



UNIVERSITY
OF
JOHANNESBURG

COPYRIGHT AND CITATION CONSIDERATIONS FOR THIS THESIS/ DISSERTATION

 creative
commons



- Attribution — You must give appropriate credit, provide a link to the license, and indicate if changes were made. You may do so in any reasonable manner, but not in any way that suggests the licensor endorses you or your use.
- NonCommercial — You may not use the material for commercial purposes.
- ShareAlike — If you remix, transform, or build upon the material, you must distribute your contributions under the same license as the original.

How to cite this thesis

Surname, Initial(s). (2012) Title of the thesis or dissertation. PhD. (Chemistry)/ M.Sc. (Physics)/ M.A. (Philosophy)/M.Com. (Finance) etc. [Unpublished]: [University of Johannesburg](https://ujcontent.uj.ac.za/vital/access/manager/Index?site_name=Research%20Output). Retrieved from: https://ujcontent.uj.ac.za/vital/access/manager/Index?site_name=Research%20Output (Accessed: Date).

A CRITICAL ANALYSIS OF THE RIGHT TO ESTABLISH A THRESHOLD OF REPRESENTATIVES IN THE WORKPLACE

Submitted in partial fulfilment of the requirements for the degree of LLM (Labour Law) at the Faculty of Law of the University of Johannesburg



UNIVERSITY
OF
JOHANNESBURG

By

Rex Joseph Mabuza

Student No. 200827639

Prepared under the supervision of

Prof LG Mpedi

17 July 2015

DECLARATION

I, **REX JOSEPH MABUZA**, declare that the work presented in this minor dissertation is original. It has never been presented to any other University or institution. Where the works of others have been used, references have been provided, and in some cases, quotations made. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements of the award of the degree of LLM in Labour Law.

Signed _____

Date _____



ACKNOWLEDGEMENTS

I wish to thank God for the strength to complete this project and the entire LLM course. I am also profoundly grateful to my supervisor, Prof LG Mpedi for his support and direction.



TABLE OF CONTENTS

TITLE PAGE	i
DECLARATION	ii
ACKNOWLEDGEMENTS	iii
TABLE OF CONTENTS	iv
LIST OF ABBREVIATIONS	v
CHAPTER 1	
INTRODUCTION	1 – 2
CHAPTER 2	
SOUTH AFRICAN LABOUR LAW AND MAJORITARIANISM	3 – 8
CHAPTER 3	
THE IMPACT OF THE CONSTITUTION	9 – 13
CHAPTER 4	
THE APPLICATION OF SECTION 18 OF THE LRA	14 – 21
i The Becca case	15 – 18
ii The Impala case	18 – 21
CHAPTER 5	
THE CONCEPT OF THE WORKPLACE AND PRACTICAL CHALLENGES	22 – 26
CHAPTER 6	
MINORITY UNIONS RIGHT TO STRIKE	27 – 29
CHAPTER 7	
RELEVANT INTERNATIONAL LABOUR STANDARDS	30 – 34
CHAPTER 8	
THE IMPACT OF THE LABOUR RELATIONS AMENDMENT ACT	35 – 37
CHAPTER 9	
CONCLUSION AND RECOMENDATIONS	38 – 41
BLIBLIOGRAPHY	42 – 44

LIST OF ABBREVIATIONS

CCMA	Commission for Conciliation, Mediation and Arbitration
LC	Labour Court
IC	Industrial Court
LAC	Labour Appeal Court
SCA	Supreme Court of Appeal
CC	Constitutional Court of the Republic of South Africa
LRA	Labour Relations Act 66 of 1995
ILO	International Labour Organisation
CFA	Committee on Freedom of Association



CHAPTER ONE

INTRODUCTION

Section 18 of the Labour Relations Act¹ (the LRA) provides that an employer and a registered trade union whose members are the majority in the workplace,² or parties to a bargaining council,³ may conclude a collective agreement⁴ establishing a threshold of representativeness required in respect of one or more of the organisational rights referred to in sections 12, 13 and 15 of the LRA.

The LRA is founded on the principles of majoritarianism as reflected by section 18 of the LRA. Section 18 of the LRA is not peremptory to the bargaining parties but could be invoked by the parties to set a threshold. This is on the premise that sections 12, 13 and 15 of the LRA do not fix a percentage or number as a threshold in order to acquire the rights. The LRA merely requires that a union which seeks recognition under sections 12, 13 and 15 of the LRA must at least be sufficiently represented.

It should be pointed out from the onset that the recognition process signals the beginning of collective bargaining and is central to the enjoyment of the rights in the LRA.⁵ The LRA requirements regarding trade union recognition are a great challenge to the unrepresentative unions. Such unions, which lack industrial leverage, are without both bargaining rights and capacity to act on behalf of employees in the disciplinary hearing.⁶

¹ Act 66 of 1995.

² Section 213 of the LRA defines a workplace as follows: “(c) ... in all other instances means the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation.”

³ Section 27 (1) and (2) of the LRA in reference to bargaining council provides as follows :“(1) One or more registered trade unions and one or more registered employers' organisations may establish a bargaining council for a sector and area by - (a) adopting a constitution that meets the requirements of section 30; and (b) obtaining registration of the bargaining council in terms of section 29. (2) The State may be a party to any bargaining council established in terms of this section if it is an employer in the sector and area in respect of which the bargaining council is established.”

⁴ Section 213 of the LRA defines collective agreement as follows:

"collective agreement" means a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand - (a) one or more employers; (b) one or more registered employers' organisations; or (c) one or more employers and one or more registered employers' organisations.”

⁵ Venter et al *Labour Relations in South Africa* (4th ed) 97.

⁶ n 5 above.

It is argued in this paper that section 18 of the LRA promotes collusion between management and the majority union to exclude the minority union and is therefore, unfair. Section 18 of the LRA was dealt with in the case of *Uasa and Another v BHP Billiton Energy Coal South Africa Ltd and Another*⁷ (the *BECSA* case) where the minority unions applied for an interdict, interdicting the Company and the majority union from applying the threshold agreement which would have seen them being derecognised. The section was also dealt with in the case of *Uasa –The Union v Impala Platinum*⁸ (the *Impala* case) where the court held that the derecognition of UASA was in order. Although the court did not interpret the meaning of this provision, the section was at the heart of the case. These cases and other related cases are discussed below in more detail.

This paper argues that section 18 of the LRA poses a serious threat to minority unions losing their recognition and/or not obtaining them at all. The section impacts negatively against their efforts of acquiring organisational rights. The paper argues that at the heart of exercising freedom of association is the attainment of organisational rights and failure to obtain same, results in the right to freedom of association limited in an unjustified manner. This paper further argues that the application of this provision gives an unfair advantage to the majority union. Furthermore, it is argued that the intervention by the legislature through section 18 between the employer and employee relationship is not necessary and is in conflict with international labour standards.

This paper argues further that the Labour Relations Amendment Act 66 of 2014 published on 18 August 2014, which came into effect on 01 January 2015 does not meaningfully address this issue. This paper concludes by making recommendations.

In its quest to realize its intended objectives the study will focus on section 18 of the LRA and analyse it from its background of majoritarianism. It must be pointed out from the onset that this is a pure legal study. Therefore, relevant case law, legislation, articles and international labour standards will be referred to.

In order to kick start the debate, the next chapter deals with the principle of majoritarianism under South African labour law.

⁷ [2013] 6 BLLR 602 (LC).

⁸ [2012] 7 BLLR 708 (LAC).

CHAPTER 2

SOUTH AFRICAN LABOUR LAW AND MAJORITARIANISM

The principle of majoritarianism as entrenched in our law is a well-known principle which guides our legal system. The Constitution of the Republic of South Africa (the Constitution)⁹ is founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms. It propounds the principles of non-racialism and non-sexism, the supremacy of the Constitution and the rule of law.¹⁰ It is these principles which inform South African labour law.

This majoritarian principle also is clear in the Constitutional Court of South Africa's jurisprudence. As an example, in the *Certification* judgment¹¹ the Constitutional Court noted that after a long history of "deep conflict between a minority which reserved for itself all control over the political instruments of the state and a majority who sought to resist that domination", the overwhelming majority of South Africans across the political divide realised that the country had to be urgently rescued from imminent disaster by a negotiated commitment to a fundamentally new constitutional order premised upon open and democratic government and the universal enjoyment of fundamental human rights.¹²

That commitment is expressed in the preamble to the Interim Constitution of the Republic of South Africa Act 200 of 1993 by an acknowledgement of the following:

"... need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms."

"... provides a historic bridge between the past of a deeply divided society

⁹ Act 108 of 1996.

¹⁰ Section 1 of the Constitution.

¹¹ *In re Certification of the Constitution of the Republic of South Africa*, 1996 BCLR 1253 (CC) at para 10.

¹² *The Azanian Peoples Organisation (AZAPO) and Others v The President of the Republic of South Africa and Others* 1996 (4) SA 672 (CC) at paras 1 and 2.

characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.⁹”

Amongst others, the Constitutional Court also noted further that the new constitutional context was premised on the principles such as:¹³

- (a) A constitutional democracy based on the supremacy of the Constitution protected by an independent judiciary.¹⁴ This was to guarantee that every law shall be tested through the Constitution for its validity and whenever is inconsistent with the Constitution it is to be declared invalid.¹⁵
- (b) A democratic system of government founded on openness, accountability and equality, with universal adult suffrage and regular elections.¹⁶ This was to guarantee equality to everyone and also introduce political rights¹⁷ such as the right to vote, rights which the majority of South African were previously excluded.
- (c) A legal system which ensures equality of all persons before the law, which includes laws, programmes or activities that have as their objective the amelioration of the conditions of the disadvantaged, including those disadvantaged on grounds of race, colour or creed.¹⁸ This was introduced to ensure that programs which deals with previously disadvantaged citizens are fast tracked to enable them to actively participate in the economy are made available. This has seen the enactment of legislation such as the Employment Equity Act 55 of 1996.
- (d) Representative government embracing multi-party democracy, a common

¹³ *In re Certification* (n 11 above) at para 45.

¹⁴ Section 2 of the Constitution.

¹⁵ Section 2 of the Constitution.

¹⁶ Section 1 of the Constitution.

¹⁷ Section 19 of the Constitution.

¹⁸ Section 9 of the Constitution.

voters' roll and, in general, proportional representation.¹⁹ This also introduced the political rights which were previously reserved for the minority.

- (e) The right of employers and employees to engage in collective bargaining and the right of every person to fair labour practices.²⁰ This has introduced the labour relations rights which are enshrined in section 23 of the Constitution of South Africa which has ultimately led to the enactment of the LRA.

The Labour Appeal Court made it clear in the case of *Kem-Lin Fashions CC v Brunton & Another*²¹ regarding the new South African government's policy choice and held that:

“The legislature has also made certain policy choices in the [LRA] Act which are relevant to this matter. One policy choice is that the will of the majority should prevail over that of the minority. This is good for orderly collective bargaining as well as for the democratisation of the workplace and sectors. A situation where the minority dictates to the majority is, quite obviously, untenable. But also a proliferation of trade unions in one workplace or in a sector should be discouraged. There are various provisions in the Act which support the legislative policy choice of majoritarianism. Some of them are sections 14(1); 16(1); 18(1); 25(1) and (2); 26(1) and (2); 32(1) (a) and (b); 32(3) (a), (b), (c) and (d) and 32(5); 78(b).”²²

It is clear that our labour relations regime favours the majoritarian system. Although this is so, this paper argues that this is unfair to the minority unions as it has the effect of compromising the aims and objectives the LRA seeks to achieve which includes industrial peace.²³ The LRA seeks to promote orderly collective bargaining, collective bargaining at sectoral level, employee participation in decision-making in the workplace and the effective resolution of labour disputes.²⁴ It must be emphasised that the LRA is aimed at advancing economic development, social justice, labour peace and democratisation of the workplace.²⁵

¹⁹ Section 19 of the Constitution.

²⁰ Section 23 of the Constitution.

²¹ (2001) 1 BLLR 25 (LAC).

²² n 21 above at para 19.

²³ Ngcukaitobi “Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana” (2013) 34 ILJ 836 852.

²⁴ Section 1 (d) of the LRA.

²⁵ Section 1 of the LRA.

It is inconceivable how orderly collective bargaining ought to be achieved while others are left outside solely by a mere adjustment of a threshold.

It should be pointed out that before there could be any collective bargaining there must be recognition between the employer and the union.²⁶ The union will be granted rights to enjoy in the workplace, which are termed organisational rights.²⁷ Organisational rights refers to rights such as access to workplace,²⁸ deduction of subscription or levies,²⁹ trade union representatives,³⁰ leave for trade union activities³¹ and disclosure of information.³² The LRA distinguishes between organisational rights which require majority and sufficient representation. For a registered trade union to be recognised for access to the workplace, deductions of trade union subscriptions and leave for trade union representatives, the LRA requires that such union must be sufficiently represented.³³ The LRA does not stipulate what constitutes 'sufficiently representative'. However, this may mean the unions which do not have as their members the majority of employees employed by an employer at the workplace but have certain acceptable numbers to deserve limited rights.³⁴ In the past, the courts have emphasised that sufficient representativeness ought not to be determined solely with reference to numbers.³⁵ A trade union is probably sufficiently representative if it can influence negotiations, the financial interest of those engaged in the industry peace and stability within an industry or any segment of that industry.³⁶

This study argues that excluding a trade union which is sufficiently representative is not in the interest of peace and stability at the workplace. Because of the significant membership numbers that they may have, they can command a strike which may seriously impair production in their efforts to achieve recognition.

²⁶ Section 21 of the LRA.

²⁷ Chapter III, Part A of the LRA.

²⁸ Section 12 of the LRA.

²⁹ Section 13 of the LRA.

³⁰ Section 14 of the LRA.

³¹ Section 15 of the LRA.

³² Section 16 of the LRA.

³³ Sections 12, 13 and 15 of the LRA.

³⁴ Section 11 of the LRA.

³⁵ *ACTWUSA v National Industrial Council of the Leather Industry of SA* (1989) 10 ILJ 894 (IC) 899A–F.

³⁶ *SACTWU v Sheraton Textiles (Pty) Ltd* [1997] 5 BLLR 662 (CCMA).

Section 18 of the LRA permits the majority union together with the employer to conclude an agreement which determines the threshold of representativeness. This is a way of limiting the number of unions in the workplace which is a feature of the majoritarian principle. It is argued that the majoritarian principle favours a winner takes all approach which in the industrial relations point of view may be a disadvantage to the minority union.

When a registered trade union³⁷ seeks to be recognised for the purposes of trade union representation and disclosure of information, such a union is required to have the majority of employees as their members at the workplace.³⁸ A trade union will in terms of section 21 of the LRA inform the employer in writing that it wishes to exercise one or more rights indicated above i.e. access to the workplace, deduction of subscription, trade union representative and access to information. The parties will have to meet and resolve the matter within thirty (30) days.³⁹ Should no resolution be reached, a dispute may be referred to the Commission for Conciliation, Mediation and Arbitration (the CCMA) for conciliation.⁴⁰ The LRA requires that the CCMA commissioner in dealing with the matter must seek to minimise the proliferation of unions in a single workplace and thus, minimise the financial and administrative burden to the employer.⁴¹

Once there is an understanding between the parties, they will conclude a collective agreement which will be binding between the parties. If no agreement is reached, the union will have an option either to refer the dispute to the CCMA for arbitration⁴² or to embark on strike action.⁴³

Tembeka Ngcukaitobi has a view on this subject and states the following:

“The effect of this framework for collective bargaining, what is sometimes referred to as ‘winner takes all’, majoritarian approach to collective bargaining, is that it protects

³⁷ Section 95 of the LRA.

³⁸ Sections 14 and 16 of the LRA.

³⁹ Section 21(3) of the LRA.

⁴⁰ Section 21(6) of the LRA.

⁴¹ Section 21(8) of the LRA.

⁴² Section 21(7) provides: “If the dispute remains unresolved, either party to the dispute may request that the dispute be resolved through arbitration.”

⁴³ Section 65(2)(a) provides: “Despite section 65(1)(c), a person may take part in a strike or a lock out or in any conduct in contemplation or in furtherance of a strike or lock out if the issue in dispute is about any matter dealt with in sections 12 to 15.”

the interests of the well established and larger unions. But this is not a bad thing per se. There is strength in the numbers of workers belonging to trade unions. The point being made is that working outside of established bargaining structures can mean workers are subjected to decreased access to information, thereby increasing frustration and insecurity. More broadly, the effect of this approach has meant that neither employers nor employees derive the intended value from its framework. It has become increasingly difficult for employers to maintain industrial peace while workers struggle to maintain certain standards of rewards and of stability in their employment. While employers are increasingly perceived as unrelenting, workers lose faith in the negotiation process and are forced to find unconventional ways to air their concerns. Therefore this majoritarian approach, as explained by Kahn, is out of tune with the realities of today's labour relations.⁴⁴

This paper agrees with the sentiments shared above by Ngcukaitobi and argues that the majoritarian approach, in particular which is contained in section 18 of the LRA, is no longer relevant in the context of South African labour law. This, as Ngcukaitobi states, may often force the minority union to resort to unconventional ways to air their views in order to obtain the rights that they seek. Although this paper accepts the scheme of the LRA for putting more emphasis in the numbers and further that for seeking to avoid proliferation of unions in the workplace. This paper argues that the application of section 18 of the LRA collective agreements has taken this philosophy further than to merely avoid the proliferation of unions in the workplace, but has unwittingly resulted in the protection of the majority union which as a result thereof makes it harder for the minority union to gain access to the workplace.

This chapter has pointed out that our legal regime favours a majoritarian system and as a result, our labour law system has accordingly been influenced by the majoritarian system.

The next chapter will demonstrate the impact of the Constitution on the South African labour law regime. In particular it will deal with the provisions of sections 22 and 23 of the Constitution and it will demonstrate the impact that these sections have had on the LRA.

⁴⁴ Ngcukaitobi (n 23 above) at pages 853 to 854.

CHAPTER 3

THE IMPACT OF THE CONSTITUTION

The impact of the Constitution on the South African labour law jurisprudence will not be complete without dealing with sections 22 and 23 of the Constitution. Section 23 of the Constitution in particular deals with labour relations, while section 22 of the Constitution deals with the rights of every citizen to choose their trade, occupation or profession freely. Section 22 states further that the practice of a trade, occupation or profession may be regulated by law.

The LRA has been enacted in order to give effect to section 23 of the Constitution. The Constitution states in section 23 that everyone has the right to fair labour practices. In this regard, the Constitutional Court of South Africa has ruled that the word 'everyone' referred to in the section extends to employers.⁴⁵ Section 23(2) of the Constitution provides that every worker has the right to form and join a trade union and to participate in the activities and programmes of a trade union and to strike.⁴⁶ The same rights (i.e. rights to join and form an employer's organisation) also vest in employers.⁴⁷ The Constitution is the supreme law of the Republic and it sanctioned the enactment of the LRA in order to deal with the right to fair labour practices.⁴⁸

Having stated the above, in order to understand organisational rights as well the application of section 18 of the LRA one has to understand the philosophy of the LRA. The preamble to the LRA provides that the LRA is published in order to change the law governing labour relations and, for that purpose to give effect to section 23 of the Constitution which is to regulate the organisational rights of trade unions; to promote and facilitate collective bargaining at the workplace and at sectoral level; to regulate the right to strike and the recourse to lock-out in conformity with the Constitution; to promote employee participation in decision-making through the establishment of workplace forums; to provide simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration (for which purpose the CCMA and other bargaining councils are established), and

⁴⁵ *Nehawu v University of Cape Town & Others* (2003) 24 ILJ 95 (CC) at para 39.

⁴⁶ *South African National Defence Union v Minister of Defence & another* (1999) 20 ILJ 2265 (CC) at paras 24 and 30.

⁴⁷ Section 23 of the Constitution.

⁴⁸ Section 2 of the Constitution.

through independent alternative dispute resolution services accredited for that purpose; to establish the Labour Court and Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the LRA; to provide for a simplified procedure for the registration of trade unions and employers' organisations, and to provide for their regulation to ensure democratic practices and proper financial control; to give effect to the public international law obligations of the Republic relating to labour relations; to amend and repeal certain laws relating to labour relations; and to provide for incidental matters. The preamble summarises the entire scheme of the LRA. It also highlights key institutional features established by the LRA. While section 1 of the LRA provides that the purpose of the LRA is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of the LRA, which *inter alia* are to promote orderly collective bargaining.

The registration and the recognition of organisational rights are dealt with under the LRA. As indicated above, the LRA gives effect to public international law obligations. South Africa is a member of the International Labour Organisation. Section 4 of the LRA deals with employee's right to freedom of association⁴⁹ which include the right to form and join a trade union. This guarantees the right to freedom of association given by section 18 of the Constitution.

As pointed out above the LRA has been enacted in order to give content to the rights in the Bill of Rights, in particular section 23 of the Constitution. The LRA has fallen short to deal with the contents of section 23(5) of the Constitution which seems to impose a duty to bargain. The discussion of the duty to bargain is relevant to this topic because if the finding on the subject of duty to bargain is that it does exist, there may be no need for a trade union to seek organisational rights under section 21 of the LRA but, to rather approach the courts for relief. This paper briefly touches on the duty to bargain. Section 23(5) of the LRA is quoted in verbatim below:

“Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective

⁴⁹ Section 4 of the LRA provides as follows: “(1) Every employee has the right-(a) to participate in forming a trade union or federation of trade unions; and (b) to join a trade union, subject to its constitution.”

bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).”

In order to understand the interpretation of section 23(5) of the Constitution, it is also important to understand the background of the scheme of the LRA prior to its enactment. This is contained in the explanatory memorandum of the Labour Relations Bill⁵⁰ which states as follows:

“The fundamental danger in the imposition of a legally enforced duty to bargain and the consequent determination by the judiciary of levels of bargaining, bargaining partners and bargaining topics, is the rigidity which is introduced into a labour market that needs to respond to a changing economic environment... While giving legislative expression to a system in which bargaining is not compelled by law, the draft Bill does not adopt a neutral stance. It unashamedly promotes collective bargaining. It does so by providing a series of organisational rights for unions and by fully protecting the right to strike.”

The explanatory memorandum gives us insight into the fact that the legislature did not intend to impose or was reluctant to impose a duty to bargain in the LRA as that would be too prescriptive. Doing so would be hampered by the ever changing economic environment. Instead the legislature has opted for organisational rights rather than going with a duty to bargain.⁵¹ As it was demonstrated above, obtaining these rights ultimately remains the numbers game. The bigger the percentage of employees who are members of a union the more rights that union will obtain.

The Constitutional Court in the case of *NUMSA & others v Bader Bop (Pty) Ltd & another*⁵² (the *Bader Bop* case) when dealing with section 23 of the Constitution, stated that the Constitution recognises the importance of ensuring fair labour relations. It held further that

⁵⁰ Labour Relations Bill in GG 16259 of 10 February 1995. The Explanatory Memorandum is published at (1995) 16 ILJ 278 at 292 to 293.

⁵¹ Du Toit et al *Labour Relations Law, A comprehensive Guide (6 ed)* 24. “The Draft Bill proposed to include all workers, with the exception of the police service, the intelligence services and the defence force, within the ambit of the Act. It reinstated a voluntarist collective bargaining framework by not creating scope for a general duty to bargain. Collective bargaining would however, be bolstered by a set of organisational rights for representative trade unions and a protected right to strike after a conciliation procedures has been exhausted.”

⁵² [2003] 2 BLLR 103 (CC).

the entrenchment of the right of workers to form and join trade unions and to engage in strike action, as well as the right of trade unions, employers and employers organisations to engage in collective bargaining, illustrates that the Constitution contemplates the collective bargaining between employers and workers as key to a fair industrial relations environment. The Constitutional Court further stated that the right to strike is an important component of a successful collective bargaining system. Care must be taken to avoid setting in constitutional concrete, principles governing that bargain which may become obsolete or inappropriate as social and economic conditions change.⁵³

Another interesting contribution to this debate is the *SANDU*⁵⁴ case where the Supreme Court of Appeal (the SCA) by Conradie J found that while the Constitution is recognising and protecting the central role of collective bargaining in our labour dispensation, it does not impose on employers or employees a judicially enforceable duty to bargain. It does not contemplate that, where the right to strike is removed or restricted, but is replaced by another adequate mechanism, a duty to bargain arises.⁵⁵ This matter was appealed to the Constitutional Court and O' Regan J as she was then, confirmed the decisions in *NAPTOSA and others v Minister of Education, Western Cape and Others*⁵⁶ and *Minister of Health & another NO v New Clicks SA (Pty) Ltd and others (Treatment Action Campaign and another as Amici Curiae)*.⁵⁷ These cases *inter alia* held that where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation, as falling short of the constitutional standard.⁵⁸ O'Regan J noted that should section 23(5) of the Constitution establish a justiciable duty to bargain, enforceable by either employers or unions outside the legislative framework to regulate that duty, the court may be drawn into a range of controversial industrial relations issues and this would be generally undesirable.⁵⁹ The judgment of the Supreme Court of Appeal in this regard remains valid, which means no duty to bargain exists in South African labour law.

⁵³ n 52 above at para 13.

⁵⁴ *Minister of Defence Union & others v SA National Defence Union: Minister of Defence & others v SA National Defence Union & another* (2006) 27 ILJ 2276 (SCA).

⁵⁵ n 54 above at para 5.

⁵⁶ 2001 (2) SA 112 (C).

⁵⁷ 2006 (2) SA 311 (CC).

⁵⁸ *SA National Defence Union v Minister of Defence and others* [2007] 9 BLLR 785 (CC) at paras 50 to 51.

⁵⁹ n 58 above at para 55.

The exclusion of the duty to bargain in the South African labour regime may only mean that a prerequisite to bargaining with the employer is through the acquisition of organisational rights. The employer cannot be legally compelled to bargain with a trade union through court processes, unless the trade union is legally entitled to organisational rights. While the recognition process can easily be made difficult by the provisions of section 18 of the LRA collective agreement, it is likely to leave the minority union without any recourse other than to embark upon strike action. It is therefore argued that in this regard the South African labour regime seems to condone the strike action.

It is clear that the Constitution has been drafted in such a way to cater for both the rights of the majority and the minority. However, in this chapter, it has been observed that the LRA has been enacted in order to give effect to a constitutional right. Because the Constitution has adopted the majoritarian approach, the LRA has to follow suit. This is clear in the manner in which organisational rights are attained, as discussed in chapter two above. If the LRA was intended to treat minority and majority unions equally, it was not going to concern itself about numbers (majority or sufficient representation). It would have retained a duty to bargain, but instead opted to replace it with organisational rights. It is not this paper's view that a duty to bargain ought to have been retained as this might have had its own consequences.

As stated above, the provisions of section 18 of the LRA are at the heart of this paper. As stated in the *SANDU* case, any challenge of a constitutional principle must first be made against the enabling act, hence the challenge in this paper is premised against the LRA. In the next chapter, this paper will deal with the provisions of section 18 of the LRA and it will demonstrate, through case law, how this section has been applied.

CHAPTER 4

THE APPLICATION OF SECTION 18 OF THE LRA

As indicated in the previous chapter no enforceable duty to bargain exists. This duty exists only when there is an existing collective agreement duly signed by the parties. In this area of organisational rights we have section 18 of the LRA. It is prudent to quote the section from the onset. Section 18 of the LRA provides 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.”

Section 18 of the LRA is not peremptory to the bargaining parties but could be invoked by the employer and a trade union which has as its members a majority of employees in the workplace. The aim of a section 18 collective agreement is to determine a threshold which will bind any new union which seeks to attain any of the organisational rights in the workplace.

Brassey⁶⁰ commented that section 18 of the LRA permits a union or group of unions that have recruited the majority of employees in a workplace to introduce, by agreement with the employer, a new threshold for the acquisition of those rights that the statute confers on unions which can demonstrate ‘sufficient representativeness’. The new standard will then apply to third parties who seek to exercise statutory rights, provided it is universally applicable to all unions. One object of the section is to enable the parties to put a numerical figure to the

⁶⁰ Brassey *Commentary on the Labour Relations Act* (revision service 2, 2006 at A323–324).

otherwise somewhat indeterminate concept of ‘sufficiently representative’ for which the stipulated sections 12, 13 and 15 of the LRA provide. But the primary object of the section is to promote workplace majoritarianism, that is, the system under which a single union or group of unions enjoy exclusive rights or representation within a workplace. There is no obligation on the union to demand new thresholds or on the employer to agree to them. The matter is left to be determined in the process of collective bargaining. If the employer refuses to agree to a union’s proposal, however, the union can call its members out on strike over the issue. Brassey argues further that an agreement establishing new thresholds of representation simply substitutes a new standard for the old one of sufficient representation; it says nothing about the employer’s right to act unilaterally. If the union wants to prevent an employer from granting rights to unions who fail to meet the threshold, it must, by collective bargaining, extract a commitment from the employer to this effect.⁶¹

It is argued that this provision has been abused by some parties and used as a bar to prevent new unions or smaller unions to have access to organisational rights and therefore enjoy freedom of association as enshrined in section 18 of the Constitution. This paper illustrates this below by way of case law.

i. The *BECSA* case

Section 18 of the LRA was at issue in the *BECSA* case.⁶² In this case the United Association of South Africa: The Union (UASA) and the Association of Mineworkers and Construction Union (AMCU) formed a coalition for the purposes of establishing organisational rights. While BECSA and the National of Union and Mineworkers (the NUM) concluded a new threshold agreement that had the effect of raising the threshold for organisational rights, thus making it more difficult for the coalition to obtain those rights. The threshold agreement was to come into effect on 02 March 2013. As a result, the coalition decided to bring the application on urgent basis to the Labour Court.

The coalition requested the Labour Court to have that agreement (the 2013 threshold agreement) declared null and void; and to declare a settlement agreement between the coalition and BECSA dated 05 March 2010 valid and binding. The settlement agreement was

⁶¹ n 59 above.

⁶² n 4 above.

a product of the organisational rights dispute referred to the CCMA in December 2009 referred by the coalition (UASA and AMCU).⁶³ This resulted in a settlement agreement reached at the CCMA between the coalition and BECSA on 05 March 2010. The Coalition then lodged an application to the Labour Court which was opposed by both BECSA and the NUM arguing that they are entitled to amend the threshold agreement by virtue of the provisions of section 18 of the LRA.

The coalition's case was based on two contentions: firstly, that the settlement agreement remains valid and binding (the settlement agreement point); and secondly, that the 2013 threshold agreement is *ultra vires* section 18 of the LRA because it purports to define the 'workplace' as BECSA's operations overall and not as its individual operations (the workplace point).

In order to understand how the Labour Court has arrived at its decision it is important to understand the background of the dispute. The coalition has enjoyed organisational rights at BECSA's various operations since 2005 in accordance with the 2005 threshold agreement between BECSA and the majority trade union, NUM. NUM had a majority membership of about 62% across BECSA's operations. The threshold agreement specifically allowed a coalition for the purposes of obtaining organisational rights which is exactly what AMCU and UASA did.

The settlement agreement stated that in order to acquire organisational rights as defined in sections 12, 13 and 15 of the LRA for a specific operation, the coalition must establish membership of a minimum of 15% of employees in the bargaining unit at that specific operation. Operation which was defined as any business site at which employment is provided, including mines.

That in terms of BECSA's industrial relations policy and in accordance with section 18 of the LRA, BECSA and the majority union (currently NUM) will agree on threshold levels applicable to recognition and participation in collective bargaining structures in accordance

⁶³ The Settlement agreement granted AMCU and UASA certain organisational rights under section 12, 13 and 15 of the LRA. The Settlement agreement was made an award of the CCMA in terms of section 142A of the LRA on 30 June 2010 and certified in terms of section 143 of the LRA on 27 July 2010.

with sections 12, 13 and 15 of the LRA. It also provided for a dispute resolution mechanism that should a dispute not be resolved internally, it must be referred to the CCMA. That on 31 January 2013, BECSA informed the coalition that it had concluded a new threshold agreement (“the 2013 agreement”) with the NUM. The key features of the 2013 agreement were that with effect from March 2013, recognition of any trade union in BECSA will be based on the total union membership at asset level (i.e. BECSA as a company) and no longer by operation. That those organisational rights under sections 12, 13 and 14 of the LRA, which the coalition currently enjoys, will require 30% representation at asset level and not 15% per operation.

This paper argues that at this stage it is clear that the collusion between BECSA and the NUM was to disadvantage the minority union(s). Furthermore, by also changing the workplace not to be by operation but BECSA as a Company this was intended to stretch the language of section 18 of the LRA. The provisions of section 18 were clearly abused.

This angered the coalition and they formed the view that the settlement agreement giving effect to the 2005 threshold agreement remains valid and enforceable until set aside, as it was made an award of the CCMA and certified as such. It was also of the view that the settlement agreement and thus the 2005 threshold agreement is a valid, binding and enforceable contract.

The Labour Court found that the CCMA has jurisdiction to deal with the interpretation of a collective agreement.⁶⁴ Before referring the matter to the CCMA, the Labour Court has to first decide on whether to interdict BECSA and NUM from implementing the new threshold agreement pending the outcome of the CCMA case.⁶⁵

The Labour Court found that the NUM is not bound by the award; but BECSA is. In the circumstances of this case, the fact remains that the settlement agreement was made an arbitration award which is final and binding upon the coalition as well as BECSA.⁶⁶

The Labour Court found further that there appears to be nothing to prevent NUM and BECSA from entering into new agreements *inter se*. However, in the face of the arbitration

⁶⁴ Para 31 of the *BECSA* case.

⁶⁵ Para 33 of the *BECSA* case.

⁶⁶ Para 44 of the *BECSA* case.

award, BECSA cannot, on the face of it, enforce new thresholds contrary to those contained in the arbitration award against the coalition without their consent. It must be pointed out that the Labour Court said so, in the context of finding that the coalition has established a *prima facie* right for the interim relief they seek. In this regard, the Labour Court indicated that it is for a CCMA arbitrator to delve into and make a finding on the merits in terms of section 24 of the LRA.⁶⁷ The Labour Court left it for the proper decision to be made by the CCMA. The Labour Court then interdicted the implementation of the new threshold agreement pending the finalisation of the arbitration before the CCMA.

Subject to the outcome of the interpretation dispute at the CCMA, AMCU and UASA seem to have been saved by the earlier collective agreement which became an order of court. Yet another effect of section 18 of the LRA was felt by the minority unions. It appears from the judgment that BECSA and the majority union may be permitted to sign a collective agreement setting a threshold, although, such may not be enforced against AMCU and UASA solely because of the application of the settlement agreement in this specific instance.

This paper argues that section 18 of the LRA gives the employer and the majority union unfettered powers to limit the rights of the minority in an unjustified manner. In this case section 18 of the LRA was clearly abused in order to get rid of the minority union which previously had rights to organise at the workplace. As pointed out in the previous chapter, freedom of association is the right entrenched in the Bill of Rights cannot be limited in an unjustified manner.

ii. The *Impala* case

Another interesting case on this topic of section 18 of the LRA is the *Impala* case.⁶⁸ In order to understand the gist of the *Impala* case, this paper sets out the facts of the case.

On 23 July 1997 NUM, which at all material times represented the majority of employees employed by Impala Platinum, entered into a threshold agreement in terms of section 18 of the LRA. This agreement created three bargaining units, one category comprising employees in job categories 2 – 8 and ungraded employees, a second category of artisans and miners and

⁶⁷ Paras 45 and 54 of the *BECSA* case.

⁶⁸ n 8 above.

a third category of officials. This agreement established a threshold of 35% representivity by a registered trade union within the defined bargaining unit for the exercise of organisational rights.

On 23 March 1998, Impala Platinum entered into a series of recognition agreements with trade unions which had attained the 35% threshold in one or other of the bargaining units, including the NUM. It appears that subsequent thereto, UASA obtained recognition in the second bargaining unit as well as in the third bargaining unit. The recognition of UASA continued until 30 October 2006 when Impala Platinum, NUM and UASA concluded a new recognition agreement. In terms of this agreement, the parties agreed that there would be a single bargaining unit comprising of all employees in job categories A3 to A5. In terms of clause 4.1 of this agreement, it was agreed that Impala recognizes NUM and UASA as the collective bargaining representative bodies of all employees in the bargaining unit provided that the unions meet the representivity thresholds agreed from time to time and contained in a threshold agreement. The agreement would terminate if the NUM or UASA failed to meet the representivity level as determined by the threshold agreement, as amended from time to time.

It was common cause that the members of NUM, were in excess of 50% of employees in the single bargaining unit while members of UASA were 7% of employees in the bargaining unit. In other words, UASA had approximately some 2000 members out of the 27000 employees in the bargaining unit.

On 28 March 2007, Impala and NUM concluded a bilateral threshold agreement. In terms of this agreement NUM (being the majority union in the workplace) and Impala agreed to conclude a collective agreement that established a threshold of representativeness in accordance with the provisions of section 18 of the LRA. The threshold for the grant of organisational rights to a trade union would now be 50% plus one membership within the bargaining unit. It was further agreed that this agreement would replace the 1997 threshold agreement and that trade unions that were currently entitled to organisational rights which did not meet the threshold, would be afforded three months to do so, failing which their rights would be terminated on 30 days' notice.

On 02 April 2007, Impala gave UASA three months' notice in which to meet this threshold. On 11 May 2007, UASA declared a dispute in this regard. The essence of this dispute turned on UASA's contention that clause 4.1 of the 2006 recognition agreement contemplated that a trilateral and not a bilateral threshold agreement would be concluded, which implied that UASA had to be involved in the conclusion of any such agreement. UASA argued further that it and NUM would obtain immediate recognition and that such recognition would continue until it failed to meet the threshold of representation, agreed from time to time between all three parties to the agreement. By contrast, Impala pleaded that, in terms of clause 4.1, organisational rights were only extended to trade unions which met the requirements of the 2007 threshold agreement and that it was permissible in terms of section 18 of the LRA for Impala and NUM to conclude a bilateral threshold agreement, and in that the NUM was the majority union.

The arbitrator dismissed the application by UASA. The dispute was then referred to the Labour Court for review before Basson J. Basson J accepted that the arbitrator articulated the dispute with reference to section 18 of the LRA. She then found that the interpretation of clause 4.1 falls within the arbitrator's jurisdiction.⁶⁹

The dispute was then referred to the Labour Appeal Court. The appeal was dismissed on the ground that, there was no basis by which to justify the conclusion that the arbitrator exceeded his powers in the interpretation of clause 4.1. Accordingly, the LAC found no basis by which to interfere with the Labour Court's decision.⁷⁰

What is regrettable in this case is that UASA was previously recognised by Impala and had been enjoying certain organisational rights. All of a sudden on the strength of section 18 of the LRA collective agreement, UASA had to forfeit its recognition. There can be no doubt that this is a clear case of collusion between the company and the majority union to exclude the minority union. A trade union which has previously enjoyed certain rights, its rights to represent the employees has now been limited; this cannot be justified in an open and democratic society.

This paper observes that the difference between the *BECSA* case and the *Impala* case is that in the *BECSA* case, the minority union had a settlement agreement which had previously

⁶⁹ Para 17 of the *Impala* case.

⁷⁰ Para 27 of the *Impala* case.

given them the rights. The settlement agreement which was in turn made an order of court for the purposes of enforcement.⁷¹ In the *Impala* case, the minority union only had an agreement which had given them the rights in the past. The effect of section 18 of the LRA is that all the previous agreement/s do(es) not bar the employer and the majority union to enter into a new agreement which can set the new threshold. This paper argues that this is not fair in an open and democratic society.

Section 18 of the LRA gives the employer and the majority union an open blank cheque to determine the threshold and thereby exclude the minority union to enjoy freedom of association. This paper proposes that section 18 of the LRA must be amended. A determination of the threshold whether or not the union is sufficiently represented in order to be granted organisational rights is an issue to be properly dealt with under section 21 of the LRA. The process under section 21 of the LRA is best suitable to assist the parties to deal with organisational rights disputes. These concluding remarks are also expanded on in chapter 8 below which deals with the Labour Relations Amendment Act.

As indicated above, section 18 of the LRA provides that an employer and a registered trade union whose members are the majority of the employees in the workplace can determine a threshold. It follows that the word ‘workplace’ is also key to the interpretation of section 18 of the LRA. In the next chapter this paper discusses the concept of the workplace and its practical challenges.

⁷¹ n 1 above, section 142A of the LRA.

CHAPTER 5

CONCEPT OF THE WORKPLACE AND PRACTICAL CHALLENGES

Section 213 of the LRA defines workplace as follows:

“(c) ... in all other instances means the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation.”

This paper only quotes subsection (c) of the definition as (a) and (b) are of no relevancy for the purpose of this paper. This definition was examined in the case of *Chamber of Mines of South Africa v Association of Mineworkers of South Africa and others In re: Association of Mineworkers and Construction Union and others v Chamber of Mines of South Africa and others (the CoM's case)*.⁷² The Chamber of Mines (CoM) an employer's organisation acted as the collective bargaining agent of its members⁷³. The CoM signed a wage agreement with NUM, UASA and Solidarity. The agreement recorded that the wage agreement is extended to employees who were not members of the trade union's party to the agreement. AMCU represented a majority of the employees at five mines belonging to the CoM's members, but the number of employees who were covered by the wage agreement on extension constituted a majority of the total number of employees employed by each of the employer parties to the agreement. The majority threshold was determined by reference to the total number of employees employed by each of the employer parties, and not on the basis of those employees engaged by each of them in the agreed bargaining unit. When the CoM applied for an interdict preventing the AMCU's members from embarking on a strike in furtherance of the wage dispute, and relying in that regard on the agreement referred to above, the Labour Court granted an interim interdict. In the main application, the CoM sought confirmation of the interim interdictory order. AMCU sought to have the interim order discharged. It also filed a counter application, in which the constitutionality of section 23(1)(d) of the LRA⁷⁴ was challenged.

⁷² [2014] 9 BLLR 895 (LC).

⁷³ Anglo Gold Ashanti, Harmony Gold and Sibanye Gold.

⁷⁴ Section 23(1)(d) 1) of the LRA provides that “A collective agreement binds – (d) employees who are not members of the registered trade union or trade unions party to the agreement if : (i) the

Clause 1.2 of the wage agreement provided that in terms of section 23(1)(d) of the LRA, the agreement binds all other employees (i.e. employees not members of the trade unions party to the agreement) employed in recognition units in the workplace of each respective employer. Clause 17 of the wage agreement recorded that the agreement is concluded in full and final settlement of all demands and proposals made during the negotiations and that no party bound by the agreement will call for any strike or lockout in support of demands or proposals to amend wages and other conditions of employment, for the duration of the agreement. The CoM signed the agreement as the representative of its members each of whom recorded that the agreement was signed in respect of the workplace defined to mean, in each case, their respective mines and operations.⁷⁵

It was not disputed that while AMCU represented a majority of the employees at five individual mines (three managed by CoM's members), the number of employees who are covered by the wage agreement on extension constitute a majority of the total number of employees employed by each of the employer parties to the agreement. It is also not disputed that despite an initial averment to the contrary and in compliance with section 23(1)(d) of the LRA, the majority threshold was determined by reference to the total number of employees employed by each of the employer parties, and not on the basis of those employees engaged by each of them in the agreed bargaining unit. It is also common cause that AMCU is party to a recognition agreement at Harmony's Kusasaletu operation and at Sibanye's Driefontein operation. At AngloGold Ashanti's Mponeng, Savuka and Tautona mines, AMCU was in the process of negotiating a recognition agreement.⁷⁶

In this case the primary issues were the interpretation and application of the definition of a 'workplace' in section 213 of the LRA, the interpretation and application of section 23(1) (d) of the LRA, and the connection between that subsection and section 65(1)(a) of the LRA, given especially the constitutional rights to engage in collective bargaining and to strike. AMCU also pursued its argument in relation to section 32 of the LRA and in particular, the submission that the wage agreement is a sectoral agreement and ought to have been dealt

employees are identified in the agreement; (ii) the agreement expressly binds the employees; and (iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace.”

⁷⁵ *Chamber of Mines v AMCU* (n 72 above) para 6.

⁷⁶ *Chamber of Mines v AMCU* (n 72 above) para 7.

with in the same or similar fashion as the extension of a collective agreement under that section.⁷⁷

It was also common cause that the wage agreement met the requirements established by section 23 (1)(d)(i) and (ii) of the LRA.⁷⁸ The Labour Court referred to the authority of *Brassey* which stated the following:

"In the private sector the nature of a 'workplace' is a question of fact. If the employees all work in one place, it is the workplace: if they are divided into separate branches or depots, the separate locations can each be a workplace. Deciding whether two locations are separate workplaces entails an examination of the extent to which they operate independently of each other, which in turn entails a consideration of the size, function and organisation of each. Geographical separation will be important, but will not always be decisive."⁷⁹

The Labour Court rejected the AMCU's interpretation of section 23(1)(d) of the LRA as meaning that each of the employers' mines constituted a workplace. There was no factual basis in the papers to conclude that each of the employer's mines operated as independent units. The Labour Court found that the wage agreement was thus validly extended.⁸⁰

It worth mentioning that the Labour Appeal Court in the case of *SACCAWU v Speciality Stores*⁸¹ emphasised the point that the definition of a 'workplace' in section 213 of the LRA bears the meaning given by the LRA unless the context indicate otherwise. It also indicated that the context of determining a proper workplace in terms of the LRA in a lock out dispute may well be different from the context for determining a workplace in an organisational rights dispute. That the possibility of different determinations of a workplace, in different contexts, is one contemplated and accepted under the LRA.

⁷⁷ *Chamber of Mines v AMCU* (n 72 above) at para 14.

⁷⁸ *Chamber of Mines v AMCU* (n 72 above) at para 23.

⁷⁹ *Brassey Commentary on the Labour Relations Act* at A935 to A936.

⁸⁰ *Chamber of Mines v AMCU* (n 72 above) at para 35.

⁸¹ [1998] 4 BLLR 352 (LAC).

In the case of *OCGAWU & another v Volkswagen of South Africa (Pty) Ltd & another*,⁸² it was held that a bargaining unit within an organisation may also be considered a workplace for the purposes of determining a claim for organisational rights. In the case of *Communication Workers Union and Daily Dispatch*⁸³ it was held that a division of a newspaper publisher constituted a separate workplace for the purposes of obtaining and exercising organisational rights by a majority union.

It is clear from the discussion above that the definition of a workplace has an impact on organisational rights. As stated above by Brassey the workplace is to be determined factually. There are a number of factors which may be taken into account, one of them being whether the operations in question operate independently from each other. In the *SACCAWU* case, it was indicated that the context of determining a proper workplace in a lock out dispute may be different from the context of a workplace in organisational rights. Hence this complex phenomenon may make it difficult for the minority union to obtain organisational rights. Like in the *CoM's* case, AMCU had majority in certain operations belonging to the CoM but minority in certain operations and that weakened their position even in those areas where they had majority. In the *CoM's* case the workplace was factually determined to mean that each company operated as a single workplace. It was found that in the workplace determination AMCU lacked majority. As a result the wage agreement was extended to bind their members.

For purposes of the organisational rights dispute, a workplace is a single operation of the employer, which means if the employer has ten operations with the union having few members in all the operations they may still be denied organisational rights on the basis that they have to meet certain threshold which is determined by the employer and the trade union on each and every operation. This paper argues that for the purposes of organisational rights, the workplace argument adds to the already existing problems posed by section 18 of the LRA. In addition to what was concluded in the previous chapters, section 18 of the LRA ought to be amended.

This paper acknowledges that although the rights of minority union are affected by section 18 of the LRA, there are certain rights which are available for the minority union. In the next

⁸² [2002] 1 BALR 60 (CCMA).

⁸³ (2010) 31 ILJ 1496 (CCMA).

chapter, this paper turns to deal with those rights of minority union in particular the right to strike.



CHAPTER 6

MINORITY UNION RIGHT TO STRIKE

In order to understand the rights of a minority union, it is imperative to understand what is meant by majority union. Van Niekerk et al⁸⁴ defines majority unions as those registered unions that on their own, or in combination with any one or more unions, have as their members the majority of the employees employed by an employer in a workplace. This requires that at least 50 percent plus one of the employees employed in the workplace must be members of the union. In terms of the LRA the majority unions have the right to have their members elected and function as trade union representatives and disclosure of information.⁸⁵

The arbitrator suggested in the case of *Hospersa and Zuid-Afrikaanse Hospitaal*⁸⁶ that organisational rights are meant to enable unions “to get their foot in the door.”⁸⁷ This may prove to be difficult through the application of section 18 of the LRA.

Although it may have seemed dark and gloomy for the minority unions, the Constitutional Court has come to their rescue. The Labour Appeal Court has considered this question in the decision of *NUMSA & Others v Bader Bop (Pty) Ltd*.⁸⁸ NUMSA had represented approximately 25% of the workforce and had been granted access to the workplace and deduction of subscriptions. Because the majority union had already been afforded the right to appoint shop stewards Bader Bop (Pty) Ltd refused NUMSA the right to elect shop stewards. A dispute then arose as a result thereof and was referred to the CCMA, and when conciliation failed, NUMSA threatened to call its members out on strike in support of their demand for the election of shop stewards. Bader Bop (Pty) Ltd approached the Labour Court for an order interdicting the strike. The Labour Court ruled that the strike was protected. Bader Bob (Pty) Ltd then approached the Labour Appeal Court for a relief.

⁸⁴ Van Niekerk et al *Law @ work* (3rd ed) at page 361.

⁸⁵ Section 14 and 16 of the LRA.

⁸⁶ (1997) 2 LLD 29 (CCMA).

⁸⁷ Mischke “Getting a Foot in the Door: Organisational Rights and Collective Bargaining in terms of the LRA” (2004) CLL 13 (6) 51.

⁸⁸ (2002) 2 BLLR 139 (LAC).

The right to elect shop stewards is only afforded to unions who represent the majority of members at a workplace, and NUMSA conceded that it did not represent the majority of employees in the workplace. The question that the Labour Appeal Court thus had to decide was whether a union which admits that it does not meet the threshold for the election of shop stewards can strike in order to acquire such rights. The majority of the Labour Appeal Court found in favour of Bader Bop (Pty) Ltd. The Labour Appeal Court's findings were that the LRA confers organisational rights upon representative unions only. A registered trade union must seek those rights in terms of the provisions of section 21 of the LRA. If, having done that, the trade union is or becomes convinced that it is not representative, it cannot then sidestep the procedure provided for by the Act, throw its proverbial toys out of the cot and embark upon strike action.⁸⁹ The Labour Appeal Court thus held that a minority trade union is not entitled to strike in support of a demand for the right to elect shop stewards.

NUMSA was aggrieved by the decision and referred the matter to the Constitutional Court. The Constitutional Court overturned the decision and found that on a clear reading of the LRA, there is nothing in Part A of chapter 3 which expressly states that unions which admit that they do not meet the requisite threshold membership levels are prevented from using the ordinary processes of collective bargaining and industrial action to persuade employers to grant them organisational rights facilities such as access to the workplace, stop-order facilities and recognition of shop stewards.⁹⁰ These are matters which are clearly of mutual interest to employers and unions and as such matters capable of forming the subject matter of collective agreements and capable of being referred to the CCMA for conciliation, the condition precedent to protected strike action.

⁸⁹ n 88 above at paras 54 to 59.

⁹⁰ n 88 above at para 43: "Where employers and unions have the right to engage in collective bargaining on a matter, the ordinary presumption would be that both parties would be entitled to exercise industrial action in respect of that matter. There is nothing in sections 64 or 65 suggesting that there is a limitation on the right to strike in this regard. Davis AJA in his dissent in the LAC also pointed to the fact that there was no express limitation on the right to strike in this respect. It was his view that in the absence of any express prohibition, the Act should be read so as to afford the right to strike to minority unions in these cases consistently with the right to strike in the Constitution. On the interpretation adopted here, the provisions of section 65(1)(c) and 65(2) have no application to the dispute. These provisions are relevant only to those disputes which parties may refer to arbitration. Where a union concedes that it is not entitled to the rights in sections 12 - 15 because it is not representative as contemplated in Chapter III, Part A, the arbitration procedure is not open to it and accordingly section 65(1)(c) poses no bar to industrial action. The precise scope and purpose of section 65(2) is therefore of no application either."

As a result of the outcome of this decision, the minority union has a right to strike to demand recognition even in situation where they acknowledge that they do not have sufficient numbers. They can persuade the employer through an industrial action in order to grant them recognition.

This chapter argues that the right to strike is not an appropriate remedy for the minority union to enable them to attain their rights. Industrial action should be avoided and be embarked upon as a last resort. To be termed a minority union it may as well mean that such a union cannot command a strike because it does not have sufficient members. Even if it embarks on a strike, its members may be frustrated by the principles of no work no pay. Although this may not be condoned, their effort to strike may also be frustrated by members of a majority union through victimization and intimidation. In order to avoid competition of the unions in the workplace and exciting the workforce unnecessarily, hence, this chapter argues that strike action should be used as a last resort when other methods have failed. As it will be seen in chapter 8 below, this paper proposes other remedies other than a strike action immediately after conciliation has failed. In the next chapter this paper navigates through the relevant International Labour Organisation standards and demonstrates how section 18 of the LRA has failed to meet these standards.

CHAPTER 7

RELEVANT INTERNATIONAL LABOUR ORGANISATION (ILO) STANDARDS

The Constitution of South Africa recognises the importance of international labour standards. Sections 39(1)⁹¹ and 232 of the Constitution of South Africa are of particular importance. Section 39(1) enjoins our courts to consider international law when interpreting the Bill of Rights, while section 232 provides that customary international law is law in the Republic unless it is inconsistent with the Constitution of South Africa or an Act of Parliament.

It must be pointed out that our courts have opted for the interpretation which is consistent with international law. In *Avril Elizabeth Home*,⁹² Van Niekerk AJ, as he then, maintained that the nature and extent of the fair procedure requirements established by the LRA is supported by international labour standards. In dealing with Convention 158, he further stated that although South Africa has not ratified Convention 158, and is therefore not obliged to implement its terms in domestic legislation, the Convention is an important and influential point of reference in the interpretation and application of the LRA. This is to illustrate the point that although ILO Convention 158 was not ratified by South Africa, it was applied as a point of reference in the interpretation of the LRA which indicates the importance of international law in our legal system.

Section 233 provides that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. The Constitutional Court in the case of *S v Makwanyane*⁹³ confirmed that in appropriate cases, reports of specialised agencies such as the ILO may provide guidance as to the correct interpretation of particular provisions of the Bill of Rights.

⁹¹ Section 39 of the Constitution provides as follows:

“Interpretation of Bill of Rights.- (1) When interpreting the Bill of Rights, a court, tribunal or forum- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law. (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.”

⁹² *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation Mediation and Arbitration* 2006 ZALC 44 LC.

⁹³ 1995 (3) SA 391 (CC) at para 35.

In the case of *SANDU v Minister of Defence and another*⁹⁴ O'Regan J stated that the Constitution recognizes that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters. While in an earlier judgment of *Case & another v Minister of Safety and Security & others*⁹⁵ the Constitutional Court held that freedom of expression is one of a web of mutually supporting rights in the Constitution. It is closely related to freedom of religion, belief and opinion, the right to dignity as well as the right to freedom of association, the right to vote and to stand for public office and the right to assembly. These rights taken together protect the rights of individuals not only individually to form and express opinions of whatever nature, but to establish associations and groups of likeminded people to foster and propagate such opinions. In this regard this indicates the importance of freedom of association.

Ben-Israel stated the following with regard to freedom of association:⁹⁶

“By presenting the concept of freedom of association in a three-dimensional manner, as set forth below, the completing rights principle tends to the conclusion that denial of the freedom to strike is a great affront to justice. The organised and collective power of the workers within the framework of trade unions by itself is not sufficient in order to balance the labour relations system, and therefore it must be supplemented by two complementary freedoms. The first of these two freedoms is the freedom of collective bargaining. It is only by collective bargaining that the workers can make use of their combined power, which stems from the fact that they are organised within a trade union, in order to improve their working conditions . . . But that, too, is insufficient. The freedom to associate and to bargain collectively must be supplemented by an additional freedom, which is the freedom to strike. Hence, freedom of strike is a complementary freedom of the freedom of association since both are meant to help in achieving a common goal which is to place the employer-employee relationship on an equal.”

Once again Ben-Israel emphasises the point that freedom of association is important for the protection of employee's rights. It is therefore important to allow the employees the right to

⁹⁴ 1999 (4) SA 469 (CC) at para 7.

⁹⁵ 1996 (3) SA 617 (CC) at para 27.

⁹⁶ Ben-Israel Ruth, “International Labour Standards: The Case of Freedom to Strike”, Kluwer Law and Taxation Publishers (1988) 27.

organise through the union of their choice. Once you allow them these freedoms you avoid unnecessary strikes which may in all likelihood hamper production.

International law also comprises with what is termed international labour standards. These standards take the form of conventions or recommendations. Conventions are international treaties that bind the members states which ratify them. By ratifying the convention, members states formally commit themselves to putting their provisions into effect, both in law and practice.

South Africa has ratified a number of fundamental conventions of the ILO, including the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

The convention which is of interest to this topic is the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). Amongst others in its preamble it quotes the preamble to the Constitution of the International Labour Organisation which declares "recognition of the principle of freedom of association" to be a means of improving conditions of labour and of establishing peace. It is clear that one of the objectives of this convention was to improve labour conditions and most importantly to deal with the issue of maintaining labour peace. On this point it is worth mentioning that article 20(1) of the Universal Declaration of Human Rights 1948 states that each individual has the right to freedom of peaceful assembly and association. This is in line with the objectives of the LRA in section 1 which is to achieve industrial peace.

Article 2 of the convention on Freedom of Association and Protection of the Right to Organise provides as follows:

“Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.”

Article 2 of the convention on Freedom of Association and Protection of the Right to Organise gives employees the rights to form and join organisations without prior authorisation from any person or institution.

Article 3(2) of the convention on Freedom of Association and Protection of the Right to Organise provides as follows:

“The public authorities shall refrain from any interference which would restrict this right to impede the lawful exercise thereof.”

Article 3 of the convention prohibits any interference by the states to the enjoyment of these freedoms. This means that the state cannot through legislation limit the rights of employees to exercise the fundamental rights. In this case the interference was by a way of the LRA.

Article 11 of the convention on Freedom of Association and Protection of the Right to Organise provides as follows:

“Each Member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise.”

A member state which has ratified this convention by doing so they have undertaken to ensure that employees will be allowed to exercise these rights freely. Whilst it may be to the advantage of employers to avoid a multiplicity of trade union movements, unification through state intervention, be it a direct or indirect result of legislative provisions applicable to trade unions, is contrary to the principles embodied in articles 2 and 11 of the convention concerning Freedom of Association and Protection of the Right to Organise.

These rights are similarly protected in the International Covenant on Civil and Political Rights.⁹⁷ Article 22 thereof states: “Everyone has a right to freedom of association with others, including the right to form and join trade unions for the protection of their interests.”

As indicated above in article 2 employees are afforded the right to join and form organisations without asking for permission from the employer. This alone poses a problem under our regime because the employee is limited to join the majority union, if he or she want access to majority union rights. The right to be represented by a member of a trade union during a disciplinary could never be exercised, if one’s union is not yet recognised. This right is fundamental in the workplace. A union official cannot represent an employee unless the union has been granted rights in terms of section 14 (trade union representatives) by the employer. In this regard the right is limited. Article 11 as discussed above cautions the authorities to refrain from any interference which would restrict this right. In this case the authorities being the government have intervened in the employer and employee relationship

⁹⁷ International Covenant on Civil and Political Rights (1966).

by way of the LRA. Section 18 of the LRA is being used as discussed in *BECSA* and *Impala* cases as a way of restricting these to the minority unions. This paper submits that this restriction is in contravention of these articles and therefore falls short to the requirements of international labour standards. The provision of section 18 of the LRA does not conform with acceptable international labour standards because it gives advantage to the majority union to restrict the minority unions to come in. Section 18 of the LRA gives a majority union and the employer a blank cheque to determine a threshold which could be anything and thereby restricting the minority unions to have access to organisational rights.

In the next chapter the paper discusses the impact which is brought by the new Labour Relations Amendment Act.



CHAPTER 8

THE IMPACT OF THE LABOUR RELATIONS AMENDMENT ACT

It is important to note that no amendment was made regarding section 18 of the LRA and the section was left intact as discussed in chapter 4 above. However, the amendments are in regard to the manner in which a union can obtain organisational rights which were traditionally reserved for the majority unions. The traditional approach has always been that a majority union will be entitled to disclosure of information and trade union representative. Majority unions have always been regarded as 50% plus one. The minority unions which are sufficiently represented were only entitled to reasonable access to the workplace or deduction of stop orders and reasonable leave of shop stewards. Otherwise they were not entitled to any rights. The law was not flexible in this regard.

The new Labour Relations Amendment Act has brought a slight shift from the original position. The arbitrator has now been given discretion to grant a union whose members are minority, rights which were traditionally reserved for the majority unions under two circumstances:⁹⁸ (i) the trade union is entitled to access, deductions and stop orders; (ii) no other trade union has been granted the rights which are reserved for the majority.

This paper argues that this amendment does not at all remedy the defect or the prejudice pointed out above (in section 18 of the LRA) in chapter 4. The LRA only deals with the workplace where no union has been recognised. Section 18 of the LRA deals with a situation where there is already a union in the workplace. The amendment still favours the majoritarian principle in the workplace. This is because section 21(8B) of the Labour Relations Amendment Act states that “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.”

⁹⁸ Section 21(8A) of the Labour Relations Amendment Act provides: “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. (b) the rights referred to in section 16, 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, 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.”

This notion is not sustainable in the workplace given the South African volatile employee relations climate particularly in the mining industry i.e. (post Marikana).

Section 21 (8C) of the LRA takes it further and provides as follows:

“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.”

This amendment has brought a new element of substantial interest. This part of the amendment has not been interpreted by our courts as yet. It appears that the intention of the amendment is to limit the effect of section 18 of the LRA on the minority union, thereby giving the minority union a chance of being awarded rights which were only given to the majority union. The effect of this is that once an arbitrator is satisfied that the minority union should be granted the rights, the arbitrator can ignore the agreement concluded between the majority union and employer under section 18 of the LRA. Furthermore, the LRA amendment does not stipulate which factors should influence the discretion of the arbitrator to grant those rights. The fact that the legislature has still maintained section 18 in the LRA seems to be a contradiction because an agreement in terms of section 18 of the LRA is binding not only on the parties but also on the union which *seeks* recognition. A collective agreement in terms of section 18 of the LRA remains a valid collective agreement between the majority trade union and the employer. In this regard the Labour Relations Amendment Act has failed to address this problem but instead has created more problems for the arbitrator such as the exercise of the discretion to ignore a section 18 of the LRA agreement without laying down any guidelines to assist the arbitrator.

Another difficulty which should have been addressed by the Labour Relations Amendment Act was the issue of a relief when seeking organisational rights. Section 21(7) of the LRA clearly states that if the dispute remains unresolved either of the parties may request that the

matter be dealt with through arbitration. This section allows arbitration as a relief to deal with organisational rights dispute while section 65(2) (a) of the LRA permits a strike for organisational rights disputes. The Constitutional Court in *Bader Bop* case has ruled that a union which agrees that it is not sufficiently representative can resort to a strike in order to persuade the employer to recognise it. This paper suggest a view that this two tier remedies can only cause a lot of uncertainty in practice, particularly for the employer because it leaves the employer in the dark for what to expect as the next step from the trade union. This paper submits that the amendment should have amended section 18 of the LRA completely. This would have allowed even minority unions to approach the employer for recognition. Should the employer refuse recognition, either party can approach the CCMA for arbitration. Should the union lose the case in arbitration proceedings only then they can be allowed to either refer the case on review or resort to strike. This will minimise strikes which are intended to harm the employer's business and also for the employer to be seen to be colluding with the majority union. The objective should be to avoid industrial action and not to promote same.

In the next chapter this paper concludes the debate and makes recommendations.



CHAPTER 9

CONCLUSION AND RECOMENDATIONS

As indicated above, in the case of *Kem-Lin Fashion*⁹⁹ the South African legislature has made a policy choice of a majoritarian system. This explains the structure of the LRA which is informed by the majoritarian principle. The question is: does it need to remain as an acceptable legal principle or does it need change, in relation to labour law? Is the majoritarian principle a 'winner takes all' in the workplace regarding the acquisition of organisational rights still relevant? Can it be applied in a strict sense of the word without infringing the rights of the minority union, in particular the freedom of association as entrenched in the Bill of Rights? Or without being blamed for the rise of rival trade unions which may lead to violence and deliberate flouting of standard procedures? The answer to this question is in the negative. Section 18 of the Constitution guarantees the right to freedom of association. These rights are then codified and embedded in the LRA.

The employer and employee relationship is governed by the LRA. The state has intervened in order to regulate the employer and employee relationship. There are issues which are best left to the parties to deal with, otherwise over regulating may impact in orderly collective bargaining which is the spirit and purport of the LRA. Peace is at the heart of orderly collective bargaining, objectives which the LRA seeks to achieve. The acquisition of organisational rights in South Africa is not properly regulated. This is because section 18 of the LRA gives the employer and the majority union an unfair advantage against the minority union from exercising its rights to join, represent, and participate in union activities of their choice. This unfettered power cannot be permissible in a free and open democratic society.

It is acceptable that there are good objectives in the majoritarian approach contained in the LRA such as the ones laid down in section 21(8) of the LRA i.e. which is to minimise proliferation of trade union representation in a single workplace and to minimise the financial and administrative burden of requiring an employer to grant organisational rights to more than one registered trade union. Although this is acceptable as a factor to be taken into account, this paper concludes that other factors which bar a trade union to at least approach the employer to seek organisational rights i.e. the threshold agreement entered into between the employer and the majority union under section 18 of the LRA should not be permissible.

⁹⁹ n 21 above.

It must be borne in mind that the employees have the right to choose and join a trade union. The fact that the employers generally find it in their interests to avoid a multiplication of the number of competing organizations does not, in fact, appear sufficient to justify direct or indirect intervention by the State, and especially, intervention by means of legislation in the way in which employees should exercise these rights. By placing one organization at an advantage and the other at a disadvantage in relation to recognition, section 18 of the LRA either directly or indirectly influences the choice of employees regarding the organization to which they intend to belong, since they would want to belong to the union best able to serve them. Legislation's intervention between employer and employee relationship should not give an advantage to one party even in case of recognition of trade union which is the case with section 18 of the LRA. This practice is contrary to the principles embodied in articles 2 and 11 of the convention for Freedom of Association and Protection of the Right to Organise Convention (1948). The freedom of the parties to choose a trade union is a right expressly laid down in this Convention and the Constitution of South Africa.

It is therefore emphasised that section 18 of the LRA, and in particular any collective agreement concluded in terms of this section between the majority trade union and the employer, is in conflict with the aforesaid freedoms. Such a collective agreement limits the fundamental rights of the minority union in an unjustified manner. Such limitation will not be justified in an open and democratic society. Section 18 of the LRA which is an intervention in this relationship by the legislature is not necessary. It is therefore recommended that section 18 of the LRA should be amended entirely.

It is recommended that this problem can be resolved in the following manner. Every union which seeks organisational rights must be afforded an opportunity to be heard through section 21 of the LRA processes as opposed of being prevented to seek those rights by a section 18 agreement. Should the employer refuse to grant organisational rights on the basis that the union lacks sufficient numbers? The matter must be referred to conciliation, should conciliation fail to resolve the dispute either party must be allowed to refer the dispute to arbitration. No strike action should be allowed at this stage. The arbitrator should then make a determination of whether or not the union has sufficient numbers to deserve the rights they are seeking. Should the minority trade union lose the case only then it can be allowed to exercise their right to strike in terms of section 65(2)(a) of the LRA. This will enable the parties to find themselves and also to have an opportunity to ventilate their issues before a neutral person, before embarking into a strike action, which has a tremendous impact on the

economy. In that way the trade union's rights to strike will not be infringed and the parties would still have had an ample opportunity to resolve their dispute.

In so far as the Labour Relations Amendment Act is concerned, the effort made under section 21 of the LRA does not assist. This is because section 18 of the LRA remains intact. The discretion to disregard section 18 of the LRA agreement is left to the arbitrator without laying any guidelines as to what extent and how is the discretion going to be exercised.

As discussed in Chapter 4 above, in the cases of *Impala* and *BECSA* it is clear that in those cases the intention of the parties was to prevent the new unions from enjoying the freedom of association fully, which they achieved by setting a threshold which may be difficult for the new union to meet.

As has been seen in South Africa with the Marikana conflict between the South African Police Services and Lonmin employees which resulted in the death of 44 people on 16 August 2012 following an unprotected strike by mine employees.¹⁰⁰ The Marikana inquiry report was finalized and the report was delivered by the President of South Africa on 26 June 2015. Page two of the Marikana report gives amongst others as the scope of the inquiry being to enquire whether or not Lonmin has responded appropriately to the threat and outbreak of violence which occurred at its premises.¹⁰¹ This clearly shows that employers can be held responsible for what happens in the workplace. Employers are obliged to ensure health and safety of its employees at workplace in terms of the Mine Health and Safety Act.¹⁰² It is regrettable that although this is not condoned it remains a reality that strike actions in South Africa are violent, judging from the Marikana incident. Before Marikana incident, the NUM was still the majority trade union in the platinum industry and the Association of Mineworkers and Construction union AMCU was a minority trade union. The employees on their own embarked on an unprotected strike, while Lonmin Mine insisted that they will only talk to its bargaining structures.¹⁰³ AMCU distanced itself to the unprotected strike. It is against this background that although violence is not condoned this paper argues

¹⁰⁰ By Proclamation No. 50 of 2012 (the Proclamation) which is published in Government Gazette No. 35680 of 12 September 2012 the President appointed the Commission to investigate matters of public, national and international concern arising out of the tragic incidents at the Lonmin Mine in Marikana in the North West Province from Saturday 11 August to Thursday 16 August 2012 which led to the deaths of approximately 44 people, more than 70 persons being injured, approximately 250 people being arrested and damage and destruction of property.

¹⁰¹ Clause 1.1.2 of the Proclamation.

¹⁰² Act 29 of 1996.

¹⁰³ Page 55 of the Marikana Report.

that keeping minority unions outside the bargaining structures on the strength of section 18 agreement, cannot be in the interest of industrial peace.

As stated in the *Bader Bop* case, a minority union may strike in support of a demand for organisational rights. Although this is so, this gives the union a right to strike while on the other hand the LRA permits the employer and the majority union to conclude a threshold. The rights of the union to strike and the right of the employer and majority union to conclude a threshold agreement are therefore in conflict. One of these rights has to be limited in terms of section 36 of the Constitution.¹⁰⁴ In this regard, the right which should be limited is the right to conclude the threshold agreement which is clearly limiting the rights to freedom of association in an unfair manner which is fundamental right in respect to collective bargaining.



¹⁰⁴ Section 36 of the Constitution provides as follows:

“(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

BIBLIOGRAPHY

1. Case law

ACTWUSA v National Industrial Council of the Leather Industry of SA (1989) 10 ILJ 894 (IC).

Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation Mediation and Arbitration 2006 ZALC 44 LC.

Case & another v Minister of Safety and Security & others 1996 (3) SA 617 (CC).

Campaign and another as Amici Curiae 2006 (2) SA 311 (CC).

Chamber of Mines of South Africa v Association of Mineworkers of South Africa and others In re: Association of Mineworkers and Construction Union and others v Chamber of Mines of South Africa and others [2014] 9 BLLR 895 (LC).

Hospersa and Zuid-Afrikaanse Hospitaal (1997) 2 LLD 29 (CCMA).

Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others 1995 (4) SA 877 (CC).

In re: Certification of the Constitution of the Republic of South Africa, 1996 BCLR 1253 (CC).

Kem-Lin Fashions CC v Brunton & Another (2001) 1 BLLR 25 (LAC).

Nehawu v University of Cape Town & Others (2003) 24 ILJ 95 (CC).

NUMSA & others v Bader Bop (Pty) Ltd (2002) 2 BLLR 139 (LAC).

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

OCGAWU & another v Volkswagen of South Africa (Pty) Ltd & another [2002] 1 BALR 60 (CCMA).

S v Makwanyane 1995 (3) SA 391 (CC).

SACCAWU v Speciality Stores [1998] 4 BLLR 352 (LAC).

SANDU v Minister of Defence and another 1999 (4) SA 469 (CC).

SA National Defence Union v Minister of Defence and others [2007] 9 BLLR 785 (CC).

South Africa and Others (CC) 1996 (4) SA 672 (CC).

South African National Defence Union v Minister of Defence & another (1999) 20 ILJ 2265 (CC).

The Azanian Peoples Organisation (AZAPO) and Others v The President of the Republic of South Africa and Others 1996 (4) SA 672 (CC).

Minister of Health & another NO v New Clicks SA (Pty) Ltd and others (Treatment Action

Minister of Defence Union & others v SA National Defence Union: Minister of Defence & others v SA National Defence Union & another (2006) 27 ILJ 2276 (SCA).

Uasa –The union v Impala Platinum [2012] 7 BLLR 708 (LAC).

Uasa - The Union and another v BHP Billiton Energy Coal SA Ltd & another [2013] 6 BLLR 602 (LC).

2. Books

Brassey M *Commentary on the Labour Relations Act* (revision service 2, 2006 at A3-23-24).

Du Toit D, Cooper C, Giles GS *Labour Relations Law, A comprehensive Guide (6 ed)* Lexis Nexis (2015).

Van Niekerk A and Smit N (managing eds), Christianson MA, McGregor M, and Van Eck BPS *Law@work* (3rd ed) (Lexis Nexis (2012).

Venter R, Levy A, Conradie, M, M. Holtzhausen M *Labour Relations in South Africa* (4th ed), Oxford University Press Southern Africa (2011).

3. Journals

Ben-Israel Ruth, *International Labour Standards: The Case of Freedom to Strike*, Kluwer Law and Taxation Publishers (1988) 27.

Mischke “Getting a Foot in the Door: Organisational Rights and Collective Bargaining in terms of the LRA” (2004) CLL 13 (6) 51.

Tembeka Ngcukaitobi – *Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana* (2013) 34 ILJ 836 2013.

4. Legislation

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

Employment Equity Act 55 of 1996.

Interim Constitution of the Republic of South Africa Act 200 of 1993.

Labour Relations Amendment Act 6 of 2014.

Labour Relations Act 66 of 1995.

Labour Relations Bill in GG 16259 of 10 February 1995. The Explanatory Memorandum is published at (1995) 16 ILJ 278 at 292 to 293.

Mine Health and Safety Act 29 of 1996.

Proclamation No. 50 of 2012.

5. International Law Instruments

Freedom of Association and Protection of the Right to Organise Convention (1948).

International Covenant on Civil and Political Rights (1966).

Universal Declaration of Human Rights (1948).

6. Reports

Marikana Commission of Inquiry: report on matters of public, national and international concern arising out of the tragic incidents at the Lonmin mine in Marikana, in the North West Province published on 25 June 2015.

