold of representativeness in DSC to have access to stop order facility.

In August 2009, a trade union called South African Correctional Workers' Union (SACOSWU) was registered and seek to be granted organisational rights notwithstanding the level of their membership that fell below the representativeness required in terms of threshold agreement concluded in 2001. However, despite the fact that SACOSWU did not meet the threshold requirement, DCS granted SACOSWU right of access to premises to serve member's interest at grievance and disciplinary proceedings in terms of section 12 and right to stop order facilities in terms of section 13.

[224] *Ibid.*
[225] S 18 of 1995.

In 2012, POPCRU then lodged a dispute to GPSSBC refuting eligibility of SACOSWU from enjoying any of organisational rights contemplated in section 12, 13, 14, 15 and 16.

In 2012, the arbitrator issued an award to say that 2001 threshold agreement did not preclude the conclusion of a collective agreement between SACOSWU and DCS.

The matter was referred to the LC. In 2013, the LC reviewed and set aside the arbitration award.

In May 2015, SACOSWU lodged a dispute with CCMA. This came up after the LRA amendment to insert section 21(8C)[226] which states that:

> "(8C) Subject to the provisions of subsection (8), a commissioner may in an arbitration conducted in terms of subsection (7) grant the rights referred to in sections 12, 13 or 15 to a registered trade union, or two or more registered trade unions acting jointly, that does not meet thresholds of representativeness established by a collective agreement in terms of section 18, if—
>
> (a) all parties to the collective agreement have been given an opportunity to participate in the arbitration proceedings; and
>
> (b) the trade union, or trade unions acting jointly, represent a significant interest, or a substantial number of employees, in the workplace."

When this matter was referred to LAC, it acted under the impression that 2001 threshold agreement was still applicable and existing. The LAC then decided that the 2001 threshold agreement did not prevent SACOSWU from acquiring organisational rights under section 12, 13 and 15 from DCS in terms of section 20. This matter was further referred to the Constitutional Court.

The Constitutional Court had to decide whether the 2001 collective agreement prevented conclusion of a collective agreement between SACOSWU and DCS regulating organisational rights.

5 3 2 The finding of the court

The majority in the Constitutional Court considered the interpretation of section 18[227] and 20[228] of the LRA and concluded that section 21[229] in particular, addition

[226] S 21(8C) of 1995.
[227] Ibid.
[228] Ibid.
[229] S 21 of 1995.

of section 21(8A)[230] and 21(8C)[231] in the 2014 LRA, plays a very limited role and has no change to the ordinary meaning of section 18 and 20 but regulates the exercise of all rights conferred in Part A Chapter III of the LRA. It was further concluded that as section 21(8C)[232] is available to a trade union that has significant interest and a substantial number of employees, the interpretation of section 18 and 20 would be available for a minority trade unions which do not meet section 21(8C)[233] requirements and prefer to negotiate with the employer to acquire organisational rights.

The Constitutional Court also considered the provisions of section 23[234] of the Constitution which confers a right to an employee to form and join a trade union of his or her own which cannot be limited by and agreement between the employer and the trade union but by law of general application in terms of section 36[235] of the Constitution. In the essence, SACOSWU's right to engage in collective agreement should preferable be limited by section 18 instead of collective agreement concluded by the employer and the trade union.

The minority judgment in the Constitutional Court suggested the LC and LAC should have considered the decision made in *Bader Bop* to decide whether minority trade unions may acquire organisational rights.

The majority judgment of the Constitutional Court took cognisance of decision made in *Bader Bop*. In this case, it was stated that in terms of ILO jurisprudence freedom of association is interpreted to affords trade unions the right to recruit employees, to represent those members in grievances, the right to form and join union of choice in terms of section 23(2)(a)[236] and the right of trade union to organise in terms of section 23(4)(b)[237]. A note was also taken to the fact that these rights will be impaired if the employees are not permitted to be represented by their trade union but to be represented by the rival union they have chosen not to join. The Constitutional Court then decided that the courts must avoid interpretation that limits these rights. The right to strike was then granted to a minority trade unions in demand for collective bargaining.

---

[230] S 21(8A) of 1995.
[231] S 21(8C) of 1995.
[232] Ibid.
[233] Ibid.
[234] S 23 of 1996.
[235] S 36 of 1996.
[236] S 23(2)(a) of 1996.
[237] S 23(4)(b) of 1996.

The Constitutional Court considered the provisions of section 18[238] to have made no prohibition for an employer and a minority trade union to conclude a collective agreement and if such provision was present, it would be meaningless. This court said reason for non-existence of this prohibition is caused by the provisions of section 20[239] that declares that there is nothing in Part A of Chapter III where section 18 is located that precludes the conclusion of collective agreement that regulates organisational rights.

The contention by POPCRU that section 20 does not apply because section 18 agreement is binding in terms of section 23 was rejected by the Constitutional Court as it was cited that section 23 is not located in the part referred to in section 20 and does not create prohibition. The Constitutional Court also renounced the POPCRU's interpretation of section 18 to be denying the minority trade union the right to engage in collective bargaining.

This inference was drawn from the decision made in *South African and Allied Workers Union (SATAWU) v Moloto N.O.*[240] where the Constitutional Court held that the constitutional right awarded without limitations should not be undermined by the reading implicit limitations into them and if limitation exists, it must be interpreted least restrictive if the text bears the meaning.

5 3 3 Analysis of the LAC

The majority decision in the Constitutional Court criticised the error made by the LAC to infer that the collective agreement entered into by the employer and the majority trade union in terms of section 18 precludes the collective agreement between the employer and the minority trade union.

The Constitutional Court noted that LAC's interpretation shifted out of section 18 and 20 to a conclusion that the Bill of Rights may be limited by the law of general application only. This averment was corrected to say that in terms of section 23(5)[241] of the Constitution, the right to engage in collective bargaining may be limited by legislation that meets the requirements of section 36[242] of the Constitution.

[238] Ibid.
[239] Ibid.
[240] [2012] ZACC 19.
[241] S 23(5) of 1996.
[242] S 36 of 1996.

The Constitutional Court noted errors made by the LAC in that it granted section 13 right to stop order facility which had lapsed in terms of the collective agreement concluded by SACOSWU and DCS.

According to the Constitutional Court view, the LAC suggestion that collective agreement may be concluded in terms of section 20 to permit trade unions to represent its members at disciplinary and grievance proceedings was incorrect because section 20 says there is nothing in Part A that precludes the conclusion of a collective agreement regulating organisational rights.

The Constitutional Court criticised LAC when referring to section 12[243] organisational rights to include the right to represent employees at grievance and disciplinary processes disregarding that this is provided for in section 14(4)[244] of the LRA that clearly refers to the right of shop stewards of a majority trade union to represent employees at grievance and disciplinary proceedings.

5 3 4 Conclusive verdict

The majority in the Constitutional Courts concluded that it was in the interest of justice to determine this appeal despite that it was moot appeal and further stated that courts have entertained moot appeals for the purpose of correcting the wrong statements of law.

In deciding the merits of the appeal, the Constitutional Court declared that the right to form and join union of your own choice is associated with freedom of association which is acknowledged by the Constitution and the International Law.

It was then declared in the Constitutional Court that the inclusion of representation of employees in grievance and disciplinary processes to the right envisaged in section 12 arguably obiter is not binding on any other court

The Constitution Court rejected the interpretation construed by POPCRU and decided that the existence of a threshold agreement between the employer and the majority trade union does not prohibit the conclusion of a collective agreement by the minority trade union and the employer.

The Constitutional Court embraced the decision made in *Bader Bop*[245] and stated that the conferment of rights to a specified trade union does not mean that other unions may not bargain with the employers seeking to exercise the organisational right contemplated in Part A of Chapter III.

[243] S 12 of 1995.
[244] S 14(4) of 1995.
[245] Ibid.

5 5 Conclusion

I have noted a common verdict in respect of both *Bader Bop*[246] and *POPCRU*[247] cases which allows without reservations the interpretation of section 18 and 20 in a manner that does not prohibit a minority trade union from engaging in a collective bargaining seeking acquisition of organisational rights from the employer.

There are disparities noted in both case regarding issues for decision. In *Bader Bop*[248] was on whether a minority trade union has the right to strike to force the employer to recognise its shop stewards whilst in *POPCRU*[249], the issue to be decided was whether a threshold agreement concluded by a majority trade union precluded conclusion of a collective agreement regulating organisational rights by a minority trade union. The issues for decision are different but seeking the common goal of recognition of member's representatives. In *Bader Bop*[250], there was no section 18 collective agreement whereas in *POPCRU*[251] there was section 18 agreement was eventually noted to have been revoked.

However, all this had no effect in the correct interpretation of the statutory provisions and the use of *Bader Bop*[252] to allay interpretation of section 18 and 20 of the LRA to embrace the principles of the Constitution and the International law. This interpretation is construed to be relevant in the promotion of collective bargaining.

The LRA has not explicit provision refraining minority trade unions from acquiring and exercising of organisational rights bearing in mind the employee's right to join trade union of his or her own choice.

In the following and the last chapter, I will be considering briefly in conclusion of this study.

---

[246] Ibid.
[247] Ibid.
[248] Ibid.
[249] Ibid.
[250] Ibid.
[251] Ibid.
[252] Ibid.

CHAPTER 6: CONCLUSION

The Labour Relations Act (LRA)[253] has granted representative trade unions organisational rights in terms of workplace access (section 12), deduction of trade union subscription and levies (section 13), union representatives (section 14), union leave for trade union activities (section 15), and disclosure of information (section 16).

However, not all trade unions qualify for these organisational rights by virtue of being registered and sufficiently representatives. The requirement for right to trade union representatives and disclosure have an additional requirement of being a majority trade union as a single union or two or more trade unions acting jointly.

This does not mean the trade unions that do not have majority representative are not interested in acquiring right to have union representative and disclosure of information.

The emphasis on the requirement for a union to be sufficiently representative and to be a majority trade union has been illustrated in terms of section 14[254] and section 16[255], LRA.[256] However, section 21(8A)[257] has provided a relaxation clause by allowing the arbitrator to grant section 14 and 16 rights to the most representative trade union that does not have majority representativeness.

The acquisition of section 14 and 16 organisational rights as reflected in the LRA[258] has now shifted from only being available to a majority trade union in a workplace but also to the most representative trade union by virtue of the inception of section 21(8A) if there is no majority trade union available.

Nonetheless, this means therefore that, the spirit of majoritarianism still exists in as far as granting of organisation rights is concerned.

[253] 1995
[254] S 14 of 1995.
[255] S16 of 1995.
[256] 1995.
[257] S 21(8A) of 1995.
[258] 1995.

The principle of majoritarianism envisaged in section 18[259] as well has been weakened by this principle of most representation with regard to conferring of organisational rights to a trade union.

Nevertheless, the purpose of the Act for promotion of an orderly collective bargaining will be protected hence these rights will still be enjoyed by the most representative trade union.

The conclusion of a collective agreement determining a threshold representativeness to acquire section 12, 13 and 15 organisational right in terms of section 18 has no effect in precluding trade unions that do not meet the agreed threshold for acquiring the same rights due to provisions of section 19, section 20, section 21(8A), section 21(8C). This averment has been supported by the Constitutional Court judgments in *Bader Bop* and *POPCRU* which primarily put more emphasis on the interpretation that does not limit fundamental rights imposed by the ILO and the Constitution of the Republic of South Africa.

Furthermore, the majority trade union may agree in a form of collective agreement on any threshold of representativeness with the employer but if a minority trade union becomes a member of the council in terms of section 19[260], such union will automatically acquire section 12, 13 and 15 organisational rights.

This inference therefore renders the provisions of section 18 defective and of not effect.

The majoritarianism principle has an element of oppression on the newly formed unrepresentative trade unions because the minority trade union must serve the interests of a majority trade union. In the essence, that discourages the right to form and join trade union of your own choice and limits the value of competitiveness amongst other trade unions. Article 1 of the Convention 98 of the International Labour Organisation of 1949 (right to Organise and Collective Bargaining Convention) provides that workers shall enjoy protection from employment subjecting them to a condition that he shall not join a trade union or shall relinquish a trade union membership.[261]

---

[259] S 18 of 1995.
[260] S 19 of 1995.
[261] "The International Labour Organisation-Note on Convention No. 98. Concerning right to Organise and Collective Bargaining Convention https://www.ilo.org/dyn/normlex/en

Organisational rights obtained by means of a collective agreement may not be terminated in terms of section 21(11)[262]. A party to a collective agreement that is concluded for an indefinite period may terminate the agreement by giving reasonable notice in writing to the other parties in accordance to section 23(4).[263]

The LRA[264] has made provision for the regulation of representative, most representative and majority trade unions but nothing has reference to a minority trade union.

No provision that seek to address the interest of a minority trade union except that the minority trade union is bound to adhere and abide by the interests of representative trade unions by means of extension of collective agreements. Section 32[265] stipulates that the Minister may be asked by the bargaining council to extend a collective agreement concluded at in the bargaining council to non-parties.

The inference drawn in this chapter is that the right for the minority union to acquire organisational rights is not prohibited by the LRA. Over and above, the minority trade union is not precluded from engaging in industrial action to force the employer to grant these rights.

The interpretation of these principles will be vitally important more especially if this study can now deal with pragmatic issues. These issues therefore can be found in a decided case at the Constitutional Court where the right to strike by a minority trade union was granted in *Bader Bop*[266] where there was no collective agreement concluded by the minority trade union and the employer and in *POPCRU*[267] where there was a collective agreement concluded by a minority trade union.

This constitutional development leaves the minority trade unions with no other option to enforce acquisition of organisational rights other than engaging in an industrial action in terms of section 65(2)(a)[268] or negotiate with the employer to conclude a collective agreement.

---

[262] S 21(11) of 1995
[263] S 23(4) of 1995.
[264] 1995.
[265] S 32 of 1995.
[266] [2002] ZACC 30.
[267] *[2018] ZACC 24.*
[268] S 65(2)(a) of 1995.

There is nothing that precludes a trade union from concluding a collective agreement unless such collective agreement is invalid because it is not inline or in accordance to the provisions of section 23(1)(d), section 65(1)(a) and section 65(1)(b) of the LRA.

I have noted a common verdict in respect of both *Bader Bop*[269] and *POPCRU*[270] cases which allows without reservations the interpretation of section 18 and 20 in a manner that does not prohibit a minority trade union from engaging in a collective bargaining seeking acquisition of organisational rights from the employer.

There are disparities noted in both case regarding issues for decision. In *Bader Bop*[271] was on whether a minority trade union has the right to strike to force the employer to recognise its shop stewards whilst in *POPCRU*[272], the issue to be decided was whether a threshold agreement concluded by a majority trade union precluded conclusion of a collective agreement regulating organisational rights by a minority trade union. The issues for decision are different but seeking the common goal of recognition of member's representatives. In *Bader Bop*[273], there was no section 18 collective agreement whereas in *POPCRU*[274] there was section 18 agreement was eventually noted to have been revoked.

However, all this had no effect in the correct interpretation of the statutory provisions and the use of *Bader Bop*[275] to allay interpretation of section 18 and 20 of the LRA to embrace the principles of the Constitution and the International law. This interpretation is construed to be relevant in the promotion of collective bargaining.

The LRA has no explicit provision refraining minority trade unions from acquiring and exercising of organisational rights bearing in mind the employee's right to join trade union of his or her own choice.

In my view, section 20 collective agreement has autonomous status that has no correlation with section 18 collective agreement afforded only to a majority trade union. The regulation of the organisational rights as contemplated in section 20

---

[269] Ibid.
[270] Ibid.
[271] Ibid.
[272] Ibid.
[273] Ibid.
[274] Ibid.
[275] Ibid.

refers to the terms and conditions in a collective agreement reached between the employer and any trade union interested to exercise organisational rights.

This means that, if a trade union is a party to a bargaining council there is no need for state of representativeness to be determined in terms of section 18 for it to attain section 12 and 13 organisational rights as acquisition of these rights is automatic. Further acquisition of section 15 organisational rights may be in terms of Section 18 or in terms of a collective agreement referred to in section 20. However, the trade union that is not a party to a bargaining council may conclude a collective agreement to acquire section 12, 13 and 15 rights. Section 18 therefore has no role to play in the acquisition of organisational rights by a minority trade union and its power in serving the principle of majoritarianism has been diminished and not relevant.

Over and above the latter sentiment, the prevailing of section 18 would supress the existence and growth of emerging trade unions. The majority union would set a high percentage or number of representativeness for minority union to acquire section 12,13 and 15 organisational rights in order to prevent the minority trade unions from concluding collective agreement regulating organisational rights with the employer and no employee would enjoy being a member of the minority union that has limited or no recognised organisational right to exercise in a workplace.

The strike action may be inevitable in a case where an employer refuses to grant organisational rights

BIBLIOGRAPY

Books

Basson, A; Christianson, M; Garbers, C; Le Roux, PAK; Mischke, C; Strydom, EML; *Essential Labour Law* 4th (2005) Labour Law Publications: Cape Town.

Bendix, S *Industrial Relations in South Africa*, 5th edition (2010): Cape Town

Bendix, S *Labour Relations in Practice An outcomes-based approach*, 1st edition (2010) Juta, Cape Town.

Du Toit, D; Godfrey, S; Cooper, C; Giles, G; Cohen, T; Conradie, B; and Steenkamp, A *Labour Relations Law A Comprehensive Guide* 6th (2015) LexisNexis: Cape Town.

Nel, PS; Kirsten, M; Swanepoel, BJ; Erasmus, BJ; Poisat, P *South African Employment Relations Theory and Practice*, 6th edition (2008) Van Schalk: Pretoria

Table of Statutes

Industrial Conciliation Act 11 of 1924.

Labour Relations Act 66 of 1995.

The Constitution of the Republic of South Africa 108 of 1996.

Table of cases

Bader Bop (Pty) Ltd v National union of Metal and Allied Workers of SA and others, [2001] ZALAC 27.

Bidvest Food Services (Pty) Ltd v NUMSA & Others [2014] ZALCCT 58.

ECCWUSA & others v Southern Sun Hotel Interests (Pty) Ltd [2000] 4 BLLR 404(LC).

Edgars Consolidated Stores Ltd v Federal Council of Retail & Allied Workers Union (2004) 25 ILJ 1051(LAC).

Federal Council of Retail & Allied Workers Union v Edgars Consolidated Stores Ltd [2002] 11 BLLR 1069 (LC).

Food Workers Council of SA v Bokomo Mills (1994) 15 ILJ 1371 (IC).

Lufil packaging (isethebe) v commission for conciliation, Mediation and arbitration and others [2019] ZALAC 39

National Education & Allied Workers Union (NEHAWU) v University of Cape Town and Others [2002] ZACC 27.

National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd [2001] ZALAC 27

National Union of Mineworkers of South Africa (NUMSA) v Bader Bop (Pty) Ltd, (2003) 24 ILJ 305 (CC).

Police and Prison Civil Rights Union (POPCRU v Ledwaba NO and Others[2013] ZALCJBH 224.

Police and Prison Civil Rights Union v South African Correctional Services Workers' Union and others [2018] ZACC 24.

SA Commercial Catering & Allied Workers Union v Metlife (1997) 18 ILJ 824 (CCMA).

South African Clothing & Textile Workers Union v Commission for Conciliation Mediation and Arbitration and Others [1997] ZALC 16.

South African Correctional Services Workers Union (SACOSWU) v Police and Prison Civil Rights Union (POPCRU) and others [2017] ZALAC 30.

South African Federation of Civil Engineering Contractors and Another v National Union of Metal Workers of South Africa and Others (2847/12) [2012] ZALCJHB 164.

TAWUSA & Alliance comprising of STEMCWU v Anglo Platinum Ltd (2009) 30 ILJ 2142 (LC).

Transnet Soc Limited v National Transport Movement (2013) 24 SALLR 845 (LC).

UASA and Another v BHP Billiton Energy Coal South Africa LTD and Another [2013] ZALCJHB 26.

York Timbers Limited v National Union Of Metal Workers Of South Africa and others [2017] ZALCJHB 419.

Journal Articles

Botha In search of alternatives or enhancements to collective bargaining in South Africa: Are workplace forums a viable option? 2015 volume 18

Buchler, L. Moonsammy, M. Norton, D. Taylor, M. 2002. Know your Labour Relations Act: A guide to the Labour Relations Act, 1995, 2nd Edition, Department of Labour, Johannesburg.

Convention, 1948 (No.87) Protection of the right to organise 1996-2018 International Labour Organisation (ILO).

Convention, 1949 (No.98) right to organise and collective bargaining convention 1996-2018 International Labour Organisation (ILO).

Convention, 1971 (No.135) 1996-2018 International Labour Organisation (ILO).

Kruger and Tshoose The impact of the labour relations action on minority trade unions: A South African perspective 2013

Labour Law and Employment Manual, SA Labour Guide 2013

The International Labour Organisation-Note on Convention No. 98. Concerning right to Organise and Collective Bargaining Convention https://www.ilo.org/dyn/normlex/en