The impact of Labour Relations Act 66 of 1995 (as amended) on the right to freedom of association

by

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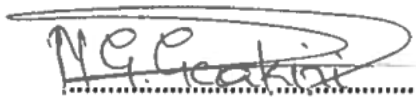
DECLARATION

I, NOMFUSI GLADYS GCAKINI, Student number 31522335, hereby declare that the thesis entitled '**The impact of Labour Relations Act 66 of 1995 (as amended) on the right to freedom of association**' is my own original work. It has been composed by myself and that the work has not been submitted for any other degree or professional qualification. The thesis is hereby submitted to the University of South Africa, in fulfilment of the requirements for the LLD in Labour Law. I confirm that the work submitted is my own.



Nomfusi Gladys Gcakini

2023-08-31

Date

DEDICATION

I owe my academic success to my parents. To my father, Mzamo Dlamini Ziz'elimnyama neenkomo zalo, and my mother, Lisa Hlathi Jambase, thank you. A special thanks to my mother for all your sacrifices. On the cusp of death, you encouraged me to further my studies. You believed in me, even though I could not do so myself. To my paternal grandmother, Malimakhwe Shweme Ntabay'inyukwa inyukwa ngamasongololo kuphela, and my maternal grandmother, Ncuthu Khwalo Sohobese, thank you for bringing us loving parents.

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SUMMARY

The primary aim of this thesis is to inquire into the impact of the Labour Relations Act 66 of 1995 as amended on the right to freedom of association. The thesis examines not only the constitutional and statutory context of freedom of association but also the contours of freedom of association as exemplified in seminal labour law cases of recent vintage.

The right to freedom of association finds explicit expression in section 27 of the Interim Constitution and section 23 of the 1996 Constitution. It is important, however, to appreciate that section 23 is merely inclusive; it provides for some thought and not all the constitutional guarantees that go with a right to freedom of association. A preliminary task, therefore, would be to locate the other sources of the legal rules bearing on the right to freedom of association outside section 23(1). Insofar as the Constitution itself is concerned, one would need to consider, among other things, section 23(1) and (2) to the extent that they intertwine with section 23(3), (4) and (5) of the Labour Relations Act 66 of 1995. One must also consider how the right to fair labour practices interacts and intersects with other fundamental rights such as the right to freedom of association, freedom of expression, right to assembly, and political rights, including the rights to citizenship and security and the right to be free from forced labour, servitude and slavery. Furthermore, the Labour Relations Act 66 of 1995 gives effect to the provision of the Constitution on freedom of association. Besides legislation, case law provides another vital source of legal rules bearing on the right to freedom of association. However, merely locating the indigenous sources of the rules pertaining to the right to freedom of association would not be enough. To obtain a broader and clearer scope of the impact of the Labour Relations Act on freedom of association, it is equally important to consider international instruments, International Labour Organization Conventions, Recommendations, and Bills of Rights of comparable jurisdictions that have attempted to articulate the attributes of freedom of association.

Keywords: freedom of association, collective bargaining, organisational rights, international instruments.

OPSOMMING

Die hoofdoel van hierdie proefsrkif is om navraag te doen oor die impak van die Wet op Arbeidsverhoudinge 66 van 1995 soos gewysig op vryheid van assosiasie. Die proefskrif ondersoek nie net die grondwetlike en statutêre konteks van vryheid van assosiasie nie, maar ook die kontoere van vryheid van assosiasie soos geïllustreer in onlangse seminale arbeidsregsake.

Die reg op vryheid van assosiasie is uitgedruk in artikel 27 van die Tussentydse Grondwet en artikel 23 van die 1996 Grondwet. Dit is egter belangrik om te besef dat artikel 23 bloot inklusief is; dit maak voorsiening vir ’n bietjie denke en nie al die grondwetlike waarborge wat met ’n reg op vryheid van assosiasie gepaard gaan nie. ’n Voorlopige taak sou dus wees om die ander bronne van die regsreëls wat betrekking het op die reg op vryheid van assosiasie buite artikel 23(1) op te spoor. Wat die Grondwet self betref, sal ’n mens onder andere artikel 23(1) en (2) moet oorweeg in soverre dit met artikes 23(3), (4) en (5) van die Wet op Arbeidsverhoudinge 66 van 1995 verweef is. ’n Mens moet ook oorweeg hoe die reg op billike arbeidspraktyke interaksie het en kruis met ander fundamentele regte soos die reg op vryheid van assosiasie, vryheid van uitdrukking, reg op vergadering en politieke regte, insluitend die regte op burgerskap en sekerheid en die regte om vry te wees van slawerny, knegskap en dwangarbeid. Verder gee die Wet op Arbeidsverhoudinge 66 van 1995 uitvoering aan die bepaling van die Grondwet oor vryheid van assosiasie. Benewens wetgewing verskaf regspraak die ander belangrike bron van regsreëls wat betrekking het op die reg op vryheid van assosiasie. Dit sal egter nie genoeg wees om bloot die inheemse bronne van die reëls rakende die reg op vryheid van assosiasie op te spoor nie. Om ‘n breër en duideliker omvang van die impak van die Wet op Arbeidsverhoudinge op vryheid van assosiasie te verkry, is dit ewe belangrik om internasionale instrumente, Internasionale Arbeidsorganisasie-konvensies, aanbevelings en handveste van regte van vergelykbare jurisdiksies wat gepoog het om die eienskappe van vryheid van assosiasie te verwoord, te oorweeg.

Sleutelwoorde: vryheid van assosiasie, kollektiewe onderhandeling, organisasieregte, internasionale instrumente.

ABBREVIATIONS AND ACRONYMS

ACHR	American Convention on Human Rights
AMCU	Association of Mineworkers and Construction Union
AU	African Union
BCEA	Basic Conditions of Employment Act 75 of 1997
BECSA	Billiton Energy Coal South Africa
CCMA	Commission for Conciliation, Mediation and Arbitration
CDPR	Committee for Dispute Prevention and Resolution
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CFA	Committee on Freedom of Association
COSATU	Congress of South African Trade Unions
DEMAWUSA	Democratic Municipal and Allied Worker's Union of South Africa
EEA	Employment Equity Act 55 of 1998
GG	Government Gazette
GN	Government Notice
ILO	International Labour Organization
ILR	International Labour Review
IMATU	Independent Municipal and Allied Trade Union
KAWU	Kungwini Amalgamated Workers Union
LAC	Labour Appeal Court
LRA	Labour Relations Act
MATUSA	Municipal and Allied Trade Union of South Africa
MEIBC	Metal and Engineering Industrial Bargaining Council
NAACP	National Association for the Advancement of Colored People
NEASA	National Employers' Association of South Africa
NEHAWU	National Education, Health and Allied Workers' Union
NEPAD	New Partnership for Africa's Development
NLRA	National Labour Relations Act of 1935
NSUWU	National Security and Unqualified Workers Union
NUM	National Union of Mineworkers
NUMSA	National Union of Metalworkers of South Africa
NUNW	National Union of Namibian Workers

OCGAWU	Oil, Chemical, General and Allied Workers Union
PAJA	Promotion of Administrative Justice Act
PCASA	Plastic Convertors Association of South Africa
POPCRU	Police and Prisons Civil Rights Union
PVC	Polyvinyl chloride
RGA	Regulation of Gatherings Act 205 of 1993
SA	South Africa
SACOSWU	South African Correctional Services Workers' Union
SACTWU	Southern African Clothing and Textile Workers' Union
SADC	Southern African Development Community
SADCC	Southern African Development Coordination Conference
SALGA	South African Local Government Association
SAMWU	South African Municipal Workers' Union
SANDF	South African National Defence Force
SANDU	South African National Defence Union
SATAWU	South African Transport Workers Union
SATUCC	Southern Africa Coordination Council
SCA	Supreme Court of Appeal
SWAPO	South West African People's Organisation
TDA	Trade Dispute Act
UASA	United Association of South Africa
USA	United States of America
VWSA	Volkswagen South Africa

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CHAPTER 1: INTRODUCTION AND DESCRIPTION OF THE STUDY

1.1 Introduction

It can hardly be disputed that freedom of association is the centrepiece of both political and workplace democracy.[1] Freedom of association is the motor keeping the wheels of collective labour law on the move. It is still running. The recent Constitutional Court decision in *POPCRU v SACOSWU*,[2] soon after the *Chamber of Mines v AMCU* trio of cases,[3] is therefore unsurprising.

The primary aim of this study is to inquire into the impact of the Labour Relations Act 66 of 1995 as amended (hereinafter the LRA) on freedom of association. The study examines not only the constitutional and statutory context of freedom of association but also its contours as exemplified in seminal labour law cases of recent vintage.

The right to freedom of association finds explicit expression in section 27 of the Interim Constitution[4] and section 23 of the Constitution of the Republic of South Africa, 1996 (hereinafter the Constitution). It is important, however, to appreciate that section 23 on the legal effect of a collective agreement is merely inclusive; it provides for some, though not all, the constitutional guarantees that go with a right to freedom of association. A preliminary task, therefore, would be to locate the other sources of the legal rules bearing on the right to freedom of association outside section 23(1). In the Constitution, one would need to consider, among other things, sections 23(1) and 23(2) to the extent that they intertwine with sections 23(3), 23(4)

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1 *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC) [48] (hereinafter South African National Defence Union v Minister of Defence (CC)). See also *National Union of Metalworkers of SA v Bader Bop (Pty) Ltd* 2003 (3) SA 513 (CC) (hereinafter *Bader Bop*). For a full discussion, see Nicolas Valticos, 'International Labour Standards and Human Rights: Approaching the Year 2000' (1998) 137 ILR 135; Eric Gravel and Quentin Delpech, 'International Labour Standards: Recent Developments in Complementarity between the International and National Supervisory Systems' (2008) 147 ILR 403.

2 *POPCRU v SACOSWU* 2019 (1) SA 73 (CC).

3 See eg *Chamber of Mines of SA acting in its own name and on behalf of Harmony Gold Mining Co Ltd v Association of Mineworkers & Construction Union* (2014) 35 ILJ 3111 (LC) (hereinafter *Chamber of Mines/AMCU I*); *Association of Mineworkers & Construction Union v Chamber of Mines of SA acting in its own name & on behalf of Harmony Gold Mining Co (Pty) Ltd* (2016) 37 ILJ 1333 (LAC) (hereinafter *Chamber of Mines/AMCU II*); *Amcu v Chamber of Mines of South Africa* 2017 (3) SA 242 (CC) (hereinafter *Chamber of Mines/AMCU III*).

4 Constitution of the Republic of South Africa Act 200 of 1993 (hereinafter the Interim Constitution).

and 23(5) of the LRA; also, how the right to fair labour practices interacts and intersects with other fundamental rights such as the right to freedom of association,[5] freedom of expression,[6] right to assembly,[7] and political rights.[8] Furthermore, the LRA gives effect to the provision of the Constitution on freedom of association. Besides legislation, case law provides the other vital source of legal rules bearing on the right to freedom of association. However, merely locating the indigenous sources of the rules pertaining to the right to freedom of association would not be enough. To obtain a broader and clearer scope of the impact of the LRA on freedom of association, it is equally important to consider international instruments, International Labour Organization (ILO) Conventions and Recommendations, and Bills of Rights of comparable jurisdictions that have attempted to articulate the attributes of freedom of association.

Once the relevant sources and legalities have been established, the next and more absorbing task would be to attempt to atomise them into discrete rights so that each right may be conveniently discussed separately though not in isolation from the other rights. In this connection, a possible approach would be to adopt the atomisation of the right to freedom of association in sections 23(2) and 23(3) of the Constitution and make each constitutional guarantee the subject of a chapter discussion, but always remembering, as mentioned earlier, that section 23(1) is inclusive rather than all-embracing. Further, some of the guarantees in section 23 are more topical than others, and this is a factor to consider when deciding what topics to include in or exclude from the main discussion. Discharging this second task forms the main corpus of the thesis.

Throughout the discussion it is anticipated that the role of the Constitutional Court will occupy a prominent place for the obvious reason that it is the court with ultimate jurisdiction over matters pertaining to the interpretation, protection, and enforcement of the fundamental rights to a fair labour practice. The relevant decisions of the Labour Court, Labour Appeal Court, Supreme Court of Appeal and Constitutional Court will, therefore, be subjected to critical analysis with a view,

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5 Section 18 of the Constitution.
6 Section 16 of the Constitution.
7 Section 17 of the Constitution.
8 Section 19 of the Constitution.

among other things, to eliciting any discernible juridical approaches to the interpretation of the right to freedom of association and whether any such approaches are consonant with the spirit and intention of the Constitution. There will also be an attempt to assess how the judicial interpretation of the right to freedom of association impacts not only the LRA but also public policy.

In a discussion of this nature, it is desirable, if not indispensable, also to consider the jurisprudence of other jurisdictions, at the very least because the 1996 Constitution is still in its nascent stage with the result that the body of corresponding constitutional case law is evolving. To confine the discussion to homegrown jurisprudence would clearly be self-limiting. Furthermore, sections 39(1)(*b*) and 39(1)(*c*) of the Constitution do, in any event, exhort the courts to have regard to international law and foreign law when fundamental rights are at issue.[9] For these reasons, it is proposed to draw analogies with comparable jurisdictions that have a legal history of judicial interpretation of the right to freedom of association.

In this connection, it is noted that the traditional approach of South African jurisprudence has been to draw from western common law or civil jurisdictions but to overlook, on the whole, the jurisprudence developed by judges and scholars in other African countries closer to home such as Botswana, Lesotho, Namibia, and further afield such as Malawi. This is both a paradox and a serious omission at the very least because these countries share in many respects a common historical, legal, cultural, or socio-economic heritage with South Africa.

The discussion will, therefore, among other things, seek to make good this omission and include African jurisdictions in the comparative analysis. In addition, as part of this analogical approach, the discussion will draw from international human rights instruments including the Universal Declaration of Human Rights (1948) (hereinafter the UDHR),[10] the International Covenant on Civil and Political Rights (hereinafter the ICCPR),[11] the European Convention for the Protection of Human

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9 Section 39(1)(*b*) and (*c*) of the Constitution.

10 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR), art 10.

11 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 14(1).

Rights and Fundamental Freedoms (1950) (hereinafter the ECHR),[12] and the African Charter on Human and Peoples' Rights (1981) (hereinafter the African Charter).[13]

The right to freedom of association is also expressly recognised in several ILO Conventions.[14] Examples are the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87) (hereinafter Convention 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No 98) (hereinafter Convention 98). This analogy with international human rights instruments is consonant with section 39(1)(*b*) of the South African Constitution, which enjoins the courts to consider public international law when interpreting fundamental rights.

Finally, it is submitted that a discussion of this nature cannot be complete without attempting to highlight any areas of shortcomings and suggesting appropriate remedial measures. In this regard, the focus will be on two areas: (a) the provisions of the Constitution and their interpretation by the courts, and (b) the provisions of the LRA. First, stock needs to be taken of any weaknesses and deficiencies in the provisions of the Constitution and their interpretation by judges. It is hoped that the twenty-four years of constitutional enterprise and twenty-two years of labour adjudication since the advent of the LRA have provided the country, including the courts, the legislature, and scholars, with an ideal opportunity to negotiate the learning curve and correct any mistakes and fill any gaps. The question, however, is whether this opportunity has, in fact, been taken. Secondly, there is little doubt

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12 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), art 6(1).

13 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter), art 7(1). This charter is also known as the Banjul Charter.

14 With regard to international law on freedom of association at the workplace, the Constitutional Court observed in *Bader Bop* [31]: 'An important principle of freedom of association is enshrined in art 2 of the Convention on Freedom of Association and Protection of the Right to Organise which states:

"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."

Both committees have considered this provision to capture an important aspect of freedom of association in that it affords workers and employers an option to choose the particular organisation they wish to join. Although both committees have accepted that this does not mean that trade union pluralism is mandatory, they have held that a majoritarian system will not be incompatible with freedom of association, as long as minority unions are allowed to exist, to organise members, to represent members in relation to individual grievances and to seek to challenge majority unions from time to time.'

that the LRA, the main piece of legislation providing a framework for a collective bargain, is under academic scrutiny. A striking example is the tragic events that occurred in Marikana near Rustenburg in North West Province in August 2012. It is of utmost importance, therefore, not to confine the remedial exercise to the Constitution and/or its interpretation only but also to extend the exercise to the relevant provisions of the LRA.

1.2 Problem statement

With the demise of the duty to bargain,[15] organisational rights have profound implications for collective bargaining, freedom of association, trade unions, and employers' organisations.[16] One of the core objectives of the LRA is to promote orderly collective bargaining.[17] In order to advance the primary objective of promoting collective bargaining, the LRA grants unions and employers certain rights and leaves it to the parties to determine whether and to what extent those rights should be exercised in collective bargaining process.[18] The emergence of militant trade unions marked by violent strikes and inter-union rivalry disputes can be traced to the struggle for acquiring organisational rights.[19]

No doubt, the tragic events on the platinum belt in August 2012 have brought to the fore the problems in the collective bargaining framework established ten years

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15 See *National Union of Mineworkers v East Rand Gold & Uranium Co Ltd* 1992 (1) SA 700 (A); *Mutual and Federal Insurance Company Ltd v Banking Insurance Finance and Assurance Workers Union* 1996 (3) SA 395 (A); *Black Allied Workers Union v PEK Manufacturing Co (Pty) Ltd* (1990) 11 ILJ 1095 (IC) (hereinafter *PEK*). See also Clive Thompson, 'A Bargaining Hydra Emerges from the Unfair Labour Practice Swamp' (1989) 10 ILJ 808.

16 J Kruger and CI Tshoose, 'The Impact of the *Labour Relations Act* on Minority Trade Unions: A South African Perspective' (2013) 16 PELJ 284, 285/487; T Cohen, 'Limiting Organisational Rights of Minority Unions: *POPCRU v Ledwaba* 2013 11 BLLR 1137 (LC)' (2014) 17 PELJ 2209.

17 Section 1(*d*) of the LRA.

18 *South African National Defence Union v Minister of Defence; Minister of Defence v South African National Defence Union* 2007 (1) SA 402 (SCA) (hereinafter *South African National Defence Union v Minister of Defence* (SCA)).

19 See eg *Chamber of Mines/AMCU I* [46]; *Chamber of Mines/AMCU II*; *Chamber of Mines/AMCU III*.

ago.[20] The consequences of these developments for labour relations and labour law are captured by the authors of an authoritative labour text as follows:[21]

> Some took the view that the country's labour relations had regressed to the state under apartheid. There was also a perception that aspects of the legislative framework had continued to intensified adversarialism and a rising tide of violence prone strikes. However, its arguable that the crisis in the labour relations system manifested in the aftermath of Marikana, if it is indeed a crisis, has much more to do with slow economic growth, continuing high unemployment, rising inequality and persistent poverty than with the legislative framework for labour relations. The leadership struggles in COSATU and some affiliates, disaffection of many workers with COSATU that has seen the emergence of rival unions and the troubled relationship between COSATU and the ANC, as well as the increasingly tarnished image of the ANC in the wake of well-publicised indiscretions or misconduct by leading politicians, have also contributed to the sense of crisis.

As a result, the question of collective bargaining could not be put into perspective today without reflecting on the violent events in Marikana in North West Province, De Doorns in the Western Cape, and elsewhere, including the ongoing political factures and economic difficulties which have propelled the introduction of the most recent set of amendments to the LRA and the Basic Conditions of Employment and Employment Equity Act 75 of 1997 (hereinafter the BCEA). At least three questions arise. What impact do the 2014 amendments to the LRA have on freedom of association, and, in particular, on collective bargaining? Is it likely to have a positive impact on labour-management relations? Or are the amendments likely to facilitate the granting of organisational rights to minority trade unions? These questions are not merely academic. The acrimonious labour relations climate on the platinum belt and the violent inter-union rivalry impact adversely on the fabric of society.

To understand the impact of the Labour Relations Amendment Act 6 of 2014 on freedom association, one has to examine organisational rights and, more specifically, the threshold question of determining what constitutes a union being sufficiently representative of employees in a workplace in order for a union to acquire organisational rights. Without meeting the threshold requirement of being sufficiently representative of employees in a workplace, a union cannot acquire

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20 Martin Brassey, 'Labour Law after Marikana: Is Institutionalised Collective Bargaining in SA Wilting? If So, Should We Be Glad or Sad?' (2013) 34 ILJ 823; Tembeka Ngcukaitobi, 'Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana' (2013) 34 ILJ 836.

21 Darcy du Toit and others, *Labour Relations Law: A Comprehensive Guide* (6th edn, LexisNexis 2015) 69.

organisational rights and by implication participate meaningfully in the workplace. The consequence of the lack of representativeness in a workplace is derecognition by the employer, usually at the behest of the majority union. The issue of representativeness is thus existential for trade unions.[22]

1.3 Aims and objectives of the study

1.3.1 Aims of the study

The primary aim of this study is to inquire into the impact of the LRA on freedom of association. The study examines not only the constitutional and statutory context of freedom of association but also the contours of freedom of association as exemplified in seminal labour law cases of recent vintage. Lastly, the study seeks to determine whether the freedom of association is effective and which changes should be implemented to improve its role.

1.3.2 Objectives of the study

The following objectives are central to this study:

(a) To provide a general overview of the role and impact of the LRA on freedom of association in South Africa.
(b) To critically consider the effectiveness of the freedom of association.
(c) To suggest mechanisms which may be implemented to ensure greater effectiveness of the right to freedom of association and the protection of workers' rights in the workplace.
(d) To make sound recommendations and findings to improve the effectiveness of the right to freedom of association.

1.4 Significance of the study

The significance of the study is to outline and analyse the impact of the LRA on freedom of association. The study also examines the constitutional and statutory context of freedom of association and the contours of freedom of association as exemplified in seminal labour law cases of recent vintage. The right to freedom of

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22 *SA Union of Journalists v SA Broadcasting Corporation* (1999) 20 ILJ 2840 (LAC), [1999] 11 BLLR 1137 (LAC).

association finds explicit expression in section 27 of the Interim Constitution and section 23 of the 1996 Constitution. It is important, however, to appreciate that section 23 of the 1996 Constitution is merely inclusive; it provides for some of the constitutional guarantees that go with a right to freedom of association. The study involves the preliminary task of locating the other sources of the legal rules affecting the right to freedom of association outside section 23(1). As for the Constitution itself, one would need to consider, among other things, sections 23(1) and 23(2) to the extent that they intertwine with sections 23(3), 23(4) and 23(5) of the LRA. To provide a broader and clearer scope of the impact of the LRA on freedom of association, the study will include international instruments, ILO Conventions and Recommendations, and Bills of Rights of comparable jurisdictions that have attempted to articulate the attributes of freedom of association.

1.5 Research questions

The main purpose of research questions is to express and illuminate what is to be investigated in the research. This study seeks to answer the following questions:

(a) What is the impact of the LRA on the right to freedom of association on the South African workforce?
(b) Which are the international instruments on the scope of the impact of the LRA on the right to freedom of association?
(c) To what extent does the LRA impact on right to freedom of association in South African labour law?
(d) Which recent labour law cases assist in understanding the impact the LRA has on the right to freedom of association?
(e) How do international and comparative analyses assist one to understand the right to freedom of association?

1.3 Literature review

If one surveys the labour law landscape, it is easy to encounter impeccable sources that have examined the trajectory of the domestic jurisprudence on freedom of

association.[23] However, to place the right to freedom of association in its contemporary context, the response to the tragic events in Marikana has promoted renewed focus on the labour relations framework and the LRA itself. Brassey[24] asked whether institutionalised collective bargaining in SA was wilting, and, if so, whether we should be glad or sad. For his part, Ngcukaitobi[25] considered the strike law, structural violence, and inequality in the platinum hills of Marikana. After discussing the *POPCRU* case, Cohen concluded:

> [T]he Marikana experience and the strike violence that has marred the South African labour market in recent times reveal the flaws in the framework and the changed dynamic of the collective bargaining environment. It may be time to return to the drawing board.[26]

In dealing with the impact of the LRA on minority unions, other prominent commentators[27] observed:

> When a minority union is faced with a situation where it loses recognition (in circumstances where it has constantly reached the threshold that existed in the

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23 See Mpfariseni Budeli, 'Workers' Rights to Freedom of Association and Trade Unionism in South Africa: An Historical Perspective' (2009) 15 Fundamina 57; Christopher Albertyn, 'Closed Shop Agreements & the Principle of Majority Unionism: Opening the Door of the Closed Shop' (1984) 2(2) Indicator South Africa 14; CJ Albertyn, 'Freedom of Association and the Morality of the Closed Shop' (1989) 10 ILJ 981; C Albertyn, 'The Closed Shop and Fairness' (1991) 7 EL 74; Brenda Grant, 'In Defence of Majoritarianism: Part 1 – Majoritarianism and Freedom of Association' (1993) 14 ILJ 303; Brenda Grant, 'In Defence of Majoritarianism: Part 2 – Majoritarianism and Freedom of Association' (1993) 14 ILJ 1145; T Madima, 'Comrades up in Arms: Expulsion of Union Members Discussed' (1993) 9 EL 134; Takalani Madima, 'Freedom of Association and the Concept of Compulsory Trade Union Membership' [1994] TSAR 545; T Madima, 'Freedom of Association and a Bill of Rights' [1994] LRSA 116; M Olivier, 'Freedom of Association and Closed-Shop Agreements (final)' [1994 April] De Rebus 352; MP Olivier and O Potgieter, 'The Right to Associate Freely and the Closed Shop' [1994] TSAR 289; MP Olivier and O Potgieter, 'Right to Associate Freely and the Closed Shop [continued]' [1994] TSAR 443.

24 Brassey, 'Labour Law after Marikana' 823.

25 Ngcukaitobi, 'Strike Law, Structural Violence and Inequality' 836. See also Jan Theron, Shane Godfrey and Emma Fergus, 'Organisational and Collective Bargaining Rights through the Lens of Marikana' (2015) 36 ILJ 849.

26 Cohen, 'Limiting Organisational Rights of Minority Unions' 2222 elaborates: 'Abject poverty, a loss of confidence in existing bargaining structures, and disappointed expectations have led to the alienation of unskilled and semi-skilled vulnerable employees from majority unions. Minority unions have taken up the cudgels of frustrated and disempowered employees – that have tired of the "co-dependent comfort zone" that majoritarianism has engendered. The Marikana experience has largely been attributed to the unsuitability of the current collective bargaining model within the South African socio-economic and political landscape.' See also David Neves and Andries du Toit, 'Working on the Margins: Poverty and Economic Marginality in South Africa' (2010) 3 LDD 7.

27 Kruger and Tshoose, 'The Impact of the *Labour Relations Act* on Minority Trade Unions' 317/487. See also Mpfari Budeli-Nemakonde, 'Organisational Rights for Minority Trade Unions: A Reflection on Ngcobo J's Judgement in *NUMSA v Bader Bop (Pty) Ltd* (2003) 24 ILJ 305 (CC)' (2017) 32 SAPL 1.

> previous collective agreement) due to the fact that the majority trade union and the employer raised the threshold for a trade union to be regarded as sufficiently representative in an new collective agreement, such union could consider the option of approaching the Labour Court for a declaratory order to the effect that the Constitutional right of freedom of association of its members has been infringed due to the loss of recognition brought by the raising of the threshold in a manner that is contrary to international standards. If this application is refused the matter should be taken through stages of appeal, through the Labour Appeal Court, the Supreme Court of Appeal, and to the Constitutional Court, if necessary.

It is against this backdrop that a critical examination of the impact of the LRA on freedom of association is conducted in the present context.

1.4 Research methodology

As this is primarily a desktop study, the research has heavily relied on library resources such as articles, books, statutes and decided cases. Chapter 2 of this thesis discusses case law and statutes on the right to freedom of association in South Africa. In addition, the research includes identifying the yardsticks set at the regional and international levels. For instance, the ILO establishes norms and standards on freedom of association that countries, including South Africa, must meet.

A case study approach is adopted to these questions while recognising that answers must be country-specific. It explores the state of, and prospects for strengthening, freedom of association as a key component of a right to fair labour practices in South Africa. It does this by comparing the approaches adopted in the United Kingdom, Botswana, Lesotho, and Malawi. Alan Watson analysed the importance of considering comparative perspectives:[28]

> Law shows us many paradoxes. Perhaps the strangest of all is that, on the one hand, a people's law, can be regarded as being special to it, indeed a sign of that people's identity, and it is in fact remarkable how different in important detail even two closely related systems might be; on the other hand, legal transplants – the moving of a rule or a system of law from one country to another, or from one people to another – have been common since the earliest recorded history.

In the context of Watson's assertion, the study is mindful that the Constitutions of these countries differ from the South African Constitution in many respects.

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[28] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, The University of Georgia Press, 1993) 21.

However, they do share some common features regarding their constitutional provisions for freedom of association.

1.5 Organisation of the study

This study comprises six chapters. A synopsis of these chapters is provided below.

Chapter 1: Introduction and background of the study

Chapter 1 sets the scene. It introduces the topic of the thesis, the right to freedom of association in the context of labour law. To appreciate the discussion of the impact of the LRA on this right, it is necessary to explain the overarching role of this right as the centrepiece of political and workplace democracy. The chapter also announces the problem statement and lists the four research questions. The literature review mentions several secondary sources. The research methodology is explained as a desktop study of books, articles, statutes, and case decisions. The structure of the thesis is described.

Chapter 2: Legal framework on the right to freedom of association in South Africa

The second chapter identifies and demarcates in broad outline the components and parameters of freedom of association embodied in the LRA. The chapter introduces the legal framework on the right to freedom of association. It defines the scope and nature of the human rights perspective on this right. It describes the right before and after the Constitution, and then gives an overview of the right of freedom of association and collective bargaining, including the constitutional and statutory context, historical overview of collective bargaining South Africa, and the levels of collective bargaining. The discussion then moves to the statutory definition of the word 'workplace'. The interplay between collective bargaining and the right to freedom of association is explored, and the litigation in the *Chamber of Mines/AMCU* case[29] is described. The chapter then discusses striking to secure organisational rights, taking into consideration several leading cases. The question

[29] See *Chamber of Mines/AMCU I*; *Chamber of Mines/AMCU II*; *Chamber of Mines/AMCU III*.

is posed whether there is collaboration in support of bargaining rights or circumvention of the Labour Relations Act.

The Constitution sought, among other things, to guarantee freedom of association, the rights of employees to form and join trade unions and to strike, and the rights of trade unions, employers, and employers' organisations to bargain collectively.[30] In the first *Certification* case, *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996*, the Constitutional Court made the following instructive observations:[31]

> Collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers therefore need to act in concert to provide them collectively with sufficient power to bargain effectively with employers. Workers exercise collective power primarily through the mechanism of strike action.

In furtherance of the fundamental right to fair labour practices,[32] the LRA establishes a purpose-built system for both collective bargaining and organisational rights. The regulatory framework is mostly consistent with international and constitutional obligations.[33] Trade unions and employers' organisations are the chief motor of collective bargaining.[34]

The right to freedom of association is regulated by sections 4[35] and 6[36] of the LRA. In accordance with section 4, employees have the right to form[37] and to become members of trade unions.[38] The employees also have a right not to form a union and a right to quit membership of a union. Furthermore, they have the right to

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30 See generally, Barney Jordaan, 'Collective Bargaining under the New Labour Relations Act: The Resurrection of Freedom of Contract' (1997) 1 LDD 1, 2; Darcy du Toit, 'Industrial Democracy in South Africa's Transition' (1997) 1 LDD 39; Karl E Klare, 'Forum Contribution: Labour Law for the 21st Century: Stalled Reform in the United States' (1997) 1 LDD 103; Vishwas Satgar, 'The LRA and Workplace Forums: Legislative Provisions, Origins, and Transformative Possibilities' (1998) 2 LDD 43; Halton Cheadle, 'Collective Bargaining and the LRA' (2005) 9 LDD 147.

31 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC) [66].

32 *Ex parte Chairperson of the Constitutional Assembly* [7]; *National Education Health and Allied Workers Union v University of Cape Town* 2003 (3) SA 1 (CC) [33]–[35], [40]–[41] (hereinafter *NEHAWU v UCT*); *Bader Bop* [13].

33 See eg Convention 87; Convention 98. See also *Chamber of Mines/AMCU III* [60]–[61].

34 Compare Budeli, 'Workers' Rights to Freedom of Association and Trade Unionism'.

35 Section 4 of the LRA deals with employees.

36 Section 6 of the LRA regulates the rights in respect of employers.

37 Section 4(1)(*a*) of the LRA.

38 Section 4(1)(*b*) of the LRA.

participate in lawful trade union activities,[39] to participate in the election of the trade union representative, and to stand for election as office-bearers, officials,[40] or trade union representatives.[41]

Chapter 3: Finding a foothold in the workplace: The perils of majoritarianism; the litmus test of representivity and extension of collective agreements to non-parties

Chapter 3 gives the background to the source of organisational rights in South African labour legislation and how a registered trade union acquires them. In discussing a trade union's finding a foothold in the workplace it is necessary to consider the sources of organisational rights.

The organisational rights are exercised in a workplace, and it becomes imperative to comprehend the concept 'workplace' before one can decide on the representativeness of a union. This chapter also analyses what constitutes a workplace as provided by section 213 of the LRA by referring to decided cases and arbitration awards. The broader public policy considerations and unanswered questions concerning the appropriateness of majoritarianism warrant sustained examination.

Chapter 3 also considers the complex issue and questions associated with the phrase 'sufficiently representative'. The focus is mainly on issues that have been considered by arbitrators and the Labour Court and Labour Appeal Court in giving content and substance to the threshold requirement of representativeness. In considering the perils of majoritarianism, the chapter deals with minority unions' perennial problem: shifting thresholds. Compulsory participation in statutory councils is explored. The chapter also discusses selected case law on the scope and nature of section 18 of the Labour Relations Act in the context of five important cases. Beyond the narrow interpretive approach to the statutory definition of 'workplace' and unanswered questions about the appropriateness of majoritarianism, the second and critical question that the *Chamber of Mines/AMCU*

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39 See *National Union of Public Service & Allied Workers obo Mani v National Lotteries Board* 2014 (3) SA 544 (CC).
40 Section 4(2)(*c*) of the LRA.
41 Section 4(2)(*d*) of the LRA.

case[42] is concerned with is the limitation of the members of the minority union's right as the result of the extension of collective agreement to non-parties. It will be recalled that section 65 of the LRA prohibits striking by anyone who 'is bound by any arbitration award or collective agreement that regulates the issue in dispute'.[43] So the exploration of this aspect of the *Chamber of Mines/AMCU III* judgment in the Constitutional Court forms the focal point of analysis in this chapter. The chapter deals with freedom of association and trade union security arrangements in the context of an agency shop agreement and a closed shop agreement. Section 18 of the Labour Relations Act is examined in the context of recognition agreements in the mining sector. Taking into consideration the litmus test of representative and thresholds, the discussion takes into account the extension of collective agreements to non-parties and the extent to which the Labour Relations Amendment Act 8 of 2018 alleviates the plight of minority parties in relation to aspects such as the extension of collective agreements, on freedom of association. picketing, and registration requirements for trade unions and employers' organisations' duty to keep records and two provide information to the registrar.

Chapter 4: International instruments on freedom of association

Chapter 4 opens with an account of the pertinent international instruments on freedom of association. A fundamental observation is that an understanding of freedom of association in modern labour law landscape must begin with the primary source of South African labour law and the ILO Conventions.

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42 See *Chamber of Mines/AMCU I*; *Chamber of Mines/AMCU II*; *Chamber of Mines/AMCU III*.

43 Section 65(1) of the LRA provides: 'No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if– … (*a*) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute'. Section 65(3) of the LRA provides: 'Subject to a collective agreement, no person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or lock-out—
(*a*) if that person is bound by—
(i) any arbitration award or collective agreement that regulates the issue in dispute; or
(ii) any determination made in terms of section 44 by the Minister that regulates the issue in dispute; or
(*b*) any determination made in terms of Chapter Eight of the Basic Conditions of Employment Act and that regulates the issue in dispute, during the first year of that determination.'

Convention 87 and Convention 98 have contributed to the substantial progress in shaping the constitutional and statutory contours of freedom of association and collective bargaining across many jurisdictions.[44] Convention 87 provides protection for freedom of association of both employers and workers. For instance, Article 2 of Convention 87 states: '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'. And Article 3 places trade unions' and employers' organisations on a firm legal footing:

> 1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.
>
> 2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

The genius of the ILO Conventions lies in their use of the Committee on Freedom of Association (CFA) and the Committee of Experts on the Application of Conventions and Recommendations (CEACR) to monitor the implementation of the key conventions. The vitality of the ILO's supervisory process is evident in developments within subjects covered by Convention 87, including the establishment of organisations, their activities, the right to strike, affiliation, and many more.[45] The work of the specialist bodies gives flesh to freedom of association and collective bargaining.

The CFA has taken up the task of interpreting the expression 'organisations of their own choosing' in Article 2 of Convention 87. The CFA indicated that this expression means that individual employees should be allowed to associate with trade unions of their own choice without giving preference to either a 'unified trade union movement' or 'trade union pluralism'.[46] The expression 'without distinction

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44 For incisive analysis, see Anon, 'Introduction: Labour Rights, Human Rights' (1998) 137 ILR 127.

45 Lee Swepston, 'Human Rights Law and Freedom of Association: Developments through ILO Supervision' (1998) 137 ILR 169; Hilary Kellerson, 'The ILO Declaration of 1998 on Fundamental Principles and Rights: A Challenge for the Future' (1998) 137 ILR 223.

46 International Labour Organization, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th

whatsoever' was considered the suitable way to articulate the universal scope of the principle of freedom of association.

Chapter 4 of the thesis discusses South Africa's compliance with the ILO's Conventions 87 and 98. Aspects dealt with are union rivalry, strike violence, and the events at Marikana. The international perspective on the right to freedom of association is summarised, and the changing dynamics of the collective bargaining environment are explored.

Chapter 5: An international and comparative analysis of the right to freedom of association

This chapter explains the reasons for embarking on an international and comparative analysis of the right to freedom of association. The chapter investigates how courts in Botswana, Lesotho, Malawi, Namibia and the United States of America (USA) have interpreted, preserved, and promoted the right to freedom of association included in their respective constitutions and other relevant legislation. As a result, this study examines, analyses, and draws some important lessons on the right to freedom of association within selected member states of the Southern African Development Community (SADC). The study also examines the history and evolution of the right to freedom of association, as well as the structure, socio-economic circumstances, and essential elements of freedom of association in various countries. This chapter also explores the USA's constitutional position and effectiveness in granting the right to freedom of association, and lessons that South Africa can learn.

Chapter 6: Conclusion and recommendations

Rounding out the study, Chapter 6 first takes stock of the shortcomings of the South African Constitution and its interpretation or implementation through statutory enactments or some legal infrastructure. Secondly, the chapter advances remedial solutions, such as redrafting the relevant provisions of the LRA constraining the exercise of freedom of association. It is hoped that through this chapter, some

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(rev) edn, ILO 2006) paras 319, 320–21 (hereinafter International Labour Organization, *Freedom of Association: Digest of Decisions*).

useful lessons would have been drawn from the two decades of constitutional enterprise and labour adjudication.

1.6 Summary

This chapter provides a brief overview of the topic and a synopsis of the chapters to be covered in this thesis. If this thesis persuades readers that the LRA impacts on the right to freedom of association and that there is a misalignment between the LRA, international instruments and constitutional values, then it would have served a valuable purpose. The discussion now moves to the legal framework on the right to freedom of association in South Africa.

CHAPTER 2: LEGAL FRAMEWORK ON THE RIGHT TO FREEDOM OF ASSOCIATION IN SOUTH AFRICA

2.1 Introduction

This chapter demarcates in broad outline the components and parameters of freedom of association embodied in the Labour Relations Act 66 of 1995 (hereinafter the LRA). The Constitution of the Republic of South Africa, 1996 (hereinafter the Constitution) sought, among other things, to guarantee freedom of association, the rights of employees to form and join trade unions and to strike, and the rights of trade unions, employers and employers' organisations to bargain collectively.[1] In the first *Certification* case, *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996*, the Constitutional Court made the following instructive observations:[2]

> Collective bargaining is predicated on the notion that employers wield more social and economic power than individual workers. Workers must consequently band together in order to jointly wield significant bargaining power with employers. Strike action is the primary means through which workers exert collective power.

Section 23(5) of the Constitution grants the right to collective bargaining to all trade unions, employers' organisations, and employers. According to Cheadle,[3] the right to engage in collective bargaining is a catch-all term encompassing a variety of rights and liberties related to the system of collective bargaining. He claims that this right is divided into three parts: 'first, the freedom to bargain collectively; second, the right of one of the bargaining parties to exercise economic power against the opposing party (via a strike or lock-out); and third, the possibility that the right

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1 Under s 18 of the Constitution, 'Everyone has the right to freedom of association.' And under s 23(2) of the Constitution, 'Every worker has the right … to form and join a trade union; … to participate in the activities and programmes of a trade union; and … to strike.' See also Barney Jordaan, 'Collective Bargaining under the New Labour Relations Act: The Resurrection of Freedom of Contract' (1997) 1 LDD 1, 2; Darcy du Toit, 'Industrial Democracy in South Africa's Transition' (1997) 1 LDD 39; Karl E Klare, 'Forum Contribution: Labour Law for the 21st Century: Stalled Reform in the United States' (1997) 1 LDD 103; Vishwas Satgar, 'The LRA and Workplace Forums: Legislative Provisions, Origins, and Transformative Possibilities' (1998) 2 LDD 43; Halton Cheadle, 'Collective Bargaining and the LRA' (2005) 9 LDD 147.

2 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC) [66] (hereinafter *Ex parte Chairperson of the Constitutional Assembly*).

3 Halton Cheadle, 'Collective Bargaining and the LRA' 158.

imposes a positive duty to bargain'. The Constitution does not impose a positive duty to bargain. Even so, employers and trade unions sometimes confuse the organisational rights granted by the LRA based on the level of representation of the trade union and the right to bargain. As discussed above, section 23(5) of the Constitution grants every employer and every employee the right to engage in collective bargaining, but the interpretation of this section often leads to the misconception that the employer has a duty to bargain.

Section 4(1) of the LRA affords every employee the right to form and belong to a trade union.[4] This section should be read in line with section 23(5) of the Constitution. In the case of *South African National Defence Union v Minister of Defence; Minister of Defence v South African National Defence Union* (hereinafter *SANDU v Minister of Defence* (SCA)),[5] the point of contention was whether the South African National Defence Force (SANDF) was obliged to bargain collectively with the South African National Defence Union (SANDU). SANDU's defence was based on section 23(5) of the Constitution, which confers on trade unions a right to engage in collective bargaining.[6] The Supreme Court of Appeal considered various international models and found that the voluntarist approach, which emerged from international instruments, is prevalent in the current labour dispensation.[7] Voluntarism implies that labour unions are not compelled to bargain, and so neither the state nor the judiciary may intervene in their choices. Instead of an obligation to bargain, the LRA offers majority unions majoritarian-driven incentives or inducements such as setting thresholds, finalising collective agreements and their renewals, and establishing workplace forums.[8] The removal of the necessity to negotiate was compensated for by the development of a set of organisational rights

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4 Under 4(1) of the LRA, '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'.

5 *South African National Defence Union v Minister of Defence; Minister of Defence v South African National Defence Union* 2007 (1) SA 402 (SCA) [4.5.1] (hereinafter *South African National Defence Union v Minister of Defence* (SCA)).

6 Section 23(5) of the Constitution provides: 'Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).'

7 *South African National Defence Union v Minister of Defence* (SCA) [11].

8 Section 4 of the LRA.

and a systematic promotion of collective bargaining, particularly at the sectoral level.

Bargaining councils remain the basis of collective bargaining. Participation in a negotiating council is still voluntary, but the LRA provides a number of incentives for unions and employers, including the possibility of extending a council's agreement to all companies and employees under its control. Furthermore, the court in *South African National Defence Union v Minister of Defence* (SCA) held that voluntarism does not imply that employees and employers bargain voluntarily. Companies use this to avoid the economic pressures caused by strikes or lock-outs. The Supreme Court of Appeal in *South African National Defence Union v Minister of Defence* (SCA) held that the legislature understood that its role is to provide a framework for collective bargaining and to provide advisory arbitration in disputes of this nature.[9]

In furthering the fundamental right to fair labour practices,[10] the LRA establishes a purpose-built system for both collective bargaining and organisational rights. The regulatory framework in the area of freedom of association and related rights is mostly consistent with international and constitutional obligations.[11] Trade unions and employer organisations are the main vehicle to drive collective bargaining.[12] The right to freedom of association is regulated by sections 4[13] and 6[14] of the LRA. In accordance with section 4, employees have the right to form[15] and to become members of trade unions.[16]

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9 *South African National Defence Union v Minister of Defence* SCA [18].

10 See *Ex parte Chairperson of the Constitutional Assembly* [7]; *National Education Health and Allied Workers Union v University of Cape Town* 2003 (3) SA 1 (CC) [33]–[35] and [40]–[41] (hereinafter *NEHAWU v UCT*); *National Union of Metalworkers of SA v Bader Bop (Pty) Ltd* 2003 (3) SA 513 (CC) [13] (hereinafter *Bader Bop*).

11 See eg ILO, Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87) (hereinafter Convention 87); ILO, Right to Organise and Collective Bargaining Convention, 1949 (No 98) (hereinafter Convention 98). See also *Amcu v Chamber of Mines of South Africa* 2017 (3) SA 242 (CC) [60]–[61] (hereinafter *Chamber of Mines/AMCU III*).

12 Compare Mpfariseni Budeli, 'Workers' Rights to Freedom of Association and Trade Unionism in South Africa: An Historical Perspective' (2009) 15 Fundamina 57.

13 Section 4 of the LRA deals with employees.

14 Section 6 of the LRA regulates the rights in respect of employers.

15 Section 4(1)(*a*) of the LRA.

16 Section 4(1)(*b*) of the LRA.

2.2 Defining the scope and nature of the human rights perspective on the right to freedom of association

Several fundamental rights are pertinent to labour law: the right to freedom of association,[17] access to courts,[18] and the right to have access to social security.[19] Of particular importance is section 33(1) of the Constitution, which provides that, 'Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.' And the Promotion of Administrative Justice Act 3 of 2000 (the PAJA) was enacted to give effect to the rights contained in section 33 of the Constitution.[20] The approaches of the Labour Court and civil courts to the relevance and application of the PAJA and the right to fair administrative action in the sphere of employment and labour disputes are often diametrically opposed.[21] For Pillay J, the right to administrative action entrenched in section 33 of the Constitution and bolstered by the PAJA has no application to labour disputes because 'labour law is not administrative law'.[22] Simply put, the common-law heritage in lines of cases, exemplified by *Zenzile*,[23] has no application because the LRA has been extended to virtually all employment relationships. However, freedom of association in this regard means to form an organisation, be a member of an association, and quit membership of an organisation.

Yet Plasket J noted that the Labour Court judges' reasoning that *Zenzile* is no longer good law reflects a parsimonious approach to fundamental rights and an austere formalism at odds with a proper approach to fundamental rights.[24] In other words,

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17 Section 18 of the Constitution.

18 Section 34 of the Constitution.

19 Section 27 of the Constitution.

20 Section 33(3) of the Constitution.

21 See Stefan van Eck and Ronell Jordaan-Parkin, 'Administrative, Labour and Constitutional Law – A Jurisdictional Labyrinth' (2006) 27 ILJ 1987; J Grogan, 'Administrative Justice in Labour Matters' (2004) 20 EL 12. See the split decision of the Supreme Court of Appeal on whether the dismissal of public service employee involves the exercise of public power in *Transnet Ltd v Chirwa* 2007 (2) SA 198 (SCA).

22 *Public Servants Association on behalf of Haschke v MEC for Agriculture* (2004) 25 ILJ 1750 (LC), [2004] 8 BLLR 822 (LC) [11]. See also *Western Cape Workers Association v Minister of Labour* (2005) 26 ILJ 2221 (LC), [2006] 1 BLLR 79 (LC) [9], [10]; *Louw v SA Rail Commuter Corporation Ltd* (2005) 26 ILJ 1960 (W); *SA Police Union v National Commissioner of the SA Police Service* (2005) 26 ILJ 2403 (LC), [2006] 1 BLLR 42 (LC).

23 See *Administrator, Transvaal v Zenzile* 1991 (1) SA 21 (A); *Administrator, Natal v Sibiya* 1992 (4) SA 532 (A); *Administrator of the Transvaal v Traub* 1989 (4) SA 731 (A).

24 *Police and Prisons Civil Rights Union v Minister of Correctional Services (No 1)* 2008 (3) SA 91 (E) [60]. See also *United National Public Servants Association of SA v Digomo* (2005) 26 ILJ 1957 (SCA), [2005] 12 BLLR 1169 (SCA); *Dunn v Minister of Defence* 2006 (2) SA 107

the protections provided by labour law and administrative law are complementary and cumulative, not antagonistic to one another simply because they are different. The Constitutional Court's recent decision in *Baloyi v Public Protector*[25] appears to accord with Plasket J's approach. The jurisdictional difficulties that were supposed to have been buried by *Gcaba v Minister for Safety & Security*[26] and *Chirwa v Transnet Ltd*[27] recently resurfaced in *Baloyi.*

2.2.1 Right to fair labour practices in relation to freedom of association[28]

Section 23(1) of the Constitution provides that everyone has the right to fair labour practices. This right applies to both employees and employers, and it provides employees with job security. The LRA's primary goal is to give effect to the fundamental rights granted by section 23 of the Constitution. The relevant part of section 1 of the LRA reads as follows:

> The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary object of this Act, which are-
> (*a*) to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution;
> (*b*) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;
> …
> (*d*) to promote-
> …
> (iv) the effective resolution of labour disputes.

In *NEHAWU obo Mpondo v Department of Arts & Culture*,[29] the commissioner stated that the focus of section 23(1) of the Constitution is, broadly speaking, the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both. It is critical to remember the inherent tension in labour relations between the interests of workers and the interests of

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(T); *Despatch High School v Head of Department of Education, Eastern Cape* 2003 (1) SA 246 (CkH).

25 *Baloyi v Public Protector* 2022 (3) SA 321 (CC).

26 *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC) (hereinafter *Gcaba v Minister for Safety and Security*).

27 *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC).

28 In *Ex parte Chairperson of the Constitutional Assembly* [67], the Constitutional Court remarked in relation to s 23 in general: 'The primary development of this law will, in all probability, take place in labour courts in the light of labour legislation. That legislation will always be subject to constitutional scrutiny to ensure that the rights of workers and employers as entrenched in NT 23 are honoured.'

29 *NEHAWU obo Mpondo v Department of Arts & Culture* [2009] 12 BALR 1306 (CCMA).

employers when giving content to that right. As a result, care must be taken to accommodate these interests where possible, in order to achieve the balance required by the concept of fair labour practices. It is in this context that the LRA must be construed.

According to section 185 of the LRA,

> Every employee has the right not to be-
> (*a*) unfairly dismissed; and
> (*b*) subjected to unfair labour practice.

When an employee claims that he or she was unfairly dismissed, the matter is referred to compulsory arbitration under section 191(5)(*a*) of the LRA, before either the Commission for Conciliation, Mediation and Arbitration (CCMA) or a bargaining council. Section 192 of the LRA, headed 'Onus in dismissal disputes', on the other hand, states that once an employee establishes the existence of the dismissal, the employer must prove that the dismissal was fair. It was determined that every employee has the right not to be dismissed unlawfully. If this right had been included in section 185 or elsewhere in the LRA, it would have allowed an employee who demonstrated that he had been wrongfully dismissed to seek an order declaring his dismissal invalid.

In the case of *Steenkamp v Edcon Ltd*,[30] it was decided that every employee has the right not to be dismissed without cause. If this privilege had been included in section 185 or elsewhere in the LRA, an employee who could establish that he had been wrongfully dismissed might have requested an order declaring his dismissal invalid. Because a finding that the dismissal is unlawful is necessary for a declaratory order that the dismissal is invalid, the lack of a provision in the LRA for the right not to be unlawfully dismissed indicates that the LRA does not contemplate an invalid dismissal as a result of a dismissal made in violation of an LRA provision.

In the definition of dismissal in section 186(1) of the LRA, once again the absence of any reference to an unlawful dismissal is telling. The absence suggests that if the

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30 *Steenkamp v Edcon Ltd* 2016 (3) SA 251 (CC).

dismissed employee wishes to raise the unlawfulness of his dismissal, he must categorise it as unfair if he is to obtain relief under the LRA.

A commissioner is required by statute to decide whether a disputed dismissal was fair. He must act fairly and quickly in accordance with section 138 of the LRA. First, he must determine whether the employer's decision to dismiss was based on misconduct.[31] This determination entails investigating whether a workplace rule was in place and whether the employee violated it. This is a traditional process of factual adjudication in which the commissioner decides the issue of misconduct. This determination and the assessment of fairness, which will be discussed later, are not limited to what happened at the internal hearing.

The promotion of the right to fair labour practices to the status of a fundamental right in the South African Constitution has significantly strengthened the protection of job security and employment rights. The right to fair labour practices has been invoked in recent landmark labour law decisions. In discussing a claim of wrongful dismissal in one case, Froneman AJA addressed the issue of fair labour practices and declared:

> Section 23(1) of the Constitution provides that everyone has the right to fair labour practices. It seems to me almost incontestable that one of the most important manifestations of the right to fair labour practices that developed in labour relations in this country was the right not to be unfairly dismissed. Had the Act not been enacted with the express object to give effect to the Constitution right to fair labour practices (amongst others), the court would have been obliged, in my view to, develop the common law to give expression to this Constitutional right in terms of s 39(2) of the Constitution. To the extent that the Act might not fully give effect to and regulate that right, that obligation on ordinary civil courts remain.[32]

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31 Particularly important in this regard is item 7 of sch 8, which reads:
'Any person who is determining whether a dismissal for misconduct is unfair should consider-
(*a*) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
(*b*) if a rule or standard was contravened, whether or not –
(i) the rule was a valid or reasonable rule or standard;
(ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard.'

32 *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA) [15].

And in another case,[33] Landman J reasoned as follows:

> Section 23(1) of the Constitution provides that everyone has a right to fair labour practice. This concept is not defined in the Constitution but embraces the right to job security. This right should not be terminated except if it is lawful and fair to do so.

The Constitutional Court addressed the aim of the LRA and section 23(1) of the Constitution in the case of *National Education Health and Allied Workers Union v University of Cape Town* on the right to fair labour practice.[34] This case was founded on a thorough examination of section 197 of the LRA. The university hired an outside contractor and laid off some of its workers (cleaners). Employees were offered a chance to apply for jobs with the new independent contractor, and they were finally hired, although for lesser pay than they had earned from the university.

The trade union lodged a complaint claiming that the university's actions constituted a transfer as a going concern under section 197 of the LRA. After the majority of the Labour Appeal Court determined that an employment contract could not be transferred without the approval of both parties, NEHAWU appealed to the Constitutional Court.

There, considering the issue of fair labour practice, Ngcobo J held:[35]

> Our Constitution is unique in constitutionalising the right to fair labour practice. But the concept is not defined in the Constitution. The concept of fair labour practice is incapable of precise definition. This problem is compounded by the tension between the interests of the workers and the interests of the employers that is inherent in labour relations. Indeed, what is fair depends upon the circumstances of a particular case and essentially involves a value judgment. It is therefore neither necessary nor desirable to define this concept.
> …
>
> The concept of fair labour practice must be given content by the Legislature and thereafter left to gather meaning, in the first instance, from the decisions of the specialist tribunals including the LAC and the Labour Court. These Courts and tribunals are responsible for overseeing the interpretation and application of the LRA, a statute which was enacted to give effect to s 23(1). In giving content to this concept the Courts and tribunals will have to seek guidance from domestic and international experience. Domestic experience is reflected both in the equity-based jurisprudence generated by the unfair labour practice

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33 *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau* (2003) 24 ILJ 1712 (LC) 1726D.

34 See *NEHAWU v UCT.*

35 *NEHAWU v UCT* [33]–[35]. See also *Govender v Dennis Port (Pty) Ltd* (2005) 26 ILJ 2239 (CCMA) [12]–[14].

> provision of the 1956 LRA as well as the codification of unfair labour practice in the LRA. International experience is reflected in the Conventions and Recommendations of the International Labour Organisation. Of course other comparable foreign instruments such as the European Social Charter 1961 as revised may provide guidance.
> …
>
> That is not to say that this court has no role in the determination of fair labour practices. Indeed, it has a crucial role in ensuring that the rights guaranteed in section 23(1) are honoured.

Ngcobo J continued:[36]

> [T]he focus of s 23(1) is, broadly speaking, the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both. In giving content to that right, it is important to bear in mind the tension between the interests of the workers and the interests of the employers which is inherent in labour relations. Care must therefore be taken to accommodate, where possible, these interests so as to arrive at the balance required by the concept of fair labour practices. It is in this context that the LRA must be construed.

The issue of fair labour practices was also discussed in *National Union of Metalworkers of South Africa v Bader Bop (Pty) Ltd*.[37] The main issue in this case was whether a minority union and its members had the legal right to strike in order to persuade an employer to recognise the union's shop stewards. The powers granted by section 14 of the LRA were granted to trade unions that had a majority of the employees employed in the workplace as members, whereas NUMSA had minority members. The court touched on the right to fair labour practice and held:[38]

> In s 23, the Constitution recognises the importance of ensuring fair labour relations. 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 that collective bargaining between employers and workers is key to a fair industrial environment. … In interpreting the rights in s 23, therefore, the importance of those rights in promoting a fair working environment must be understood.

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36 *NEHAWU v UCT* [40].
37 See *Bader Bop.*
38 *Bader Bop* [13].

2.3 Right to freedom of association before and after the Constitution

The Labour Relations Act 28 of 1956 was drafted on the basis that the workplace belongs to the employer and that labour rights had to be secured by agreement from the Industrial Court.[39] Africans were marginalised from the mainstream of industrial relations. As mentioned earlier in this chapter, South Africa was a member of the ILO and decided to withdraw in 1964 because of its apartheid laws. South African rejoined the ILO in 1994 after abolishing the apartheid laws. Before 1994, labour statutes did not recognise Black trade unions, and the labour market was racially regulated through an employment contract.[40]

Accordingly, one of the purposes of adopting the Constitution is 'to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights'.[41] When interpreting the Bill of Rights, courts and tribunals must consider international law and may consider foreign law,[42] and 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.[43]

The right to freedom of association is a fundamental right and forms an integral part of a free and open society. Without this right it would be difficult to exercise other rights such as the right to strike, to form and join a trade union, and to participate in the activities and programmes of a trade union. According to Cheadle, this right is a catch-all term for a variety of rights and liberties associated with the institution of collective bargaining.[44] He proposes that this right is divided into three parts: the freedom to bargain collectively; the right of one of the bargaining parties to use economic power against the opposing party (via a strike or lock-out); and the possibility that the right imposes a positive duty to bargain. He adds that one of the ironies of collective bargaining is that its very goal, industrial peace, depends on the

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39 JV du Plessis and MA Fouché, *A Practical Guide to Labour Law* (2nd edn, Butterworths 1996) 168.

40 Kate O'Regan, '1979-1997: Reflecting on 18 Years of Labour Law in South Africa' (1997) 18 ILJ 889.

41 Preamble to the Constitution.

42 Section 39(1)(*b*) and (*c*) of the Constitution

43 Section 233 of the Constitution.

44 Cheadle, 'Collective Bargaining and the LRA' 147.

threat of conflict. If it is accepted that collective bargaining is the best way to resolve disputes, and that the right to strike is an integral part of collective bargaining, it is argued that the goal of the law should be to regulate striking rather than to criminalise it. Secondly, the fact that strikers lose their income during the strike will, in most cases, limit the strike's duration.[45]

The Constitution does not impose a positive duty to bargain. It is section 23(5) of the Constitution that often leads to the misconception that the employer has a duty to bargain. Employers and unions sometimes confuse the organisational rights granted by the LRA based on the level of representation of the trade union and the right to bargain. Section 4 of the LRA affords every employee the right to form and belong to a trade union, and this section accords with section 23(5) of the Constitution. In the case of *South African National Defence Union v Minister of Defence* (SCA), the point of contention was whether the South African National Defence Force was obliged to bargain collectively with the South African National Defence Union. SANDU's defence was based on section 23(5) of the Constitution, which confers on trade unions, among other things, a right to engage in collective bargaining. The Supreme Court of Appeal considered various international models and found that the voluntarist approach emerged from international instruments and prevails in the current labour dispensation. It was also mentioned that voluntarism does not mean that employees and employers negotiate voluntarily. They do so to avert economic pressure brought about by strikes or lock-outs. The Supreme Court of Appeal found that the legislature understood that its role is to provide a framework for collective bargaining and to provide advisory arbitration in disputes of this nature.

In furtherance of the fundamental right to fair labour practices,[46] the LRA established a purpose-built system for both collective bargaining and organisational rights. The regulatory framework is mostly consistent with international and constitutional obligations, which provides that the state must protect trade union rights by creating a system for complaints about violations, adjudication, remedies, and punishment. For example, a government must not only refrain from punishing

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45 Du Plessis and Fouché, *A Practical Guide to Labour Law* 163.

46 See *Ex parte Chairperson of the Constitutional Assembly* [7]; *NEHAWU v UCT* [33]–[35], [40]–[41]; *Bader Bop* [13].

workers for trying to organise unions.[47] Trade unions and employer organisations are the chief motors of collective bargaining.[48] The right to freedom of association is regulated by sections 4[49] and 6[50] of the LRA. In accordance with section 4, employees have the right to form[51] and to become members of trade unions.[52] Furthermore, they have the right to participate in lawful trade union activities,[53] to participate in the election of the trade union representative or to stand for election as office-bearers, officials,[54] or trade union representatives.[55]

As indicated in the preceding chapter, freedom of association is interwoven with collective bargaining, and has profound mutual implications for it. An exposition on freedom of association[56] inevitably impinges on collective bargaining, the right to strike, and the right to fair labour practices.

Section 23 of the Constitution reads in full:

> **23 Labour relations**
> (1) Everyone has the right to fair labour practices.
> (2) Every worker has the right-
> *(a)* to form and join a trade union;
> *(b)* to participate in the activities and programmes of a trade union; and
> *(c)* to strike.
> (3) Every employer has the right-
> *(a)* to form and join an employers' organisation; and
> *(b)* to participate in the activities and programmes of an employers' organisation.
> (4) Every trade union and every employers' organisation has the right-
> *(a)* to determine its own administration, programmes and activities;
> *(b)* to organise; and
> *(c)* to form and join a federation.
> (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1).

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47 See Convention 87; Convention 98. See also *Chamber of Mines/AMCU III* [60]–[61].
48 Compare Budeli, 'Workers' Rights to Freedom of Association and Trade Unionism' 57.
49 Section 4 of the LRA deals with employees.
50 Section 6 of the LRA regulates the rights in respect of employers.
51 Section 4(1)(*a*) of the LRA.
52 Section 4(1)(*b*) of the LRA.
53 See *National Union of Public Service and Allied Workers Union obo Mani v National Lotteries Board* 2014 (3) SA 544 (CC).
54 Section 4(2)(*c*) of the LRA.
55 Section 4(2)(*d*) of the LRA.
56 Section 18 of the Constitution provides: 'Everyone has the right to freedom of association.'

> (6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter the limitation must comply with section 36 (1).

What is at stake regarding freedom of association are the interests and livelihoods of workers.[57] The influence of the ILO and its venerable conventions is manifest in both section 27 of the Interim Constitution and section 23 of the 1996 Constitution.[58] In any exposition of constitutional rights, the essential starting point is the Constitution. In that regard it is important to bear in mind that the Constitution is the supreme law so that every other law or conduct must bow to the force of this supreme instrument.[59] Another point of note is that constitutional provisions establish substantive and procedural rights by way of a Bill of Rights; it creates obligations that 'must be fulfilled' by organs of state.[60]

There are other provisions of the Constitution that compel discussion of constitutional elements even in matters of pure labour law. The reason is that our constitutional jurisprudence has demonstrated the importance of finding the space in appropriate cases to move away from overly rigid compartmentalisation in order to allow judicial reasoning to embrace fluid concepts of hybridity and permeability.[61] Indeed, Sachs J made this importance explicit when he held:

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57 In *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) [74] (hereinafter *Sidumo*), Navsa AJ held as follows in the context of the long-standing debate on how arbitrating commissioners should approach an employer's sanction for misconduct by an employee:
'The Constitution and the LRA seek to redress the power imbalance between employees and employers. The rights presently enjoyed by employees were hard-won and followed years of intense and often grim struggle by workers and their organisations. Neither the Constitution nor the LRA affords any preferential status to the employer's view on the fairness of a dismissal. It is against constitutional norms and against the right to fair labour practices to give pre-eminence to the views of either party to a dispute. Dismissal disputes are often emotionally charged. It is therefore all the more important that a scrupulous even-handedness be maintained. The approach of the Supreme Court of Appeal tilts the balance against employees.' See also David M Beatty, 'Labour is not a Commodity' in Barry J Reiter and John Swan (eds), *Studies in Contract Law* (Butterworths 1980) 313, 334.

58 *National Union of Metalworkers of SA v Lufil Packaging (Isithebe)* (2020) 41 ILJ 1846 (CC), 2020 (6) BCLR 725 (CC) [44]–[45] (hereinafter *Lufil*). See also *Bader Bop* [28]; *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC) [48] (hereinafter *South African National Defence Union v Minister of Defence* (CC)) [25]. For further analysis, see Budeli, 'Workers' Rights to Freedom of Association and Trade Unionism' 57.

59 Section 2 of the Constitution; *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) [12].

60 Section 2 of the Constitution.

61 For instance, in *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) [83], Yacoob J stated:
'The proposition that rights are interrelated and are all equally important is not merely a theoretical postulate. The concept has immense human and practical significance in a society

> Acceptance of hybridity is based on the fact that protected rights in a Constitutional democracy overlap and mutually reinforce each other. Though in particular factual situations the interests secured by rights might collide, there can be no intrinsic or categorical incompatibility between the rights themselves. Courts should not feel obliged to obliterate one right though establishing the categorical or classificatory pre-eminence of another. On the contrary, the task of the courts is to seek wherever possible to balance and reconcile the Constitutional interest involved. In this endeavour the courts will be strongly guided by the Constitutional values at stake.
> The values of the Constitution are strong, explicit and clearly intended to be considered part of the very texture of the Constitutional project. They are implicit in the very structure and design of the new democratic order. The letter and the spirit of the Constitution cannot be separated; just as the values are not free-floating, ready to alight as mere adornments on this or that provision, so is the text not self-supporting, awaiting occasional evocative enhancement. The role of Constitutional values is certainly not simply to provide a patina of virtue to otherwise bald, neutral and discrete legal propositions. Text and values work together in integral fashion to provide the protections promised by the Constitution. And by their nature, values resist compartmentalization.[62]

And further:

> The Bill of Rights does specifically identify a number of rights for special Constitutional protection. Each is independently delineated, reflecting historical experience pointing to the need to be on guard in areas of special potential vulnerability and abuse. Each has produced an outgrowth of special legal learning. Yet enumerating themes for dedicated attention does not presuppose or permit detaching the listed rights from the foundational values that nurture them. Nor does it justify severing the rights from the underlying values that give substance and texture to the Constitution as a whole. On the contrary, in a value-based Constitutional democracy with a normative structure that is seamless, organic and ever-evolving, the manner in which claims to Constitutional justice are typified and dealt with, should always be integrated within the context of the setting, interests and values involved.[63]

In this interpretive framework, Sachs J concluded:

> founded on human dignity, equality and freedom. … The Constitution will be worth infinitely less than its paper if the reasonableness of State action concerned with housing is determined without regard to the fundamental constitutional value of human dignity. … In short, I emphasise that human beings are required to be treated as human being.'
> See also *S v Makwanyane* 1995 (3) SA 391 (CC) [80]; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) [15]–[32], [112]–[113]; *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC) [102], [126]. For a nuanced and extensive treatment of poverty and the overarching role of social security in a country with the embedded triple challenges of poverty, unemployment, and inequality, see Clarence Itumeleng Tshoose, 'Social Assistance: Legal Reforms to Improve Coverage and Quality of Life for the Poor People in South Africa' (LLD thesis, University of South Africa 2016). In addition, the recent Constitutional Court judgment in *Mahlangu v Minister of Labour* 2021 (2) SA 54 (CC) represents a watershed moment for those who are concerned about employment vulnerability and social security.

62 *Sidumo* [148]–[149].

63 *Sidumo* [150].

> [T]he Bill of Rights should not always be seen as establishing independent normative regimes operating in isolation from each other, each with exclusive sway over a defined realm of public and private activity, the disparate textual protections are unified by the values immanent in all them. The relationship between the separately protected rights should thus be regarded as osmotic rather than hermetic. It should be understood not as a form of analytical blurring to be avoided, but rather as a desirable mechanism for ensuring that Constitutional interests in appropriate cases are properly protected, and Constitutional justice fully achieved. And hybridity should be recognised for what it is, the co-existence and interpenetration of more than one guaranteed right in a particular factual and legal situation. Instead of seeking to put asunder what human affairs naturally and inevitably join together, we should, in these circumstances, develop an appropriate analytical methodology that eschews formal pigeonholing and relies more on integrated reasoning.[64]

The first of these obligations is that the State must respect, promote, and fulfil the rights enshrined in the Bill of Rights, which the Constitution expressly declares to be the cornerstone of democracy in South Africa.[65] The second is that the Constitution binds all three spheres of government (the legislature, the executive, and the judiciary) as well as all state organs.[66] This necessarily imposes an obligation on the State to live up to the dictates of the Constitution.[67] One such judicial mandate is the specific injunction that courts must develop common law where they find it to be inconsistent with the spirit, purpose, or objectives of the Bill of Rights.[68] This is reinforced by section 173 of the Constitution, which states that by vesting the inherent powers in the Constitutional Court, the Supreme Court of Appeal, and the High Court of South Africa, the Constitution obliges them to develop the common law in the interests of justice.[69] The Bill of Rights entrenches, among others, the right to the protection of the security of the person, including the right to be free from all forms of violence from either public or private sources;[70] the right to

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64 *Sidumo* [151].

65 Section 7(1)–(2) of the Constitution.

66 Section 8 of the Constitution.

67 Note that the President and the Deputy President are required to take an oath before assuming office in which they swear to 'obey, observe, uphold and maintain the Constitution and all other laws of the Republic'. Cabinet ministers, premiers of provinces, members of the executive council of provinces, members of the National Assembly, delegates to the National Council of Provinces, and members of the provincial legislatures are all required to take a similar oath before assuming office in which they swear to 'obey, observe, uphold and maintain the Constitution and all other laws of the Republic'. See ss 87, 90(3), 95, 129, 131(3), 135, 48, 61(6) and 107 of the Constitution, read with sch 2, items 1–5.

68 Section 39(2) of the Constitution.

69 Eg *Charmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC); *Minister of Safety and Security v Hamilton* 2004 (2) SA 216 (SCA); *K v Minister of Safety and Security* 2005 (3) SA 179 (SCA), reversed by the Constitutional Court in *K v Minister of Safety and* Security 2005 (6) SA 419 (CC); *Grobler v Naspers Bpk* 2004 (4) SA 220 (C).

70 Section 12(1) of the Constitution.

life;[71] the right to human dignity;[72] the right to privacy;[73] the right to equality before the law and the prohibition against unfair discrimination based, for example, on grounds of race, gender, sex or sexual orientation.[74]

2.4 Overview of the right of freedom of association and collective bargaining

2.4.1 General remarks

As has been stated, freedom of association is the centrepiece of both political and workplace democracy.[75] Discussion of the right to freedom of association cannot take place without examining the overarching role of the right to freedom of association and collective bargaining.

Obviously, trade unions play a vital role during collective bargaining with the employer in order to preserve the interests and protect the rights of employees under South Africa's labour framework. Historically, organised labour was not effectively protected, but now has constitutionally enshrined fundamental rights that are supported by international law. Furthermore, trade unions have the right to freedom of association as well as the right to organise and regulate their own affairs, among other things.[76] The current trade union structure, on the other hand, is based on the classification of distinct sorts of unions, depending on their membership representation. 'These classifications are for those in the industrial sectors and organised labour unions who fought for better wages, reasonable hours, and safer working conditions.'[77]

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71 Section 11 of the Constitution.
72 Section 10 of the Constitution.
73 Section 14 of the Constitution.
74 Section 9 of the Constitution.
75 *South African National Defence Union v Minister of Defence* (CC) para 48. See also *Bader Bop*. See generally Nicolas Valticos, 'International Labour Standards and Human Rights: Approaching the Year 2000' (1998) 137 ILR 135; Eric Gravel and Quentin Delpech, 'International Labour Standards: Recent Developments in Complementarity between the International and National Supervisory Systems' (2008) 147 ILR 403.
76 Sections 16(1) and 23(5) of the Constitution. See also Clive Thompson, 'Collective Bargaining' in Halton Cheadle (ed), *Current Labour Law, 1995: A Review of Recent Developments in Key Areas of Labour Law* (Juta 1995).
77 Thompson, 'Collective Bargaining' 257.

2.4.2 Constitutional and statutory context

The 1996 Constitution sought, among other things, to guarantee freedom of association, the rights of employees to form and join trade unions and to strike, and the rights of trade unions, employers, and employer organisations to bargain collectively.[78] In the first *Certification* case, the following instructive observations were made:[79]

> Collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers therefore need to act in concert to provide them collectively with sufficient power to bargain effectively with employers. Workers exercise collective power primarily through the mechanism of strike action.[80] In theory, employers, on the other hand, may exercise power against workers through a range of weapons, such as dismissal, the employment of alternative or replacement labour, the unilateral implementation of new terms and conditions of employment, and the exclusion of workers from the workplace (the last of these being generally called a lockout). The importance of the right to strike for workers has led to it being far more frequently entrenched in constitutions as a fundamental right than is the right to lock out.

Further supporting collective bargaining, section 23(6) of the Constitution provides that national legislation may be enacted to regulate collective bargaining. Hence, the LRA countenances both agency shop agreements (deductions for majority union fees from all employees, who are part of the bargaining unit but not members of the majority union)[81] and closed shop agreements (collective agreement may oblige all employees to be members of the majority trade union).[82] Although union security arrangements are not in themselves immune from constitutional scrutiny, a litigant seeking to mount a constitutional claim still faces a formidable hurdle.[83] In

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78 Halton Cheadle, 'Collective Bargaining and the LRA' (2005) 9 LDD 147. See also Barney Jordaan, 'Collective Bargaining under the New Labour Relations Act: The Resurrection of Freedom of Contract' (1997) 1 LDD 1, 2; Darcy du Toit, 'Industrial Democracy in South Africa's Transition' (1997) 1 LDD 39; Karl E Klare, 'Forum Contribution: Labour Law for the 21st Century: Stalled Reform in the United States' (1997) 1 LDD 103; Vishwas Satgar, 'The LRA and Workplace Forums: Legislative Provisions, Origins, and Transformative Possibilities' (1998) 2 LDD 43.

79 *Ex parte Chairperson of the Constitutional Assembly* [66].

80 Du Plessis and Fouché, *A Practical Guide to Labour Law* 144.

81 Section 25 of the LRA. See also *UASA – The Union v BHP Billiton Energy Coal SA* (2013) 34 ILJ 1298 (LC), [2013] 1 BLLR 82 (LC).

82 Section 26 of the LRA.

83 *National Manufactured Fibres Employers Association v Bikwani* (1999) 20 ILJ 2637 (LC), [1999] 10 BLLR 1076 (LC) [20]–[21]; Zondo J (as he then was) held as follows in respect of s 25 of the LRA: 'Where the benefits of the deals secured through the efforts of the representative trade union in collective bargaining are passed on to other employees who are not members of the representative trade union, such employees should make a contribution towards the costs which the representative trade union incurs in connection with its collective

this regard, *Greathead v Metcash Trading Ltd* held that section 25 of the LRA must first be ruled unlawful in order to succeed in declaring an agency shop agreement invalid.[84] It is well-established law that a petitioner cannot bypass legislation (such as the LRA) and rely only on the Constitution to assert that a collective agreement (such as an agency shop agreement) is unconstitutional.[85]

The LRA strengthens the right to freedom of association by protecting every employee from employer coercion not to exercise this right, as well as from discrimination or victimisation for exercising this right.[86] For example, section 5(1) of the LRA begins with a general prohibition: 'No person may discriminate against an employee for exercising any right conferred by this Act.' The Code of Good Practice: Dismissal (in Schedule 8 to the LRA) further strengthens the legislative protection of associational freedom. It specifically provides that if disciplinary action is envisaged against shop stewards or union officials, their unions must be informed and consulted.[87] Besides the protection afforded by section 5, the LRA also categorises the dismissal of an employee because he has exercised his right to freedom of association as automatically unfair.[88]

The position stated above was further reiterated by the Labour Appeal Court in *National Union of Metalworkers of South Africa obo Motloba v Johnson Controls*

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bargaining work. If they do not pay that is unfair because members of the representative trade union pay for those costs. An agency shop agreement seeks to make them pay without compelling them to join the representative trade union.
…

The fact that such workers may be members of another union in the workplace to which they pay union dues does not turn them into paying riders. … Such employees remain free riders because they make no contribution towards the collective bargaining costs of the representative union….'
See generally, MH Cheadle, DM Davis and NRL Haysom, *South African Constitutional Law: The Bill of Rights* (Issue 11, LexisNexis 2011) 18-17, para 18.5.2.

84 *Greathead v Metcash Trading Ltd* (WLD) unreported case no 97/24313; *UASA – The Union v BHP Billiton Energy Coal SA* [23].

85 *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC) [51]. See generally *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) [73].

86 *Independent Municipal & Allied Trade Union v Rustenburg Transitional Council* (2000) 21 ILJ 377 (LC), [1999] 12 BLLR 1299 (LC) (hereinafter *IMATU*).

87 See *Banking Insurance Finance & Allied Workers Union v Mutual & Federal Insurance Co Ltd* (2006) 27 ILJ 600 (LAC).

88 Item 4(2) of the Code of Good Practice: Dismissal (in sch 8 to the LRA). See generally *Elliot International (Pty) Ltd v Veloo* (2015) 36 ILJ 422 (LAC); *Kroukam v SA Airlink (Pty) Ltd* (2005) 26 ILJ 2153 (LAC), [2005] 12 BLLR 1172 (LAC).

Automotive SA (Pty) Ltd.[89] The concept stated in the substantial body of authority in both the Labour Court and the Labour Appeal Court is that a shop steward should boldly promote the interests of his constituency and should be protected from any kind of victimisation for doing so. This power and protection are not, however, an excuse to engage in disobedience and unnecessary conflict. A shop steward is still an employee, and his employer has the right to expect acceptable behaviour from him. The fact that negotiation discussions frequently degrade does not imply the notion that,

> As in the workplace, at the bargaining table, the employer and the employee should treat each other with the respect they both deserve. Assaults and threats thereof are not conducive to harmony or to productive negotiation. It is unacceptable to hold that when one acts in a representative capacity "anything goes".[90]

A vociferous and determined shop steward should act in the best interest of his constituency and not in a manner that is improper and unbefitting of his office. Despite the absence of the duty to bargain,[91] the LRA places a premium on collective bargaining.[92] It encourages and promotes collective bargaining through a diverse mechanism,[93] first, by providing extensive protection for the right of employees and employers to form, join, and participate in the lawful activities of trade unions and employers' organisations;[94] secondly, by providing for the acquisition of organisational rights;[95] thirdly, by providing for the establishment of collective bargaining structures such as bargaining councils; fourthly, by regulating

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89 *National Union of Metalworkers of South Africa obo Motloba v Johnson Controls Automotive SA (Pty) Ltd* (2017) 38 ILJ 1626 (LAC), [2017] 5 BLLR 483 (LAC) [48].

90 Darcy Du Toit, 'The Extension of Bargaining Council Agreements: Do the Amendments Address the Constitutional Challenge?' (2014) 35 ILJ 2637.

91 See Ministerial Task Team, Department of Labour, 'Explanatory Memorandum to the Draft Labour Relations Bill, 1995' (1995) 16 ILJ 278, 293. See also *South African National Defence Union v Minister of Defence; Minister of Defence v South African National Defence Union* 2007 (1) SA 402 (SCA) [25] (hereinafter *South African National Defence Union v Minister of Defence* (SCA)); *National Union of Mineworkers v Eskom Holdings Soc Ltd* (2012) 33 ILJ 669 (LC) [24]; *SA Municipal Workers Union v SA Local Government Association* (2010) 31 ILJ 2178 (LC) [16].

92 Thompson, 'Collective Bargaining' 281.

93 See the preamble to the LRA, which states that one of its purposes is 'to promote and facilitate collective bargaining at the workplace and at sectoral level'. See also s 1(*d*) of the LRA, which states that the purpose of the Act is 'to promote – (i) orderly collective bargaining; (ii) collective bargaining at sectoral level'.

94 Sections 4(1)–(3) and 5(1)–(3) of the LRA.

95 Sections 11–22 of the LRA.

the legal nature and enforceability of collective agreements;[96] and, finally, by providing for the right to strike to enforce collective bargaining rights, subject to the prior requirement of obtaining an advisory award.[97]

It is difficult to overestimate the importance of the right to freedom of association and collective bargaining in redressing the negotiating imbalance between employers and employees. The basic goal of collective bargaining is to regulate employment terms and conditions.[98] In *National Union of Metal Workers of SA v Bader Bop (Pty) Ltd*, the Constitutional Court held that collective bargaining is a significant facet of fair labour relations.[99] It is argued that it would be a grievous omission not to address the origins of collective bargaining in South Africa.

2.4.3 The historical overview of collective bargaining in South Africa

Collective bargaining comprises a series of meetings between a company and employees with the goal of negotiating a collective bargaining agreement. Negotiations begin in a naturally non-confrontational manner, and if concessions are not forthcoming, a strike will inevitably follow. South Africa had a long history of inequality, illegal strikes, and the non-recognition of Black labour unions in the workplace. However, the strike is used as a weapon available to employees when faced with difficult employers or when there is no agreement between them and the other negotiating party. The history of labour law in South Africa is rooted in the struggle against apartheid.[100] Racial prejudice and discrimination were prevalent in all aspects of life, including the workplace.[101]

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96 Section 23. See Du Toit, 'The Extension of Bargaining Council Agreements' 2637; Martin Brassey, 'Fixing the Laws That Govern the Labour Market' (2012) 33 ILJ 1.

97 *National Union of Mineworkers v Wanli Stone Belfast (Pty) Ltd* (2015) 36 ILJ 1261 (LAC). See also Neil Coetzer, 'The Road less Travelled: Unlocking the Potential of Advisory Arbitration Awards' (2014) 35 ILJ 880; Alan Rycroft, 'Strikes and the Amendments to the LRA' (2015) 36 ILJ 1.

98 See *Free Market Foundation v Minister of Labour* 2016 (4) SA 496 (GP); *Association of Mineworkers & Construction Union v Bafokeng Rasimone Management Services (Pty) Ltd* (2017) 38 ILJ 931 (LC). For further discussion, see Barney Jordaan, 'Collective Bargaining under the New Labour Relations Act: The Resurrection of Freedom of Contract' (1997) 1 LDD 1.

99 *Bader Bop* [13].

100 Anton Steenkamp, Susan Stelzner and Nadene Badenhorst, 'The Right to Bargain Collectively' (2004) 25 ILJ 943.

101 Steenkamp, Stelzner and Badenhorst, 'The Right to Bargain Collectively' 943.

From 1902 to 1924, there was a series of labour strikes. An illegal strike erupted on the Rand in 1922. Hostilities erupted between capital and labour in the Transvaal gold mines, culminating in the Rand Rebellion.[102] Following the strike, the Smuts government attempted to regulate relations between employers and labour, and it passed the Industrial Conciliation Act 11 of 1924 as a means of ensuring the control of industrial unrest by institutionalisation.[103] Before 1924, strike action was illegal, and trade unions were not acknowledged by law.[104] From 1924 to 1974, most legislation was amended, including the Industrial Conciliation Act 1924 and the Native Labour Act 48 of 1953. These statutes were initially committed to establishing a dualistic, racially segregated industrial relations system to force non-racial trade unions to split on racial lines after appointing a commission to investigate labour unrest. The Industrial Conciliation Act 1924, which was intended to regulate collective bargaining, excluded the black working class. After this statute was promulgated, a committee system for black workers was established, but black workers were excluded from collective bargaining. This dualistic approach did not prevent industrial unrest.

The racialised labour laws exacerbated political tensions. The Black Labour Relations Regulation Act 48 of 1953 governed the position of Blacks in the labour market. This statute, among other things, gave Blacks a restricted right to strike. The Industrial Conciliation Act 1924 evolved into the Labour Relations Act 28 of 1956.[105] This new statute provided a basic understanding of unfair labour practices. The right to freedom of association protects employees from employer and state interference as well as trade union discrimination. Now that the unfair labour practice remedy has been limited to individual employees, the antidiscrimination sections of the LRA and the EEA receive much union attention. It was not clear from the Act that the duty to bargain was created.

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102 Johann Maree, 'Trends in Collective Bargaining: Why South Africa Differs from Global Trends' <https://www.ilera-directory.org/15thworldcongress/files/papers/Track_4/Wed_P4_MAREE.pdf> accessed 30 April 2024.

103 Section 2 of the Industrial Conciliation Act 1924 stated: 'The purpose of this act is to ensure the control of industrial unrest by means of institutionalisation.'

104 Industrial Conciliation Act 1924.

105 Jonathan Bloch, *The Legislative Framework of Collective Bargaining in South Africa* (United Nations 1978) 63.

In the late 1970s, the South African government appointed Professor Nic Wiehahn to chair and lead a commission of inquiry into labour policy. The most radical recommendation in the commission's report was that 'employee freedom of association be extended to all employees, regardless of race, and that Black trade unions be permitted to register'.[106] Another recommendation provided substance to the idea of unfair labour practice. The commission also suggested that labour and practice accord with international agreements and codes. It recommended that the government make sweeping changes to include the legal recognition of Black trade unions and migrant workers, the abolition of statutory job reservation, the retention of the closed shop bargaining system, the creation of a National Manpower Commission, and the introduction of an Industrial Court to resolve industrial litigation. The Industrial Court placed a premium on the responsibility to bargain, and a trade union might petition this court for an order compelling an employer to deal with the trade union. The Ministerial Task Team from the Department of Labour found that this jurisprudence was perplexing because the court did not consistently apply this concept.[107] Furthermore, it was expected that the imposition of a closed shop bargaining system would lead to an inflexible structure that would be incompatible with future labour market trends.

The duty to bargain diminished with the introduction of the LRA, which advocated a voluntarist approach. Where it was deemed fair, the court would issue the order to bargain. The first democratic election took place in 1994 and heralded the new labour dispensation. The labour relations system changed remarkably from the system under the apartheid administration. The new government prioritised the review of labour legislation, with particular attention to the review of the collective bargaining system. The abuse of trade unions under the previous government gave rise to a unique entrenchment of labour rights in the Constitution. The drafters of the Constitution were committed to avoiding a repetition of the abuse of rights of workers after 1994. The Constitution introduced section 23, which aims, amongst

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106 Budeli M, 'Workers' Rights to Freedom of Association and Trade Unionism in South Africa: An Historical Perspective' (2009) 70.

107 Ministerial Task Team, Department of Labour, 'Explanatory Memorandum to the Draft Labour Relations Bill, 1995' 292.

other things, to protect the right of every trade union to participate in collective bargaining.

The ILO has significantly influenced the progression of issues concerning the right to freedom of association and collective bargaining in South Africa. Articles 22 to 25 of the Universal Declaration of Human Rights (1948) appear to have paved the way for the right to collective bargaining. The ILO's fact-finding and conciliation commission reviewed the collective bargaining system in South Africa and produced a number of proposals which were integrated into the recommendations of the Ministerial task force in 1995 and formed the foundation for the LRA. These proposals have also been used by courts in understanding issues concerning the right to collective bargaining. The Bill of Rights as contained in Chapter 2 of the Constitution contains pertinent provisions on equality in labour relations.[108] Section 23 of the Constitution thus provides that everyone, including employers and employees, has the right to fair labour practices. The provisions of section 23 give everyone, including employers and the workers, the right to fair labour practices.

The most significant amendments brought about by section 23 of the Constitution are the recasting of collective bargaining provisions to conform to the Constitution's principle of equality. According to South African labour history, the goal of the Constitution drafters was to encourage consensus among the various actors of collective bargaining in a labour environment. In South Africa, the right to bargain collectively is governed in two ways: first, via the LRA, which does not expressly define collective bargaining; second, through the Constitution, which fosters collective agreements formed as a consequence of collective bargaining and the Constitution. The judiciary's function in this regard is to interpret the rights enshrined in the Constitution and the LRA. The impact of the Constitution on collective bargaining in South Africa has been interpreted by the courts to mean that the employer is required to bargain. Section 23(5) of the Constitution, on the other hand, has been read in some quarters to give collective bargaining a voluntary aspect. The right's voluntary character helps to encourage sound labour relations.[109]

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108 Section 23 of the Constitution.

109 Angela Patricia Molusi, 'The Constitutional Duty to Engage in Collective Bargaining' (2010) 31 Obiter 156.

The rights to strike and engage in collective bargaining are enshrined in the South African Constitution. Every worker has the right to strike under section 23(2)(*c*).[110] And according to section 23(5), 'Every trade union, employers' organisation, and employer has the right to engage in collective bargaining'. Collective bargaining may be regulated by national legislation. To the extent that the legislation may limit a right in this Chapter, it must do so in accordance with section 65 of the LRA about limitations on the right to strike or the recourse to lock-out. It was asserted that people who engage in collective bargaining had the right to use economic force against their opponents. The right to freedom of association is the foundation of collective bargaining and is required for the fulfilment of collective bargaining and strike rights. Similarly, exercising organisational rights would be difficult without freedom of association, as it would limit the capacity to recruit and organise. As a result, trade unions require the freedom of employees to communicate freely with one another, with the ultimate objective of trade unions' organising until their employer recognises them.

One of the key characteristics of the LRA is the concession of organisational rights to trade unions in specific circumstances. This concession is based on the belief that granting these rights to trade unions will allow them to organise and function successfully in the workplace. This would strengthen their standing in the workplace and increase the likelihood that the employer would be willing to conclude a collective bargaining arrangement with them without the need for legal coercion.[111] The issue of what constitutes a workplace is discussed and analysed. The discussion is considered in the context of the overriding majoritarianism principle.

An examination of the elusive task of gaining a foothold in the workplace involves the co-equal task of determining what constitutes a workplace. The procedure is both evaluative and interpretative. It is essential to remember that when it comes to applying the notion of a workplace, constitutional principles and regulatory limits are pervasive. In this regard, the implications of the litigation in *Chamber of Mines v AMCU and on behalf of Harmony Gold Mining Co (Pty) Ltd* loom large.[112]

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110 Section 23(2)(*c*) of the Constitution.
111 Sonia Bendix, *Industrial Relations in South Africa* (3rd edn, Juta 1996) 278.
112 *Chamber of Mines/AMCU II.*

2.5.4 Levels of collective bargaining

There are various forums in which collective bargaining takes place and at distinct levels throughout the world. In South Africa, collective bargaining takes place at national level through the National Economic Development and Labour Council (NEDLAC), at sectoral or centralised level, and at plant level. In the USA, since the companies that appeared in the Industrial Era were large, they could thwart the power of the union at the plant or enterprise level; but bargaining at the enterprise level has been the more usual procedure.[113] Collective bargaining may take place at the following four different levels:

- Plant level bargaining, which is bargaining by an individual employer with one or more trade unions;
- Industry level bargaining, which is bargaining between a trade union and employer and employer association at national level;
- Sectoral bargaining, which is negotiation between one or more unions and numerous employers from a certain industry or vocation; and
- Multinational bargaining, which is bargaining on a worldwide level between trade unions or trade union federations and employers' groups.

Employers first saw collective bargaining at the industry level as a means of eliminating rivalry based on labour costs through standardised wage rates. Employers no longer consider collective bargaining a viable option. Centralised collective bargaining is viewed as depriving enterprises of the necessary freedom to compete based on modifications at the company level concerning salary, working hours and working conditions, work organisation, and manpower utilisation.

2.5 Statutory definition of 'workplace'

The word 'workplace' is ubiquitous in the labour law lexicon. It occurs in thirty-two sections of the LRA. Most of these provisions are found in the chapter dealing with

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113 Michael R Carrell and Christina Heavrin, *Labour Relations & Collective Bargaining: Cases, Practices & Law* (6th edn, Pearson Education 2000) 120–30.

workplace forums. Although section 213 of the LRA defines 'workplace' as 'the place or places where the employees of an employer work', it adds this proviso:

> 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.

It is always crucial to remember that organisational rights are exercised in a workplace. The issue of thresholds and a litmus test for representivity are also determined with reference to the workplace. In brief, collective bargaining process begins and ends with reference to the workplace. According to legal scholars, the word 'workplace' bears a meaning different from the one in the statutory definition.[114] In these provisions, said the commissioner, the word 'workplace' clearly referred to the premises as a whole.[115] It is important to note that absurdities would result if the word were to be given that wide meaning in the references to 'workplace' in the chapter dealing with organisational rights.[116] Accordingly, the legislature could not have intended to deprive unions with majorities in the applicable bargaining unit of the right to appoint shop stewards or to conclude binding collective agreements. It also overlooks the fact that a threshold of a majority in the workplace as a whole would constitute a radical departure from the rights won by many unions in their historical bargaining constituencies.[117]

The words 'majority of employees … in a workplace' in section 18 of the LRA (which concerns the right to establish thresholds of representativeness) accordingly refer to the majority of employees in the bargaining unit in respect of which the union has gained recognition.[118] Majority trade unions have more powers and influence than other unions under the present trade union framework. These unions have stronger organisational rights and the ability to form workplace forums. Employee participation in the workplace necessitates the use of these forums. The LRA structure has a drawback in that it prohibits adequately represented and minority trade unions from exercising their constitutional rights in the sense that only a few

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114 *Oil Chemical General & Allied Workers Union and Volkswagen of SA (Pty) Ltd* (2002) 23 ILJ 220 (CCMA) [16] (hereinafter *OCGAWU v VWSA*).
115 *OCGAWU v VWSA* [22].
116 *OCGAWU v VWSA* [24].
117 *OCGAWU v VWSA* [26].
118 *Chamber of Mines/AMCU III* [26]–[37].

rights are accorded to unions that are well represented, whereas none are granted to minority unions. As a result of section 18 of the LRA, the dominant trade union is allowed to dominate the block and prevent any minority trade union from posing a danger to its supremacy. As seen by the 'Marikana massacre' and the pervasive violence in the recruitment arena, the effects of this dominance and the resistance to it may have jeopardised labour peace.[119]

2.6 Interplay between collective bargaining and the right to freedom of association

An understanding of freedom of association and collective bargaining in the modern labour law landscape must begin with the primary source of South African labour law, the ILO, particularly its Conventions. Convention 87 and Convention 98 have contributed to the substantial progress in shaping the constitutional and statutory contours of freedom of association and collective bargaining across many jurisdictions.[120] The Committee of Experts on the Application of Conventions and Recommendations (CEACR) was formed in 1926 to examine the growing number of government reports on ratified conventions.

The Conference Committee on the Application of Standard (CCC) requires governments to report every three years on the actions that they have taken in law and practice to implement any of the eight basic and four governance conventions that they have ratified, such as Convention 87 and Convention 98 and the Domestic Workers Convention, 2011 (No 189) (hereinafter Convention 189). The CEACR finds that the majoritarian system is compatible with freedom of association and that a trade union representing the majority in a bargaining unit may have preferred or exclusive negotiating rights.[121] The CEACR also emphasises that minority trade unions should be given a voice, as they represent a significant number of employees.

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119 *National Union of Mineworkers v Lonmin Platinum Comprising Eastern Platinum Ltd and Western Platinum Ltd* [2013] 10 BLLR 1029 (LC) 1033–34.

120 For incisive analysis, see Anon, 'Introduction: Labour Rights, Human Rights' (1998) 137 ILR 127, 127–33.

121 Bernard Gernigon, Alberto Odero and Horacio Guido, 'Collective Bargaining: ILO Standards and the Principles of the Supervisory Bodies' (2000) <http://www.ilo.org/global/standards/information-resources-and-publications/publications/WCMS_087931/lang--en/index.htm> accessed 10 April 2024.

The CEACR, which is the first to intervene in the supervisory process, is a highly technical and quasi-judicial organisation. It is composed of jurists from all over the world, and its mission is to oversee the implementation of ILO standards by member states, particularly the conventions that they have ratified. The CEACR examines government reports and observations from employers' and workers' organisations at its annual meeting, and monitors follow-up on recommendations made by other supervisory bodies. It also uses information supplied to these bodies, as well as information gathered during so-called direct contact missions and the types of special missions mentioned above. The CEACR and the Committee on Freedom of Association (CFA) have played a crucial role in interpreting and closing the gaps left by international rules and standards on freedom of association.

The ILO's work on freedom of association and collective bargaining is coordinated by two ILO units:[122]

> The ILO Declaration on Fundamental Principles and Rights at Work, adopted in 1998 and amended in 2022, is an expression of commitment by governments, employers' and workers' organizations to uphold basic human values - values that are vital to our social and economic lives. It affirms the obligations and commitments that are inherent in membership of the ILO, namely; freedom of association and the effective recognition of the right to collective bargaining; he elimination of all forms of forced or compulsory labour; the effective abolition of child labour; the elimination of discrimination in respect of employment and occupation; and a safe and healthy working environment.[123]

Article 20(1) and article 20(2) of the ILO Freedom of Association and Collective Bargaining state that 'everyone has the right to freedom of peaceful assembly and association' and that no one may be compelled to belong to an association.[124] A free and open society requires workers and employers to have the freedom to organise and join groups of their choosing. In many cases, these organisations have played a key part in the democratic transition of their countries.[125]

The voluntary nature of collective bargaining is expressly laid down in Article 4 of Convention 98. The CFA has made it clear that measures to promote collective

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122 ILO, Freedom of Association and Collective Bargaining 1996.
123 ILO, Declaration on Fundamental Principles and Rights at Work, 1998.
124 ILO, Freedom of Association and Collective Bargaining 1996.
125 ILO, Freedom of Association and Collective Bargaining 1996.

bargaining exclude recourse to measures of compulsion.[126] It is also important to note that the Collective Bargaining Convention, 1981 (No 154) (hereinafter Convention 154) defines collective bargaining in Article 2 as follows:

> For the purpose of this Convention the term ***collective bargaining*** extends to all negotiations which take place between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more workers' organisations, on the other, for–
>
> (a) determining working conditions and terms of employment; and/or
>
> (b) regulating relations between employers and workers; and/or
>
> (c) regulating relations between employers or their organisation and a workers' organisation or workers' organisations.

The ILO Governing Body established the Committee on Freedom of Association in 1951. Unlike the Committee of Experts, the Committee on Freedom of Association is a tripartite organisation composed of members of the Governing Body. It has had an independent chairwoman since its inception. The ILO decided soon after the adoption of Convention Nos 87 and 98 on freedom of association and collective bargaining that 'the principle of freedom of association required a new supervisory procedure to ensure its implementation in countries that had not ratified the relevant Conventions'.[127] The Committee on Freedom of Association meets three times a year to investigate complaints of infringement of freedom of association made by workers' organisations and, to a lesser extent, employers' organisations. The mechanism in place allows the governments of the nations involved to respond to the allegations and offer any evidence to counter them.[128]

Notably, the committee considers both complaints against nations that have ratified the International Covenant on Civil and Political Rights 1966[129] and complaints against countries that have not done so. In fact, the vast majority of governments comply with the committee's work, which allows governments to defend themselves against baseless accusations or explain why they implemented the measures that

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126 For detailed discussion, see Bernard Gernigon, Alberto Odero, and Horacio Guido, 'ILO Principles Concerning Collective Bargaining' (2000) 139 ILR 33.

127 ILO, Supervisory System, the Committee on Freedom of Association 1996, 93.

128 ILO, Freedom of Association and Collective Bargaining 1996.

129 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

are being criticised. The procedure followed empowers the governments of the nations involved to respond to the allegations and submit any evidence to counter them. It is crucial to understand that the committee investigates both complaints against nations that have ratified the Conventions on Freedom of Association and complaints against countries that have not yet done so.

Equally, the CFA has also considered the adverse effect of the proliferation of trade unions on any collective bargaining system. It is incontestable that small and weak trade unions militate against the unity of workers, thereby undermining collective bargaining. Nonetheless, the CFA is opposed to the unification of the trade union movement inspired by legislative enactments. Such measures would violate the deeply entrenched principle enshrined in Articles 2 and 11 of Convention 87. The CFA has indicated:[130]

> A provision authorizing the refusal of an application for registration if another union, already registered, is sufficiently representative of the interests which the union seeking registration proposes to defend, means that, in certain cases, workers may be denied the right to join the organisation of their own choosing, contrary to the principles of freedom of association.

The ILO requires objective and precise criteria to obviate the scope of impartiality against minority unions:[131]

> These limitations not only exclude smaller unions from membership of bargaining councils, but also limit the right of trade union members to be represented by their representatives during individual grievance and disciplinary proceedings. Added to this, clear guidelines have not been established by the amendments pertaining to the notions of 'a significant interest' or a trade union which represents a substantial number of employees. The Committee of Experts and the CFA declared that the law may impose certain conditions on the right to strike, such as the obligation to provide prior notice, the obligation to use conciliation before a strike, the use of voluntary arbitration, and the use of a secret ballot.[132]

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130 International Labour Organization, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th (rev) edn, ILO 2006) para 328.

131 Temogo Geoffrey Esitang and Stefan van Eck, 'Minority Trade Unions and the Amendments to the LRA: Reflections on Thresholds, Democracy and ILO Conventions' (2016) 37 ILJ 763, 765.

132 Bernard Gernigon, Alberto Odero and Horacio Guido, 'ILO Principles Concerning the Right to Strike' (1998) 137 ILR 441, 477; AJ Pouyat, 'The ILO's Freedom of Association Standards and Machinery: A Summing Up' (1982) 121 ILR 287, 297.

These conditions, however, should not make a strike difficult or impossible. The conditions serve specific purposes, such as resolving the dispute amicably or ensuring that the strike action is supported by the majority the employees in the workplace or industry in question. For example, the requirement to provide prior notice to the employer allows the employer to take corrective action before the strike begins.[133]

2.7 Chamber of Mines/AMCU litigation

The recent judicial pronouncements in the *Chamber of Mines/AMCU* litigation answered important questions about freedom of association and organisational rights. The Labour Court, the Labour Appeal Court, and the Constitutional Court clarified the breadth and scope of the LRA's definition of 'workplace': in other words, what the word 'workplace' means in the statute and, more specifically, in section 23(1)(*d*). In so doing, the Constitutional Court had to confront persistent and contentious questions. Does the word mean all the mines of the Chamber member companies overall – where AMCU was in the minority? Or the individual goldmines – where it had a majority? And if it was all the mines of the member companies overall, thus snatching away from the Association of Mineworkers and Construction Union (AMCU) members at the individual mines their right to strike, does the statutory provision withstand constitutional challenge?

Beyond the narrow interpretive approach to the statutory definition of 'workplace', the factual scenario in the case of *Chamber of Mines v AMCU* reflects the perceived collective bargaining shortcomings that underlie the tragic events on the platinum belt on 12 August 2012. In blunt terms,[134] the arduous battle for improved salaries and working conditions for generations of mineworkers laid the groundwork for South Africa's prosperity, with an increasingly heated competition among unions over who would represent the workers in that struggle today. In effect, *Chamber of Mines v AMCU* raises wider policy issues and unaddressed concerns about the propriety of majoritarianism in the context of nearly twenty-six years of democracy

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133 Gernigon, Odero and Guido, 'ILO Principles Concerning Collective Bargaining' 477; see generally Pouyat, 'The ILO's Freedom of Association Standards and Machinery'.

134 *Chamber of Mines/AMCU III* [2].

and more than two decades since the LRA's enactment.[135] It might be argued that a different definition of 'workplace' would have worked just as well, if not better, and would have been fairer to smaller or emerging unions. The key question was whether an agreement reached between mining companies and their collective bargaining representative, on the one hand, and trade unions representing a majority of those companies' workers, on the other hand, binds employees at individual mines where their own trade union, which is not a signatory to the agreement, is the majority union.[136] According to section 65 of the LRA, anybody who is 'bound by …any arbitration award or collective agreement that regulates the issue in dispute' is not allowed to strike. Section 65 of the LRA provides in relevant part:

> (1) No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if–
> (*a*) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute.
> …
> (3) Subject to a collective agreement, no person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or lock-out—
> (*a*) if that person is bound by—
> (i) any arbitration award or collective agreement that regulates the issue in dispute; or
> (ii) any determination made in terms of section 44 by the Minister that regulates the issue in dispute; or
> (iii) any determination made in terms of Chapter Eight of the Basic Conditions of Employment Act and that regulates the issue in dispute, during the first year of that determination.

In the present case, the applicant union, AMCU, represented the majority of workers at each of the mines as the first applicant, the Association of Mineworkers and Construction Union (AMCU). The applicant faced difficulties because it was not the dominant union at any of the mining firms that owned the mines. The point of contention was an agreement reached between mining companies and their collective representative, on the one hand, and unions representing a majority of those companies' workers, on the other hand, binding employees at individual mines where AMCU was the majority union, even though AMCU was not a party to

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135 *Chamber of Mines/AMCU III* [47]–[48].
136 *Chamber of Mines/AMCU III* [41], [59].

the agreement.[137] What is significant about the dispute is whether a single mine can constitute a 'workplace'. It clearly can. The definition specifically states this, but the complicated and intriguing topic that emerged for resolution was whether any of the five AMCU-majority mines constituted an autonomous operation because of size, purpose, or organisation.

The applicant's core argument was that AMCU-majority mines constituted a separate 'workplace'. It was contended that the definition of 'workplace' does not apply to the reference in section 23(1)(*d*)(iii) of the LRA to 'the majority of employees employed by the employer in the workplace'.[138] Seen in this light, the definitions in the LRA apply only 'unless the context otherwise indicates'. In addition, AMCU maintained that, if the term did apply, it might be construed in a 'broad' fashion, implying that 'workplace' refers to a single mine rather than all the employer's activities together.[139]

When confronted with AMCU's arguments on the correct interpretation of the statutory definition of a workplace, both the Labour Court and the Labour Appeal Court were laudably conclusory. Simply put, the individual AMCU-majority mines did not constitute independent operations.[140] On this point, the courts were not influenced by the fact that the companies had entered into separate recognition agreements with AMCU at some individual mines. It follows that each mining company constituted a single industry-wide workplace.[141]

In inviting the Constitutional Court to reverse the decisions of the courts below, AMCU pointed out that both the Labour Court and the Labour Appeal Court erred in approaching the meaning of 'workplace' as solely a question of fact, to the exclusion of any interpretive analysis in which AMCU's constitutional rights featured.[142] The Constitutional Court was asked to rule on whether section 23(1)(*d*) of the LRA unjustifiably restricts the applicant's members' rights to fair labour practices, such as the ability to negotiate collectively through AMCU, the right to

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137 *Chamber of Mines/AMCU III* [10].
138 *Chamber of Mines/AMCU III* [11].
139 *Chamber of Mines/AMCU III* [11].
140 *Chamber of Mines/AMCU III* [31].
141 *Chamber of Mines/AMCU III* [31]. See also *Chamber of Mines/AMCU I* [29]–[35]; *Chamber of Mines/AMCU II* [61]–[68].
142 *Chamber of Mines/AMCU III* [34].

strike, and the right to freedom of association. According to AMCU, constitutional principles of interpretation pointed to a different outcome: that each individual mine was a 'workplace' for the purposes of section 23(1)(*d*) of the LRA.[143] The Constitutional Court made it clear from the outset that the statute defines 'workplace'. In this respect, there are two important aspects of the statutory definition: first, its focus on employees as a collective; secondly, the relative immateriality of location. Both signal that 'workplace' has a special statutory meaning.[144]

First, the term 'workplace' does not refer to the place of any particular employee's workshop, assembly line, field, desk, or office. It is the location where 'the employees of an employer' work collectively. The statute approaches the topic from the perspective of those employees as a collective. This approach is consistent with the LRA's use of the phrase 'workplace'. Workers are described as a group rather than as solitary individuals in this perspective. This, in turn, aligns with the objectives of the LRA. One of the LRA's declared principal objectives is to promote orderly bargaining by workers collectively. The fact that the focus of the concept of 'workplace' is on employees as a collective rather than as distinct individuals accords with and accentuates the second point as follows:[145]

> The location is not primary but functional organisation is. The definition encompasses one or more 'places where an employer's employees work'.[146] This means that a single workplace may be defined as 'the place or places' where employees work. Right at the outset this eliminates any notion, which the ordinary meaning of 'workplace' might encourage, that each single place where a worker works is a separate 'workplace'.[147]

As appears from the court's reasoning, several issues of practical significance emerge. By the same token, further underlying frailties underpinning AMCU's central contention deserve some brief comment. The definition creates a default rule that, regardless of the places, one or more places where employees of an

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143 *Chamber of Mines/AMCU III* [32].

144 *Chamber of Mines/AMCU III* [24].

145 *Chamber of Mines/AMCU III* [25].

146 Section 213 of the LRA. See also *Professional Transport and Allied Workers Union obo members v Professional Aviation Services* [2016] 4 BALR 421 (CCMA) [29].

147 Section 213 of the LRA. The meaning of the word 'workplace' in the LRA is determined by reference to a range of factors, not only geographical location. The 'workplace' will not always necessarily be where the head office is situated or where the majority of the workforce is employed.

employer work are all part of the same workplace.[148] Differently put, the applicant had maintained that the ordinary meaning of 'workplace' applied: the geographical places where its members work at their individual mines. First, the LRA approached the concept of 'workplace' from the point of view of those employees as a collective. Expressed differently, a workplace is where 'the employees of an employer', collectively, work.[149] The statute approaches the concept from the point of view of those employees as a collective. It follows that the focus of the statutory definition of 'workplace' is on workers as a collective rather than as separate individuals.

Cameron J reminded us that:[150]

> Both features of the definition — its approach to workers as a collectivity, and its de-emphasis of geography — have a practical bite . They signal that for purposes of the LRA "workplace" does not have its ordinary meaning: the legislature has assigned a special meaning to the term. It follows that Amcu's contention that the ordinary meaning of "workplace" applies, namely the geographical places of work of its members, at their individual mines, faces into a conceptual windstorm. It must battle against not only the specified statutory wording, but the entire statutory context that supports that meaning and in which it is embedded.
> … It is this statutory definition the Labour Court and the Labour Appeal Court applied. Was each Amcu-majority mine a separate "workplace"? That depends not on the mines' geographic location or where the individual workers worked, but on the functional signifiers of independence the definition lists. It requires one to determine whether the employer companies conduct two or more operations "that are independent of one another by reason of their size, function or organisation".[151]

The definition delineates one or more 'place or places where employees of an employer work'. This delineation implies that 'the place or places' where workers work may constitute a single workplace. The corollary of the scope of the definition is that it envisages and entails the intrinsic possibility of locational multiplicity for a single 'workplace'. Lastly, as to AMCU's plea for 'the broad interpretation' of 'workplace', which does not result in encroachment on fundamental rights, the court found that such an approach runs counter to the tenor of the statutory language. As already indicated, this approach would mean that each AMCU-majority mine would be a workplace.[152] To accept AMCU's proposition, the court would have to entirely

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148 *Chamber of Mines/AMCU III* [27].
149 *Chamber of Mines/AMCU III* [25].
150 *Chamber of Mines/AMCU III* [29], [30].
151 *Chamber of Mines/AMCU III* [26].
152 *Chamber of Mines/AMCU III* [32].

ignore the colour which the statute and the rights it implements give to the interpretive process.[153]

In short, the agreement was validly extended to AMCU members at the five AMCU-majority mines. The *AMCU/Chamber of Mines* trilogy breaks important new ground in the interpretation of section 23(1)(*d*) of the LRA. This trilogy ending in an important Constitutional Court judgment reflects an increasingly fierce contest between unions about membership and the bitter struggle for better wages and conditions in the unsettled mining sector. Of greater significance for the union rivalry is that this is an exceptional judgment reflecting the jurisprudential thinking of an innovative and skilful judge, premised on a statutory definition in a manner that promotes the object as well as the spirit and purport of the LRA and the Bill of Rights.

2.8 Striking to secure organisational rights: from Bader Bop to AMCU/Chamber of Mines and onwards

The other important question to answer in this chapter of the thesis relates to the question of whether an unrepresentative trade union has a right to strike in order to secure organisational rights. Related to this is the critical question raised by *AMCU/Chamber of Mines* about whether an agreement reached between mining companies and their collective representative, on the one hand, and unions representing a majority of those companies' workers, on the other hand, binds employees at individual mines where their own union, which is not a party to the agreement, is the majority union. The question is how far a minority union and its members can go in exercising their right to strike in the face of a strike ban agreement to which they were not parties. The answers to these crucial issues are not very startling in themselves. Instead, the most interesting feature is the legacy of *Bader Bop* and the views crystallised in the *AMCU/Chamber of Mines* trilogy.

2.8.1 Legacy of *Bader Bop*

In *Bader Bop*, the Constitutional Court was requested to rule on whether it is permissible for a trade union to go on strike to persuade the employer to give it

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153 *Chamber of Mines/AMCU III* [32].

organisational rights even when it does not represent the majority of workers there. The court concluded:[154]

> There is nothing in part A of chapter III [of the LRA] … which expressly states that unions that admit they do not meet the requisite threshold membership levels are barred from using ordinary collective bargaining and industrial action to persuade employers to grant them organisational facilities such as access to the workplace, stop-order facilities, and shop steward recognition. These are obviously concerns of "mutual interest" to employers and unions, and as such, they are capable of becoming the subject-matter of collective agreements and being brought to the CCMA for conciliation, the condition antecedent to protected strike action.

Mischke clearly opines that small minority unions will not be able to effectively engage in strike action in support of a demand for organisational rights.[155] Yet there may be an exception where, for example, a numerically small union representing a highly skilled group of employees such as engineers or senior artisans could possibly bring the employer's operations to a standstill if they withdrew their expertise in support of their union's demands for organisational rights.[156] In the wake of *Bader Bop*, the Labour Court in *Transnet SOC Ltd v National Transport Movement* had to decide whether a strike by a minority union to secure organisational[157] rights was unprotected in that the union sought to coerce the employer to do the 'unlawful act' of defying a pre-existing and binding collective agreement with majority unions. In a nutshell, the facts were as follows. Transnet had reached a recognition agreement with a number of trade unions in the workplace, under which recognition thresholds were set for accomplishing organisational rights. Organisational rights were reserved for those unions that were deemed sufficiently representative, in that they represented a minimum of 30% of the employees at the workplace.[158] The respondent, National Transport Movement, a minority union, sought to obtain organisational rights by means of strike action, despite falling well below the required threshold. The applicants contended that the collective agreement regulated the basis on which organisational rights could be

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154 *Bader Bop* [40].

155 C Mischke, 'Getting a Foot in the Door: Organisational Rights and Collective Bargaining in terms of the LRA' (2004) 13 *CLL* 51.

156 Mischke, 'Getting a Foot in the Door' 51.

157 *Transnet SOC Ltd v National Transport Movement* (2014) 35 ILJ 1418 (LC), [2014] 1 BLLR 98 (LC) [1] (hereinafter referred to as *Transnet*). See also PAK le Roux, 'Organisational Rights for Minority Unions' (2014) 23 *CLL* 64.

158 *Transnet* [4].

attained, and as the respondent did not meet the threshold requirements for organisational rights, a demand for such entitlement would constitute a breach of the agreement.

The solution seemed to be displeasing, according to Van Niekerk J.[159] Whether a collective agreement between an employer and third-party unions can limit a non-party union's ability to strike, in my opinion, is a matter that must be addressed by the provisions of the agreement, read in conjunction with sections 64 and 65 of the LRA. The collective agreement seems not to have been extended to bind employees who were not members of any of the union parties to the agreement.[160] The minority union was not a party to the collective agreement, and Van Niekerk J found that the union was not bound by the provisions of that agreement and hence had the right to strike.[161]

2.8.2 *AMCU/Chamber of Mines III*: Collective agreement and limitation of the minority union's right to strike

As previously indicated, the second critical aspect of *AMCU/Chamber of Mines III* concerned AMCU's contention that section 23(1)(*d*) of the LRA violates the right to freedom of association, the right to collective bargaining, and the right to strike. In essence, AMCU challenged the application of the principle of majoritarianism under the LRA.[162] The appellant's complaints turned on the constitutional propriety of applying majoritarianism to a sector-wide agreement under section 23 of the LRA.[163] Put differently, AMCU wanted majoritarianism to apply at each individual mine, with the result that AMCU's majority at five of them could prevail. However, the court dealt a decisive blow to AMCU's complaint about the sector-wide application of majoritarianism as lacking the rigour of logical principle. Cameron J held:[164]

> If its claim to be the majority union at the five mines fails, it suffers relegation to being a minority in the sector as a whole. That's tough for a union that has fought laboriously, against the odds, mine by mine, to establish itself. Hence it

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159 *Transnet* [18].
160 *Transnet* [19].
161 *Transnet* [19].
162 *AMCU/Chamber of Mines III* [35]. See also s 23(1)(*d*) of the LRA.
163 Section 23(1)(*d*) of the LRA.
164 *AMCU/Chamber of Mines III* [46].

> contends that the "principle of majoritarianism does not achieve social justice for minority workers whose social circumstances may not be the same as those workers who have mandated the majority". This is a scarcely veiled claim that Amcu represents the poorest and least-empowered workers in the sector, and therefore that the court should intervene to impose mine-by-mine majoritarianism.

Nevertheless, the court acknowledged that AMCU was correct that the codification of majoritarianism in section 23(1)(*d*) of the LRA limits the right to strike.[165] Although at first glance the majoritarianism system operates, it still allows minority unions freedom of association. For instance, '[m]inority unions have recruiting rights (which Amcu had), organisational rights (which Amcu had), deduction rights (which Amcu had), recognition of shop stewards (which Amcu had), time off for union office bearers to do union work (which Amcu had) and bargaining rights (which Amcu had)'.[166]

Of the utmost importance is the fact that in spite of losing the right to strike while the agreement was in force, 'none of the non-signatory unions or employees lost any of their organisational and collective bargaining entitlements'.[167] Seen in this light, the LRA, although underpinned by majoritarianism, is not an instrument of oppression. According to Cameron J, majoritarianism does not completely suppress minority unions:[168] 'Its provisions give ample scope for minority unions to organise within the workforce — and to canvass support to challenge the hegemony of established unions.' It is primarily because the LRA grants AMCU these rights that AMCU has been able to grow its membership, strength, and influence so dramatically as an insurgent force in the established union sector. This is significant in assessing the scope of the rights limitation imposed by section 23(1)(*d*) of the LRA.

In so far as a section 23(1)(*d*) agreement imposes limitations on the right to strike, it is strictly circumscribed, in both ambit and time. 'A collective agreement extended to non-parties does not apply to them indefinitely. It applies only for the duration of the agreement and regarding the specific issues it covers.'[169] This all points

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165 *AMCU/Chamber of Mines III* [50].
166 *AMCU/Chamber of Mines III* [54].
167 *AMCU/Chamber of Mines III* [54].
168 *AMCU/Chamber of Mines III* [55].
169 *AMCU/Chamber of Mines III* [58]

distinctly to the conclusion that section 23(1) of the LRA does not countenance indefinite or far-reaching extension. It directly ties the limitation of the right to strike to the outcome of collective bargaining and is narrowly tailored to the specific goal of orderly collective bargaining.[170] As a result, AMCU's objections to the constitutional structure that allows non-parties to extend collective agreements under section 23(1)(*d*) of the LRA could not prevail.[171]

2.8.3 *National Union of Metal Workers of South Africa v Lufil Packaging (Isithebe)*

Lufil produces printed and plain paper bags, as well as paper and paper-derivative-based packaging products. The National Union of Metal Workers of South Africa demanded organisational rights for its members who work for the employer. The latter declined the organisational rights on the grounds that NUMSA's Constitution prohibits it from operating in the industry in which the employer operates. The packaging industry is not included in the scope described in NUMSA's Constitution. The statutory Council for the Printing, Newspaper and Packaging Industries (PNPI) has jurisdiction over Lufil. NUMSA was neither a PNPI union member nor a PNPI participant. At the CCMA, NUMSA admitted that its scope was not covered by the employer's operations but argued that this did not preclude NUMSA from organising or representing its members who fell outside its specified scope. As a result, the employer raised the preliminary point that the union lacked jurisdiction to refer the matter. The commissioner determined that a union has the standing to seek organisational rights in workplaces not covered by its Constitution and dismissed the preliminary point.[172]

The matter was referred to the Labour Court, where the decision was affirmed. The court concluded that the fact that NUMSA has standing to seek for organisational rights and submit a disagreement to the CCMA does not mean that it is entitled to those rights under the LRA's legislative criteria. The major problem throughout, as acknowledged by the CCMA in both its judgment and the award, was the allegation

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170 *AMCU/Chamber of Mines III* [58].
171 *AMCU/Chamber of Mines III* [58].
172 *Lufil* [1], [2], [3] and [4].

that NUMSA could not qualify for organisational rights because Lufil employees are ineligible to be members.

The LRA requires unions' constitutions to specify which employees are eligible to join them and, by extension, prohibits them from admitting as members those employees who are not eligible to be admitted under the terms of the LRA. A trade union cannot create a class of membership outside the provisions of its constitution, and if the union purports to do so, it exceeds its powers and the act has no validity. A purported decision by a union to admit as a member someone who is not eligible under its constitution to become a member is not a mere internal decision immune from attack by an affected employer: such a decision is ultra vires and invalid and, as such, challengeable by the employer from whom organisational rights based on the membership concerned are sought. The employees that the union relied on in support of its contention that it was sufficiently representative could not become members of the union. As a result, the union was not sufficiently representative. The appeal was upheld.

In the Constitutional Court, NUMSA argued that this matter raised several key constitutional issues. The right to join a union is a constitutional right afforded to all workers but is not an unfettered right. NUMSA also argued that it is a registered union with sufficient representation, as 70% of Lufil employees applied to become and were accepted as members of NUMSA. NUMSA stated that it had complied with the representivity provisions of the LRA and ought to be granted organisational rights within Lufil. An additional argument was that if the legislature intended the scope of the union's constitution to be determinative, the legislature would have said so.[173]

The Constitutional Court determined that freedom of association is a positive right because it allows individuals to organise around specific issues of concern and necessitated consideration of how NUMSA could advance the interests of its existing members as well as the newly enlisted members in the paper and packaging industry. The court decided that the right to freedom of association in this situation was not a unilateral, self-contained right that might be exercised

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173 *Lufil* [64].

without regard for other rights. There might be a variety of reasons why members who were now covered by NUMSA's scope would oppose NUMSA's diversification and the addition of another unrelated industry to its coverage.

As a result, the courts found that NUMSA's flagrant disrespect for its own constitutional requirements might undermine the existing members' freedom to associate and dissociate. Relying on the Labour Court judgment in *Van Wyk and Taylor v Dando and Van Wyk Print (Pty) Ltd*,[174] the Labour Appeal Court found that if it is shown that the persons concerned are precluded by the union's constitution from becoming its members, any purported admission of those employees as members is ultra vires the union's constitution and invalid.[175] Based in this judgment, it is argued that its importance is the finding that trade unions that have defined eligibility requirements for membership in their constitutions cannot admit employees as members who do not meet these requirements and subsequently seek to obtain organisational rights from an employer on the basis of those purported members.

2.8.4 *Combined Cleaners (Pty) Ltd t/a Spot on Cleaners v National Union of Metalworkers of South Africa*[176]

The employer sought to interdict a strike called by the union. The strike had been called in support of a demand relating to the union's acquisition of organisational rights at the employer's premises.[177] The employer refused to provide the union's requested organisational powers, which resulted in several referrals to the CCMA. On 8 October 2020, 'the CCMA issued a certificate to the effect that the dispute between the parties remained unresolved'.[178] The union also demanded that the disagreement be settled through arbitration on the same day. The arbitration hearing was set for 11 February 2021. The dispute was settled during the hearing on the premise that the employer would withhold trade union subscriptions from its employees who were not union members. It was also decided that the union would

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174 *Van Wyk v Dando & Van Wyk Print (Pty) Ltd; Taylor v Dando & Van Wyk Print (Pty) Ltd* (1997) 18 ILJ 1059 (LC), (1997) 7 BLLR 906 (LC).

175 *Lufil* [69].

176 *Combined Cleaners (Pty) Ltd t/a Spot on Cleaners v National Union of Metalworkers of South Africa* [2021] ZALCJHB 348 (12 October 2021) (hereinafter *Combined Cleaners*).

177 *Combined Cleaners* [1].

178 *Combined Cleaners* [2].

not be awarded any more organisational privileges unless its constitution was updated to include the laundry industry. On 2 May 2021, the union again referred a dispute about organisational rights, demanding the same rights that were the subject of the prior referral. On 7 June 2021 at the CCMA, the parties agreed to meet by no later than 18 June 2021 and to engage on the issues of the union scope, subscriptions, and membership verification.

The employer claimed that the union's constitution did not apply to the industry in which it was involved. On 7 July 2021, the union referred yet another disagreement to the CCMA, this time seeking the same organisational rights as the prior two referrals.[179] At the conciliation meeting on 2 August 2021, the employer repeated its refusal to extend organisational rights to the union because the employer was engaged in an industry that fell outside the union scope as defined by the constitution. On 2 August 2021, the CCMA issued a certificate that the dispute remained unresolved. On 8 October 2021, the union issued a notice of its intention to commence a strike on 11 October 2021. The employer asserted that in terms of the union's constitution, its employees were not eligible for membership and that the union was not entitled to organisational rights in respect of members admitted outside the terms of the constitution.[180]

The union had been unable to obtain a constitutional amendment that would broaden its definition of eligibility to include employees involved in laundry and dry cleaning. The court was also entitled to take judicial notice of the fact that existing bargaining councils established for the laundry, cleaning and dyeing industry defined in the agreements those activities which relate to the carrying on in establishments of laundromats and launderettes, in-house laundry is away articles of laundered, cleaned or died to the order of customers, including depots or vehicles where such articles are received in order to be laundered, cleaned or dyed. Given the circumstances, held Van Niekerk J,[181]

> it would seem to me in the circumstances that the reference to "cleaning" in the union's constitution is a reference to the cleaning envisaged by the contract cleaning services industry (for which a bargaining council is also in existence),

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179 *Combined Cleaners* [2].
180 *Combined Cleaners* [6].
181 *Combined Cleaners* [7]

> a definition that extends to the cleaning or washing of buildings and other premises, carpets, floors, walls and the like, but which does not include laundry and dry cleaning activities.

The union appeared to have accepted this position by consenting to a settlement that required it to alter its constitution after the settlement to include the applicant's operations and to guarantee that the revision was recorded and presented to the applicant.[182] The legal principles had been affirmed by the Constitutional Court decision in *NUMSA v Lufil Packaging (Isithebe)*. The court held that a trade union acts ultra vires its own constitution when it allows the membership of individuals who are not permitted to be members of the union in terms of its own constitution. The court held that the union's constitution did not include employees falling within the laundry, cleaning and dyeing industry. Consequently, the court granted an order declaring the strike called by the union unprotected and interdicting the union from participating in the strike or in any conduct in contemplation or furtherance of the strike.

2.8.5 *Murray and Roberts (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration*[183]

In *Murray and Roberts (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration*, the Labour Appeal Court had to decide whether to set aside a settlement agreement between Murray and Roberts and AMCU which was allegedly entered into on a false premise and legal interpretation of section 18 of the LRA.[184] Murray and Roberts, one of the construction companies working on the Kusile project for Eskom, had concluded two collective agreements with seven unions that had organisational rights within the company. They effectively signed a Labour Project Agreement (LPA) and a Final Project Agreement (PA) that governed remuneration and employment terms and conditions for all employees at the company. Furthermore, these agreements contained threshold requirements which essentially indicate that any union can become a party to these agreements provided the union signs them, is a registered member of the Metal and Engineering

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182 *Combined Cleaners* [7].

183 *Murray and Roberts (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* [2019] 11 BLLR 1224 (LAC), (2019) 40 ILJ 2510 (LAC) (hereinafter referred to as *Murray and Roberts*).

184 *Murray and Roberts* [1].

Industry Bargaining Council (MEIBC) or the Bargaining Council for the Civil Engineering Industry (BCCEI) and has at least 300 members in the workplace. AMCU filed an organisational rights dispute with the CCMA because the CCMA did not meet with AMCU after the statutorily mandated 30 days.

The parties reached a settlement agreement at a conciliation based on the interpretation of section 18 of the LRA. Murray and Roberts informed AMCU and the CCMA that because of the threshold criteria under the LPA and PA agreements, Murray and Roberts were unable to give organisational powers to AMCU and that AMCU must first join the MEIBC. In addition, AMCU also had to demonstrate that they had a minimum of 5 000 members in the industry to become a member of the MEIBC. AMCU decided that in order to join the MEIBC, they must first submit their audited financial statements and become a member. AMCU sought organisational rights again about a year later, and the subject was brought before the CCMA once more. Murray and Roberts contended that the matter was res judicata, meaning that it had already been decided by a competent court, and that the CCMA lacked jurisdiction as a result. The CCMA agreed. AMCU then filed a motion with the Labour Court to have the settlement agreement annulled, saying that it was concluded on the basis of an inaccurate legal position regarding the interpretation of section 18 of the LRA.

The Labour Appeal Court acknowledged that the settlement agreement was reached because of a mutual misunderstanding between the parties, citing the Constitutional Court's decision in *POPCRU v SACOSWU*:[185] the notion that threshold agreements served as a 'shield' for the majority trade unions was debunked by the Constitutional Court on appeal in *POPCRU v SACOSWU*. Section 18 of the LRA does not preclude a minority union from seeking organisational rights, as section 20 of the LRA states unequivocally that '[n]othing … precludes the conclusion of a collective agreement that regulates organisational rights'. As a result, the LPA and PA agreements did not deprive AMCU of the ability to negotiate collectively with Murray and Roberts to reach a settlement agreement on the exercise of organisational rights.

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185 *POPCRU v SACOSWU* 2019 (1) SA 73 (CC).

According to the court, a minority union has three options for establishing organisational rights in the workplace. The first option is by meeting the threshold in any collective bargaining agreement. In this manner, the minority union would not have to argue for these rights because they would be granted automatically. The second option is that the union may bargain jointly for organisational rights, after which an employer might grant rights to the union and vice versa. And the third option is that if a union meets the LRA's basic standards, it can have organisational rights awarded to it through litigation. The Labour Court overturned the parties' settlement agreement.

2.9 Marching in support of bargaining rights or circumvention of the Labour Relations Act?

The case of *ADT Security (Pty) Ltd v National Security and Unqualified Workers Union*[186] poses the intriguing and somewhat unusual question of whether a union and its members can circumvent the restrictions of the LRA through the application of section 17 of the Constitution and the terms of the Regulation of Gatherings Act 205 of 1993[187] in order to embark upon a march to the employers' head office in support of organisational rights and matters of mutual interest. The appellant had unsuccessfully approached the Labour Court for an interdict prohibiting its employees who were the members of the respondent union, the National Security and Unqualified Workers Union (NSUWU), from taking part in a planned 'march' at the company's head offices which had been organised and/or called for by the union. The employer sought to interdict the gathering on the basis that it was unlawful. The nub of ADT's cause of action was twofold: first, that the 'march' and/or picket planned was unlawful because it circumvented the provisions of the LRA; secondly, that the 'march' and/or picket would constitute a breach of contract.[188]

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186 *ADT Security (Pty) Ltd v National Security and Unqualified Workers Union* [2012] ZALCCT 57 (1 September 2012) (hereinafter referred to as *ADT*).

187 See also *SATAWU v Garvas* 2013 (1) SA 83 (CC). See generally Ernest Manamela and Mpfari Budeli, 'Employee's Right to Strike and Violence in South Africa' (2013) 46 CILSA 308; AA Landman, 'No Place to Hide – A Trade Union's Liability for Riot Damage: A Note on *Garvis & Others v SA Transport & Allied Workers Union (Minister for Safety & Security, Third Party)* (2010) 31 ILJ (WCC) 2521' (2011) 32 ILJ 834; J Grogan, 'Riotous Strikes. Unions Liable to Victims' (2012) 28:5 EL 11; SB Gericke, 'Revisiting the Liability of Trade Unions and/or Their Members during Strikes: Lessons to Be Learnt from Case Law' (2012) 75 THRHR 566.

188 *ADT* [10].

ADT stated in favour of the application that it did not recognise the respondent union as a collective bargaining agent because it had not gained organisational rights under the LRA. Only trade union contributions were withdrawn from employees' pay and paid to the union on a monthly basis. In practice, the union had no additional organisational rights other than those outlined in the LRA.

Rather than relying on the mechanisms afforded to it in terms of the LRA, NSUWU applied to the Cape Town Metro Municipality to hold a gathering in terms of section 3 of the Regulation of Gatherings Act. In terms of this statute, a 'gathering' is defined as

> any assembly, concourse or procession of more than 15 persons in or on any public road as defined in the Road Traffic Act, 1989 (Act 29 of 1989), or any other public place or premises wholly or partly open to the air-
> (*a*) at which the principles, policy, actions or failure to act of any government, political party or political organization, whether or not that party or organization is registered in terms of any applicable law, are discussed, attacked, criticized, promoted or propagated; or
> (*b*) held to form pressure groups, to hand over petitions to any person, or to mobilize or demonstrate support for or opposition to the views, principles, policy, actions or omissions of any person or body of persons or institution, including any government, administration or governmental institution.

The march was scheduled to take place on 5 September 2011. The City gave NSUWU permission to march. After obtaining this permission from the City, the union proceeded with a 'march' at ADT's head offices in reaction to the company's refusal to grant organisational rights. Before the Labour Court, the union prevailed as Steenkamp J held that the 'march' and/or picket was lawful because it was sanctioned by section 17 of the Constitution.[189] Section 17 of the Constitution gives effect to the right to assemble, demonstrate, and picket; this right was given effect to by the Regulation of Gatherings Act.

The court emphasised that the right asserted by the union was not based on any provision of the LRA. In other words, the NSUWU did not intend to participate in strike action as defined by the LRA but relied instead on section 17 of the Constitution as implemented by the Regulation of Gatherings Act. Furthermore, the appellant did not allege that the planned 'march' and/or gathering fell within the definition of a strike. The appellant merely stated that the planned march was illegal.

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189 *ADT* [9].

In this regard, the Labour Court ruled that the 'right afforded by Section 17 of the Constitution is a right extended to everyone and not just employees'.[190] However, this right is limited by the rules of the Regulation of Gatherings Act. One of these constraints is the requirement to submit notification and the essential information to the competent authorities. The appropriate notice had been submitted to the City, and permission obtained to proceed with the planned 'march' and/or gathering.[191]

A weighty factor in Steenkamp J's reasoning in the Labour Court was that the planned march did not constitute a breach of contract, as the members of the respondent union who would be participating in the planned 'march' were not obliged to tender their services to the employer during the time of the planned protest since they (these employees) would be off duty at the relevant time. Consequently, their participation would not amount to a breach of contract.

In overturning the decision of the Labour Court, the Labour Appeal Court clarified its attitude towards the right of off-duty employees who wished to march, gather, and picket for the purposes of handing over a petition to senior management about disputes of right and interest covered by labour law. It is worth noting that, as regards disputes of interest and disputes of right, the LRA requires employees to refer all interest disputes to the CCMA and/or the Labour Court for conciliation and/or adjudication before taking action against an employer.[192] It was argued for ADT that the union and its members did not refer any dispute to conciliation, nor did they meet the requirements of the LRA as regards their disputes of right, in particular the demand relating to organisational rights.

Further, section 22 of the LRA obliges parties to refer any dispute over organisational rights to the CCMA for conciliation and, if necessary, to arbitration.[193] The crux of ADT's submission was that non-compliance and use of the provisions of the Regulation of Gatherings Act as an alternative mechanism amounts to circumventing the provisions of the LRA. The question for determination then was whether the union's reliance on the provisions of the Regulation of Gatherings Act

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190 *ADT* [9].
191 *ADT* [9].
192 See Anton Steenkamp and Craig Bosch, 'Labour Dispute Resolution under the 1995 LRA: Problems, Pitfalls and Potential' [2012] Acta Juridica 120.
193 *ADT* [25].

and/or the Constitution amounts to circumventing the LRA provisions. Writing for the unanimous court and relying on eminent authorities,[194] Hlophe AJA held that the legal position was straightforward: it cannot be correct to allow a litigant to bypass the LRA. Section 1 of the LRA states that, 'The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act , which are— (*a*) to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution of the Republic of South Africa, 1996'.[195] It should be obvious that once it was determined that this matter included organisational rights, it needed to be dealt with in accordance with the procedure specified in section 22 of the LRA on disputes about organisational rights.[196]

The duty of good faith extends even beyond normal working hours. Accordingly, it cannot be an excuse to say that workers were merely picketing during their lunch hour which they had sacrificed. There can be no doubt that picketing at the employer's head office even during their lunch hour could impact on the employer's goodwill and reputation. In short, the *ADT* case stands a cautionary tale to minority unions seeking organisational rights. The case of *Bader Bop* interpreted the provisions of the LRA to protect the organisational rights of minority unions. The lesson to be learned from the *AMCU/Chamber of Mines III* judgment is that the limitation of the non-party minority trade union's right to strike as a result of the extension of collective agreement is narrowly tailored to the specific goal: orderly collective bargaining. In addition, the lesson that emerges from the *ADT* case is clear: it cannot be correct to allow a litigant to bypass the LRA where, in essence, a dispute is one concerning organisational rights that should thus be dealt with according to the procedure contemplated in section 22(1) of the LRA.

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194 See *Sidumo* [105]; *Chirwa*; *NAPTOSA v Minister of Education of Western Cape* 2001 (2) SA 212 (C) 123A; *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC); *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC) [51]; *Gcaba v Minister for Safety and Security* [5].

195 *ADT* [30].

196 *ADT* [31].

2.10 Summary

At face value, the employment laws in South Africa are among the most advanced, allowing for organised and systematic collective bargaining. In practice, though, there are indications of dysfunction in the collective bargaining process. This dysfunction is demonstrated in protracted wage negotiations, violent prolonged strikes, possible tension in the labour market, and extreme events such as the Marikana tragedy at Lonmin Mine. To varying degrees, the parties themselves – the employers and the trade unions – and how they conduct themselves during negotiating may be criticised for these issues.

Stock needs to be taken of any weaknesses and deficiencies in the provisions of the Constitution and their interpretation by judges. It is hoped that experience from the Interim Constitution era and twenty-six years of labour adjudication since the advent of the LRA have provided the country, including the courts, the legislature, and scholars, with an ideal opportunity to negotiate the learning curve and correct any mistakes and fill any gaps. The question, however, is whether this has, in fact, been the case. There is little doubt that the LRA, the main piece of legislation providing the framework for collective bargaining is under academic scrutiny. The striking example is the tragic events that occurred in Marikana in 2012. It is of utmost importance, therefore, not to confine the remedial exercise to the Constitution and/or its interpretation but also to extend the exercise to the relevant provisions of the LRA.

The response to the Marikana tragedy has promoted renewed focus on the labour relations framework and the LRA itself. Brassey[197] asked whether institutionalised collective bargaining in South Africa was wilting, and, if so, whether one should be glad or sad, while Ngcukaitobi[198] considered the strike law, structural violence and inequality in the platinum hills of Marikana. After discussing the *POPCRU* case, Cohen concluded:

> [T]he Marikana experience and the strike violence that has marred the South African labour market in recent times reveal the flaws in the framework and the

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197 Martin Brassey, 'Labour Law after Marikana: Is Institutionalised Collective Bargaining in SA Wilting? If So, Should We Be Glad or Sad?' (2013) 34 ILJ 823.

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

> changed dynamic of the collective bargaining environment. It may be time to return to the drawing board.[199]

It is worth noting that it has been eleven years since Marikana, the flaws in the collective bargaining framework have not changed, and the majoritarian approach is still the order of the game, especially in the mining industry. AMCU constantly attacks the constitutionality of collective agreements and the binding nature thereof. The next chapter considers the perils of majoritarianism, questions associated with the nebulous phrase 'sufficiently representative' and the problematic issue of requisite membership threshold levels.

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199 T Cohen, 'Limiting Organisational Rights of Minority Unions: *POPCRU v Ledwaba* 2013 11 BLLR 1137 (LC)' (2014) 17 PELJ 2209, 2222.

CHAPTER 3: FINDING A FOOTHOLD IN THE WORKPLACE: THE PERILS OF MAJORITARIANISM; THE LITMUS TEST OF REPRESENTIVITY AND EXTENSION OF COLLECTIVE AGREEMENTS TO NON-PARTIES

3.1 Introduction

This chapter gives the background to the sources of organisational rights and discusses the processes required for a registered trade union to acquire organisational rights. The chapter further considers the complex issue and questions associated with the phrase 'sufficiently representative', which the Labour Relations Act 66 of 1995 (LRA) does not define. This allows the parties a measure of flexibility when defining the term. Sufficient representivity means something different from majority representation. The arbitrator should consider not only the number of employees of the trade union but also the interests of the trade union.[1]

This chapter focuses mainly on issues that have been considered by arbitrators and the Labour Court as well as the Labour Appeal Court in giving content and substance to the threshold requirement of representivity. Beyond the narrow interpretative approach to statutory definition of 'workplace', and unanswered questions about the appropriateness of majoritarianism, the critical question in *Chamber of Mines v AMCU* concerned the limitation of the rights of minority unions (for example, the right to freedom of association) which was curtailed by the extension of collective agreement to non-parties. It will be recalled that section 65 of the LRA prohibits a strike by anyone who 'is bound by any arbitration award or collective agreement that regulates the issue in dispute'. Section 65 of the LRA provides in relevant part:

> (1) No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if–
> (*a*) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute.
> …
> (3) Subject to a collective agreement, no person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or lock-out—
> (*a*) if that person is bound by—

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1 'Representative Thresholds and Sufficient "Representativeness' 2021 <https://www.labournetblog.com/post/2017/08/01/representative-thresholds-and-sufficient-representativeness> accessed 17 February 2023.

(i) any arbitration award or collective agreement that regulates the issue in dispute; or
(ii) any determination made in terms of section 44 by the Minister that regulates the issue in dispute; or
(iii) any determination made in terms of Chapter Eight of the Basic Conditions of Employment Act and that regulates the issue in dispute, during the first year of that determination.

3.2 Finding a foothold in the workplace

Examining the elusive task of finding a foothold in the workplace involves the co-equal task of determining what constitutes a workplace. The process is both evaluative and interpretive. It is important to bear in mind that in applying the definition of workplace, constitutional values remain pervasive. In this regard, the implications of the litigation in *Amcu v Chamber of Mines of South Africa* loom large.[2] The Constitutional Court stated that:

> To this should be added that the LRA does not define when a trade union is "sufficiently representative" to enjoy organisational rights under ch 3. It allows for the representivity threshold to be agreed upon in a collective agreement between an employer and a minority union. As this judgment later clarifies, possible abuses of this kind are subject to review.[3] … And the statutory structures that enforce the majoritarian system nevertheless allow minority unions freedom of association.[4]

The phrase 'sufficiently representative' as the benchmark for determining membership thresholds at the workplace has not worked equally well, or maybe even better, or been fairer to smaller or emerging unions. These issues are summarised below and certain conclusions are drawn. Under section 95(7) of the LRA, a trade union claiming legislated rights should be a registered union with its members being sufficiently represented in the workplace.[5] The LRA provides for trade unions that are merely sufficiently representative and those trade unions that have as their members the majority in the workplace. Majority trade unions may lay an automatic claim to all five organisational rights found in the LRA. These

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2 *Association of Mineworkers & Construction Union v Chamber of Mines of SA acting in its own name & on behalf of Harmony Gold Mining Co (Pty) Ltd* 2017 (3) SA 242 (CC) (*Chamber of Mines/AMCU III*).

3 *Chamber of Mines/AMCU III* [53].

4 *Chamber of Mines/AMCU III* [54].

5 Section 95(7) of the LRA. Subsection (7) provides: 'The registrar must not register a trade union or an employers' organisation unless the registrar is satisfied that the applicant is a genuine trade union or a genuine employers' organisation.'

organisational rights include the right to have access to workplace,[6] deduction of trade union subscriptions or levies,[7] trade union representatives,[8] leave for trade union activities,[9] and disclosure of information.[10] This, however, does not prevent a minority union from obtaining organisational rights through collective bargaining.

Employers should consider whether a trade union seeking organisational rights is sufficiently representative of its employees in the workplace. After all, the LRA does not define a sufficiently representative trade union. Representivity is defined within the context of the collective bargaining in the workplace.

3.2.1 Sources of organisational rights

The Constitution gives every worker the right to form and join a trade union and to participate in its activities. One of the primary purposes of the LRA is to advance social justice. Craig defines social justice as a set of political goals pursued through social, economic, environmental, and political policies informed by values such as achieving fairness and equality of outcomes and treatment; recognising the dignity and equal worth of all people and encouraging their self-esteem; meeting basic needs; and maximising the reduction of wealth, income, and life inequalities.[11] A commissioner may 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 the thresholds of representativeness established by a collective agreement entered into in accordance with section 18 of the LRA, if all parties to the collective agreement have been given an opportunity to participate in the proceedings and the trade union represents all parties to the collective agreement.[12] The purpose of the new labour dispensation, which includes the advancement of economic development and social justice, is to promote 'labour peace and the democratisation of the workplace'.[13]

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6 Section 12 of the LRA.
7 Section 13 of the LRA.
8 Section 14 of the LRA.
9 Section 15 of the LRA.
10 Section 16 of the LRA.
11 Gary Craig, 'Poverty, Social Work and Social Justice' (2002) 32 British Journal of Social Work 669; Michael O'Brien, 'Equality and Fairness: Linking Social Justice and Social Work Practice' (2011) 11 Journal of Social Work 143.
12 Section 21 of the LRA.
13 Section 1 of the LRA.

Section 39 of the Constitution, which forms part of the Bill of Rights, stipulates that when interpreting the Bill of Rights, a court must consider international law and may consider foreign law, implying that the ILO Conventions must be considered. Among these conventions are the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87)[14] and the Right to Organise and Collective Bargaining Convention, 1949 (No 98).[15] The ILO's Conventions 87 and 98 on freedom of association are the primary source of organisational rights in public international law. These conventions are binding to South Africa as it is a member of the ILO and ratified both these Conventions on 19 February 1996. 'Fundamental conventions', according to the ILO Governing Body, are critical to the rights of people at work, regardless of the level of development of individual member nations.

Crucially, these rights are a precondition for all others in that they provide the necessary tools for individuals and groups to act freely to improve their working conditions. Notably, an important principle of freedom of association is enshrined in Article 2 of Convention 87, which states:[16]

> 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.

The ILO has upheld the protection of rights such as those of trade union access to the employer's premises, of employees to be represented by officials of their union, and of union officials to exercise their agency shop agreement right.[17] The ILO Fact Finding and Conciliation Commission to South Africa (the Commission) exerted considerable influence over the drafting of the LRA, especially in the recognition of organisational rights. Early in 1992, the Commission reported on its investigation into the complaint lodged by COSATU against the previous Labour Relations Act 1956 and found certain of its provisions incompatible with the principle of freedom

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

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

16 *South African National Defence Union v Minister of Defence; Minister of Defence v South African National Defence Union* 2007 (1) SA 402 (SCA) (hereinafter *South African National Defence Union v Minister of Defence* (SCA) [7].

17 Darcy du Toit and others, *Labour Relations Law: A Comprehensive Guide* (6th edn, LexisNexis 2015) 123.

of association. The Commission recommended the removal of these impediments to organisational freedom.[18] The Ministerial legal task team charged with drafting the current LRA was instructed that the new statute should recognise the fundamental organisational rights of trade unions in the context of, among other things, the Reconstruction and Development Programme (RDP), the ILO Conventions, the findings of the Commission, and the fundamental rights enshrined in the Constitution.

The organisational rights align with the Constitution, which guarantees every worker the right to form and join a trade union[19] and the right 'to participate in the activities and programmes of a trade union'.[20] The Constitution guarantees every union the right to organise[21] and to bargain collectively.[22] The LRA gives effect to these constitutional rights because one of its declared primary objectives is to provide a framework within which employees and their trade unions, employers, and employer organisations can collectively bargain to determine matters of mutual interest.[23] It is clear that the purpose of the LRA is to give effect to constitutional rights. The LRA is also designed to give legislative effect to international treaty obligations arising from South Africa's ratifying relevant conventions, thus giving it an international obligation. The LRA also seeks to provide a framework whereby both employers, employees, and their organisations can participate in collective bargaining and formulate industrial policies. This framework promotes orderly collective bargaining with the emphasis on bargaining at sectoral level and employees' participating in decisions in the workplace and the effective resolution of labour disputes.

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18 Du Toit and others, *Labour Relations Law* 123.

19 Section 23(2)(*a*) of the LRA.

20 Section 23(2)(*b*) of the LRA.

21 Section 23(4)(*b*) of the LRA.

22 Section 23(5) of the LRA.

23 Section 1 of the LRA provides that 'the purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are:

…

(*c*) to provide a framework within which employees and their trade unions, employers and employers' organisations can –

(i) collectively bargain to determine wages.

With the demise of the duty to bargain,[24] organisational rights have profound implications for collective bargaining, freedom of association, trade unions, and employers' organisations.[25] One of the core objectives of the LRA is to promote orderly collective bargaining.[26] To advance the primary objective of promoting collective bargaining, the LRA grants unions and employers certain rights and leaves it to the parties to determine whether and to what extent these rights should be exercised in the process of collective bargaining.[27] The emergence of militant trade unions marked by violent strikes and inter-union rivalry disputes can be traced back to the struggle for acquiring organisational rights.[28] Section 21 of the LRA is a gateway provision to organisational rights and the workplace. The first question to be decided when a trade union requests organisational rights is whether it has met the requirements of section 21 of the LRA. The section reads in relevant part as follows:

> (1) Any registered trade union may notify an employer in writing that it seeks to exercise one or more of the rights conferred by this Part in a workplace.
>
> (2) The notice referred to in subsection (1) must be accompanied by a certified copy of the trade union's certificate of registration and must specify—
>
> (*a*) the workplace in respect of which the trade union seeks to exercise the rights;
>
> (*b*) the representativeness of the trade union in that workplace, and the facts relied upon to demonstrate that it is a representative trade union; and
>
> (*c*) the rights that the trade union seeks to exercise and the manner in which it seeks to exercise those rights.

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24 See *National Union of Mineworkers v East Rand Gold & Uranium Co Ltd* 1992 (1) SA 700 (A); *Mutual & Federal Insurance Co Ltd v Banking, Insurance, Finance and Assurance Workers Union* 1996 (3) SA 395 (A); *Black Allied Workers Union v PEK Manufacturing Co (Pty) Ltd* (1990) 11 ILJ 1095 (IC) (hereinafter *PEK*). See also Clive Thompson, 'A Bargaining Hydra Emerges from the Unfair Labour Practice Swamp' (1989) 10 ILJ 808.

25 Mpfariseni Budeli, 'Workers' Rights to Freedom of Association and Trade Unionism in South Africa: An Historical Perspective' (2009) 15 Fundamina 57; J Kruger and CI Tshoose CI, 'The Impact of the *Labour Relations Act* on Minority Trade Unions: A South African Perspective' (2013) 16 PELJ 284, 285; T Cohen, 'Limiting Organisational Rights of Minority Unions: *POPCRU v Ledwaba* 2013 11 BLLR 1137 (LC)' (2014) 17 PELJ 2209.

26 Section 1(*d*) of the LRA.

27 *South African National Defence Union v Minister of Defence; Minister of Defence v South African National Defence Union* 2007 (1) SA 402 (SCA).

28 See eg *Chamber of Mines of SA acting in its own name and on behalf of Harmony Gold Mining Co Ltd v Association of Mineworkers & Construction Union* (2014) 35 ILJ 3111 (LC) (*Chamber of Mines/AMCU I*); *Association of Mineworkers & Construction Union v Chamber of Mines of SA acting in its own name & on behalf of Harmony Gold Mining Co (Pty) Ltd* (2016) 37 ILJ 1333 (LAC) (*Chamber of Mines/AMCU II*); *Amcu v Chamber of Mines of South Africa* 2017 (3) SA 242 (CC) (*Chamber of Mines/AMCU III*).

> (3) Within 30 days of receiving the notice, the employer must meet the registered trade union and endeavour to conclude a collective agreement as to the manner in which the trade union will exercise the rights in respect of that workplace.

Only a registered trade union has a certain level of representativeness that is eligible to acquire organisational rights. The union must specify the workplace in which it seeks to exercise organisational rights and the rights that it seeks to exercise.[29]

The key question about a trade union attempting to get its foot in the workplace is whether it has demonstrated its sufficient level of representivity. The scope and complexity of the threshold test are compounded by definitional difficulties. The LRA does not define the expression 'sufficiently representative'. Exploring this concept is difficult. Interpreting it is left entirely in the hands of tribunals or courts that hear the matter. Conflicting interpretations of the phrase result.

The next part of this study explores how the tribunals and courts have interpreted the meaning and content of the phrase 'sufficiently representative'. The case of *SA Clothing & Textile Workers Union v Marley (SA) (Pty) Ltd t/a Marley Flooring (Mobeni)*[30] provides a good illustration. In this case, the applicant union (the Southern African Clothing and Textile Workers' Union (SACTWU)), referred to the CCMA a dispute over its entitlement to organisational rights at the employer's workplace in terms of sections 12 and 13 of the Act: the rights to access and to the deduction of union subscriptions. Of the 52 employees at the workplace, 29, or 55.8 of the workforce, belonged to NUMSA and 22, or 42.3% of the workforce, belonged to SACTWU. The employer manufactured PVC (polyvinyl chloride) flooring and fell under the Metal and Engineering Industry Bargaining Council (MEIBC). NUMSA was a member of the council and had an agency shop agreement with the employer. SACTWU was not a member of the council, and SACTWU's Constitution, which defined the scope of its activities, did not include the manufacture of PVC flooring.

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29 See eg *National Union of Metalworkers of SA v Bader Bop (Pty) Ltd* 2003 (3) SA 513 (CC) (*Bader Bop*).

30 *SA Clothing & Textile Workers Union v Marley (SA) (Pty) Ltd t/a Marley Flooring (Mobeni*) (2000) 21 ILJ 425 (CCMA).

The commissioner noted that, to acquire organisational rights in terms of sections 12 and 13 of the Act, the union had to show that it was 'sufficiently representative' of the employees under consideration.[31] In coming to a finding, the commissioner referred to the requirements of section 21(8)(*b*) of the LRA, and concluded as follows:[32]

> (1) Minimizing the proliferation of trade union representation in a single workplace. NUMSA had an agency shop agreement which avoided fragmentation of the workforce. Both unions were members of COSATU which discouraged the poaching of members of other unions. There was no good reason to allow such proliferation, or to believe that it would be to the advantage of employees. (2) Minimizing the financial and administrative burden or requiring an employer to grant organizational rights to more than one union. The agency shop agreement lessened the administrative burden on the employer. Further, if rights were granted some employees would have to pay double subscriptions. (3) The nature of the workplace. A union ostensibly created to represent employees in the clothing and textile industry had no place in an industry manufacturing PVC flooring. (4) The nature of the organizational rights sought. There was already a union in place and the agency shop agreement ensured continuity and uniformity regarding the payment of union subscriptions. (5) The nature of the sector. SACTWU was not a party to the bargaining council. (6) The organizational history at the workplace. The employer had a long association with NUMSA. The granting of rights to SACTWU would be the recipe for conflict and discord, and the unnecessary duplication of administrative tasks, and would not benefit the employees concerned.

It stands to reason that interpreting the phrase 'sufficiently representative' has wider implications. It affects both the employees and the employer. If a union's membership declines below the required threshold, this drop may trigger the withdrawal of the recognition, even if a union becomes insufficiently representative because of the employer's restructuring.[33] It is equally clear that the withdrawal of organisational rights may signal the demise of the trade union concerned.[34]

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31 *SA Clothing & Textile Workers Union v Marley (SA) (Pty) Ltd t/a Marley Flooring (Mobeni)* 427F–G.

32 *SA Clothing & Textile Workers Union v Marley (SA) (Pty) Ltd t/a Marley Flooring (Mobeni)* 424H–426B, in the headnote to the law report.

33 *Group 4 Falk (Pty) Ltd v DUSWO* [2003] 4 BALR 422 (CCMA). However, if an employer decides not to recognise a union with a lower threshold, the employer may be ordered to do so if it continues to recognise a union with an equally small membership. See *Organisation of Labour Affairs (OLA) v Old Mutual Life Assurance Company* (*SA*) [2003] 9 BALR 1052 (CCMA).

34 *National Entitled Workers Union v Director, Commission for Conciliation, Mediation & Arbitration* (2011) 32 ILJ 2095 (LAC), [2011] 9 BLLR 861 (LAC); *Commission for Conciliation, Mediation & Arbitration v Registrar of Labour Relations* (2010) 31 ILJ 2886 (LC), [2010] 11

3.3 Analysis of the phrase 'sufficiently representative'

The LRA does not specify when a trade union is entitled to Chapter III organisational powers. The LRA enables an employer and the majority union to agree on a representivity threshold in a collective agreement.[35] The term 'workplace' means

> in relation to the public service, for the purposes of collective bargaining and dispute resolution, the registered scope of the Public Service Co-ordinating Bargaining Council or a bargaining council in a sector in the public service, as the case may be. [36]

The definition of the word 'workplace' has far-reaching ramifications for minority unions and their members. Individual mining operations are not different workplaces, according to *AMCU/Chamber of Mines*. As a result, when a minority union was not a party to the collective agreement, a collective agreement established between the representative union(s) and employers can be legitimately extended to union members. Section 65(3)(*a*)(i) of the LRA also forbids strike action by persons bound by a collective agreement that governs the issue in dispute.

The path to the acquisition of organisational rights by emerging and minority unions at the workplace is arduous. Appraisal of case law developments concerning thresholds disputes, then, must be understood as conclusively demonstrating that section 18 of the LRA on the right to establish thresholds or representativeness shields the majority union from competition with emerging players in the workplace. The importance of minimising the proliferation of trade union representation in a single workplace and ensuring orderly collective bargaining can hardly be overstated. In the same breadth, there is an overarching need to level the playing field to counter majority unions' abuse of dominance. Enhancing multi-party democracy in the workplace itself justifies a different approach to the determination of threshold disputes.

BLLR 1151 (LC); *United People's Union of South Africa v Registrar of Labour Relations* (2010) 31 ILJ 198 (LC), [2010] 2 BLLR 201 (LC).

35 Lucien van der Walt, 'The First Globalisation and Transnational Labour Activism in Southern Africa: White Labourism, the IWW, and the ICU, 1904–1934' (2007) 66 African Studies 223, 225.

36 Labour Relations Act 1995, s 213 'workplace' definition, para (a)(i).

It is submitted that no one should underestimate the magnitude of the task facing smaller or emergent unions seeking to gain traction in the workplace. Esitang and Van Eck assert:[37]

> The fact that s 18 of the LRA remains intact begs the question whether the amendment went far enough in protecting minority trade unions' labour rights. A complete removal of s 18 would have prevented the situation where the dominant parties at a workplace still have the option to be in cahoots and to exclude small and start-up trade unions from establishing traction at a workplace. Under the existing circumstances, policy makers at the very least should have placed the onus on the dominant parties to s 18 agreements to convince the arbitrator why organisational rights should not be granted to minority applicant trade unions in order to counter the negative effects which their anti-competitive behaviour may have.

3.4 Perils of majoritarianism

Majoritarianism is a principle that implies majority rule; it enables the majority's inclination, desire, and preferences to be united. The notion of majoritarianism is strengthened by international labour regulation. The application of the Freedom of Association Conventions and Recommendations encapsulates the principle that majoritarianism is compatible with freedom of association, and that majority unions may have exclusive bargaining powers as long as minority trade unions are permitted to operate and represent their members in individual disputes.[38] This is a critical resource for authoritative interpretations of the ILO conventions, even though how they are implemented in practice varies from country to country.

3.4.1 Shifting thresholds: Minority unions' perennial problem

A much-debated question has been the adverse impact of section 18 of the LRA on minority unions barred from gaining a foothold by impossible threshold requirements. Generally, dominant unions have relied on section 18 agreements to exclude small and start-up trade unions from gaining traction in a workplace. This raises a host of focal questions: how far have the 2015 amendments addressed the plight of minority unions? Do the new provisions discourage employers and dominant trade unions from fixing thresholds that effectively prevent minority trade

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37 Esitang and Van Eck, 'Minority Trade Unions and the Amendments to the LRA' 777.

38 T Cohen, 'Limiting Organisational Rights of Minority Unions: *POPCRU v Ledwaba* 2003 11 BLLR 1173 (LC)' (2014) 17 PELJ 2209, 2220; *Chamber of Mines/AMCU II* [110]; *Free Market Foundation v Minister of Labour* 2016 (4) SA 496 (GP) [112].

unions from enjoying organisational rights? Do the new provisions constitute a positive development as far as it is now possible for sufficiently representative trade unions to gain all the organisational rights even though these unions may not represent a majority of workers at a workplace?

A meaningful attempt at answering these vexed questions can be made only by considering decisions where the dispute over thresholds of representativity has been at issue. Until recently, there has been little judicial consideration of section 21(8C) of the LRA. Section 21(8C) states that any of the organisational rights conferred by this Part and which are exercised by any other registered trade union in respect of that workplace may be withdrawn if that other trade union has ceased to be a representative trade union.[39] For example, *Independent Municipal & Allied Trade Union v Commission for Conciliation, Mediation & Arbitration* (hereinafter *IMATU v CCMA*)[40] is the leading authority on the interpretation of section 21(8C) of the LRA. The facts illustrate the hurdle faced by a breakaway union in gaining a foothold in the workplace. The Municipal and Allied Trade Union of South Africa (MATUSA), the new entrant in this case, was created as a breakaway union from the South African Municipal Workers' Union (SAMWU). The Stellenbosch Municipality had entered into a collective agreement with IMATU and SAMWU in this case. The South African Local Government Association (SALGA) had also reached a national agreement that established a 15% membership bar for registered trade unions seeking organisational rights in the local government sector. In terms of membership percentages at the municipality, the unions were as follows: IMATU 29%, SAMWU 25%, and MATUSA 15%.[41]

MATUSA attempted to obtain organisational rights through the Stellenbosch Municipality. The parties were unable to reach an agreement. In accordance with section 21(8C) of the LRA, MATUSA referred a dispute to the CCMA.[42] The outcome of the arbitration proceedings was that the municipality was ordered to

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39 Section 21(8C) of the LRA.
40 (2017) 38 ILJ 2027 (LC), [2017] 6 BLLR 613 (LC) (hereinafter *IMATU v CCMA*).
41 *IMATU v CCMA* [15]–[16].
42 *IMATU v CCMA* [19].

grant organisational rights to MATUSA. In awarding organisational rights to MATUSA, the arbitrator considered the new provisions in section 21(8C):[43]

> The rationale for the new amendments of s 21 of the LRA is an attempt to adopt a more holistic approach by broadening/adjusting the scope to grant organisational rights to unions that do not enjoy a majority at the workplace. The amendments give effect to the principles of freedom of association in that employees have the right to choose their representation and that minority unions can approach the CCMA where they have not been granted organisational rights. The amendments are also an attempt to provide for the recruitment and protection of workers in atypical forms of employment taking cognisance of the ideal of decent work.

The arbitrator acknowledged that MATUSA's representivity at the workplace (being the municipality, rather than its representivity nationally) was 15%. The arbitrator articulated his finding as follows:[44]

> I have considered [SAMWU's and IMATU's] submissions and whilst I respect that they are bound by the collective agreement concluded in the bargaining council as parties to the council, I'm not persuaded that I do not have the powers in granting ss 12, 13 and 15 rights to [MATUSA]. I am persuaded that s 21 of the LRA and in particular s 21(8A) empowers commissioners to grant organisational rights at the workplace when an applicant does not meet the threshold as per the collective agreement.

Furthermore, the arbitrator held:[45]

> I'm further persuaded that Stellenbosch Municipality is an independent entity and that it constitutes the workplace and that [SAMWU and IMATU] are not the majority at the workplace, and thus as per s 21(8A) grant organisational rights to [MATUSA] in this matter. I'm further not persuaded by [SAMWU's and IMATU's] submissions that if ss 12, 13 and 15 rights are granted to [MATUSA], it would undermine the collective bargaining system at the council level. [MATUSA] has not applied for bargaining rights and has applied for organisational rights which are in line with s 21 of the LRA, including giving effect to the principles of freedom of association in allowing members of a trade union to exercise their rights as provided for in the LRA.
>
> I have considered the submissions by [MATUSA] including those of [SAMWU and IMATU] and decided as per s 21(8A)-(8C), that despite the threshold agreement that was concluded in the bargaining council and that the new amendments make provision for a commissioner to granting organisational rights to a minority union who has a significant interest in the workplace (sic). I do find that [MATUSA] has a significant interest in the workplace with a 15% membership at the Stellenbosch Municipality and that it would be prudent to grant [MATUSA] organisational rights in terms of ss 12, 13 and 15. And, in addition, these rights will also be subject to the submissions that [the three trade unions] made to me in the arbitration hearing. The [municipality] shall deduct

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43 *IMATU v CCMA* [10].
44 *IMATU v CCMA* [12].
45 *IMATU v CCMA* [12].

> and pay over union levies to [MATUSA] commencing from the 15th day of the new month together with a schedule of deductions made to the union as per s 13 of the Act.

Dissatisfied with the outcome of the arbitration procedure, IMATU filed an application to review and set aside the award. IMATU claimed that the commissioner misunderstood the scope of the investigation. Furthermore, the commissioner was entrusted with deciding whether MATUSA should be awarded organisational rights despite failing to meet the representivity criterion stipulated in the national threshold agreement. It was further claimed that the commissioner failed to recognise that the functioning of section 21(8C) of the LRA is 'subject to the provisions of paragraph (8)', and hence did not conduct the investigation required by that subsection.[46] The Labour Court noted acutely that MATUSA's quest for organisational rights must be considered in the context of the LRA and of the collective bargaining regime in the local government sector. In setting aside the award and referring the matter to be heard afresh before another commissioner, the court was swayed by the fact that the commissioner had failed to consider the peremptory factors set out in sections 21(8)(*a*) and 21(8)(*b*) of the LRA. Steenkamp J isolated factors that ought to have been considered by the commissioner as follows:[47]

> 20.1 He should have sought to minimise the proliferation of trade union representation in a single workplace, i.e., the Stellenbosch Municipality [s 21(8)*(a)*(i)];
>
> 20.2 He should have sought to minimise the financial and administrative burden on the Municipality to grant organisational rights to a third trade union [s 21(8)*(a)*(ii)];
>
> 20.3 He should have considered the nature of the workplace, being a single municipality within the local government sector;
>
> 20.4 He should have considered the nature of the organisational rights that MATUSA seeks to exercise; for example, the deduction of trade union subscriptions in a workplace where there is already an agency shop agreement in place;
>
> 20.5 He should have considered the nature of the local government sector;
>
> 20.6 He should have considered the organisational history at the workplace, e.g., the Municipality's and SALGA's agreements with IMATU and SAMWU; and

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46 *IMATU v CCMA* [3].
47 *IMATU v CCMA* [20].

20.7 He should have considered the composition of the workforce.

Another pertinent factor overlooked by the commissioner related to the fact that MATUSA members would continue to be bound by the agency shop agreement. Indisputably, Steenkamp J's finding accords with the majoritarian regime underpinning section 18 of the LRA. Yet the decision in *IMATU v CCMA* can also be interpreted to mean that the amendments have not necessarily ameliorated the asperities of section 18 towards minority unions. It also lends credence to the critics'[48] view that:

> we are not convinced that the amendments do enough to establish the type of multi-party democracy which the Constitution envisages. The model of democracy established by the Constitution allows for minority parties with relatively low numbers of votes to participate in parliamentary processes. Added to this, the limitations which the LRA places on minority trade unions appear to be disproportional in as far as they limit the constitutional rights to associate and to organise.

Some commentators argue that the current condition of the LRA cannot be construed to justify successful manipulation of collective bargaining units to prevent minority trade unions from engaging in collective bargaining on behalf of their members employed by a given employer.[49] Logically, this approach would entail that, properly construed, section 18 of the LRA should not be interpreted as *carte blanche* for a representative union to eradicate the bargaining rights of unions, which satisfy the criteria envisaged in section 21(*b*) of the LRA. Freedom of association is a human rights issue; it has both an individual and a collective nature and it is protected by international law and by the LRA to a certain extent. The LRA protects freedom of association but it does not protect the right not to join a trade union, and this becomes evident in the trade union's peculiar arrangements. However, the Constitution states 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.[50]

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48 Esitang and Van Eck, 'Minority Trade Unions and the Amendments to the LRA' 777.

49 Kruger and Tshoose, 'The Impact of the *Labour Relations Act* on Minority Trade Unions' 319. Kruger and Tshoose suggest that when majority unions negotiate with employers regarding proposed thresholds of representativeness, recognised minority unions must be permitted to participate in the process, and that changes to existing bargaining units may not be unilaterally amended by agreements contemplated by s 18.

50 Section 23(1)(*a*)–(*b*) of the Constitution.

3.4.2 Compulsory participation in statutory councils

Statutory councils are established in sectors where there is no bargaining council, on the application of a union which has at least 30% of the employees as its members or an employer's organisation whose members employ at least 30%.[51] In a case where parties do not reach an agreement to be parties to the council, the Minister may admit parties and allocate the number of representatives of the council and appoint representatives and alternates.[52] The establishment of a statutory council can be forced upon parties who are not willing to participate.

3.4.3 Discussion of selected case law on the scope and nature of section 18 of the LRA

Section 18 of the LRA allows for threshold agreements in relation to organisational rights. It states that an employer and a majority trade union may enter into a collective agreement establishing a threshold of representativeness required in relation to one or more of the organisational rights referred to in LRA sections 12 (access to the workplace), 13 (deduction of trade union subscriptions or levies), and 15 (leave for trade union activities). Sections 14 and 16 of the LRA expressly reserve organisational rights to majority trade unions.

3.4.3.1 *Oil Chemical General & Allied Workers Union v Volkswagen of SA (Pty) Ltd*[53]

The case of *Oil Chemical General & Allied Workers Union v Volkswagen of SA (Pty) Ltd* (hereinafter *OCGAWU v VWSA*) is one of first impression on the meaning and scope of section 18 of the LRA. OCGAWU considered itself sufficiently representative of employees in the VWSA factory and requested the company to grant it access rights and stop-order rights. The company refused to do so. The union referred the dispute to the CCMA. While the proceedings continued, VWSA concluded a threshold agreement with the recognised union, NUMSA, under which it was agreed that the company would not recognise any union unless it had 30% of the applicable bargaining unit as members. In a later agreement, the threshold

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51 Sections 39–40 of the LRA.
52 Section 41(3)–(6) of the LRA.
53 *Oil Chemical General & Allied Workers Union v Volkswagen of SA (Pty) Ltd* (2002) 23 ILJ 220 (CCMA) (hereinafter *OCGAWU v VWSA*).

was raised to 40%. OCGAWU contended that NUMSA could not conclude a threshold agreement because it did not enjoy a majority in the workplace. NUMSA had as members the majority of employees in the applicable bargaining unit (ie hourly rated employees), but it lacked a majority in the workforce as a whole. OCGAWU was not granted the organisational rights, as it lacked 40% membership among hourly rated employees. The commissioner determined that, at the very least, to implement section 18 of the LRA, the measure should be the level of representivity of a trade union within a bargaining unit. The commissioner further stated that the legislature could not have intended to promote majoritarianism to the point of undermining the rights of unions that had established majority status in a specific bargaining unit. The commissioner also stated that a majority in the workplace as a whole would be a radical departure from the rights won by unions in their traditional bargaining constituencies.[54]

3.4.3.2 *Police and Prisons Civil Rights Union v Ledwaba*[55]

Police and Prisons Civil Rights Union v Ledwaba involved an unrecognised minority union that had concluded an agreement with the Department of Correctional Services to grant it organisational rights although a majority union, POPCRU, had already concluded several collective agreements with the department. When POPCRU objected and referred a dispute for bargaining council arbitration, the arbitrator held that the agreement on organisational rights had been validly concluded. On review, the Labour Court noted that the process of collective bargaining is made up of organisational rights, the right to strike, and the conclusion of collective agreements. As a matter of principle, preference must be given to collective agreements with a majority union over organisational rights to which a minority union may be entitled in terms of the LRA. No purpose would be served by affording a minority union such rights where collective agreements already regulate the relationship between the employer and a majority union. Accordingly, the

54 *Oil Chemical General & Allied Workers Union v Volkswagen of SA (Pty) Ltd* (2002) 23 ILJ 220 (CCMA).

55 *Police and Prisons Civil Rights Union v Ledwaba* (2014) 35 ILJ 1037 (LC), [2013] 11 BLLR 1137 (2014) (hereinafter *POPCRU v Ledwaba*).

department could not conclude a valid agreement on organisational rights with the minority union.[56]

Cohen[57] has stated that the predictable outcome in *POPCRU v Ledwaba* is consistent with the tenor of section 18 and appropriate within the context of a majoritarian regime. Nonetheless, the author has posited that the case represents a cautionary tale in the light of the Marikana experience and the strike violence that has marred the South African labour market in recent times. The apparent flaws in the majoritarian framework and the changed dynamic of the collective bargaining environment[58] make return to the drawing board imperative. As the Constitutional Court remarked:[59]

> Academics and labour lawyers alike have pointed to these examples of industrial strike action as exposing the deficiencies that stem from a "winner-takes-all" approach to labour relations.[60] The rapidly changing labour relations landscape has drawn into focus the concerns of minority voices in the labour context. The present case speaks directly to this. The continued omnipotence of the principle of majoritarianism has been called into question.

3.4.3.3 *POPCRU v SACOSWU*[61]

In *POPCRU v SACOSWU*, the issue to be decided was whether an employer is precluded from affording organisational rights set out in sections 12, 13, and 15 of the LRA to a minority union when it falls short of the representivity threshold agreed between the employer and the majority trade union in terms of section 18(1) of the LRA.[62] The agreement was binding on the parties and all members of registered trade unions who fell within the same bargaining unit. SACOSWU sought

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56 *POPCRU v Ledwaba* [13].

57 T Cohen, 'Limiting Organisational Rights of Minority Unions: *POPCRU v Ledwaba* 2003 11 BLLR 1173 (LC)' (2014) 17 PELJ 2209, 2222.

58 Cohen, 'Limiting Organisational Rights of Minority Unions' 2222.

59 *Chamber of Mines/AMCU III* [27].

60 Thembeka Ngcukaitobi, 'Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana' (2013) 34 ILJ 836, 852–58; Stefan van Eck, 'In the Name of "Workplace and Majoritarianism": Thou Shalt Not Strike - *Association of Mineworkers & Construction Union & Others v Chamber of Mines & Others* (2017) 38 ILJ 831 (CC) and *National Union of Metalworkers of SA & Others v Bader Bop (Pty) Ltd & Another* (2003) 24 ILJ 305 (CC)' (2017) 38 ILJ 1496, 1506; Jan Theron, Shane Godfrey and Emma Fergus, 'Organisational and Collective Bargaining Rights through the Lens of Marikana' (2015) 36 ILJ 849, 867–68 remark that '[a]n overemphasis on stability and maintaining a status quo that is perceived as beneficial to either or both parties, as we have seen at Marikana, can have the opposite effect'.

61 *POPCRU v SACOSWU* 2019 (1) SA 73 (CC) (hereinafter *POPCRU v SACOSWU*).

62 *POPCRU v SACOSWU* [1].

permission to represent its own members in disciplinary proceedings and for trade union subscriptions to be deducted. This permission was granted. The commissioner held that the collective agreement between SACOSWU and the Department of Correctional Services was valid and enforceable based on section 22 of the LRA, which clearly states that nothing in part A of Chapter II of the LRA precludes the conclusion of a collective agreement regulating organisational rights.[63]

POPCRU took the matter to the Labour Court, on the basis that the collective agreement concluded between SACOSWU and the Department of Correctional Services did not align with section 18(1) of the LRA. The Labour Court overturned the Bargaining Council's decision and found that the collective agreement was indeed invalid. SACOSWU appealed to the Labour Appeal Court, which found that the threshold agreement did not prevent minority unions from concluding agreements for acquiring organisational rights.

POPCRU then took the matter to the Constitutional Court. The application for leave to appeal concerned a dispute between two rival unions over the right of a minority union to acquire organisational rights from an employer where the majority union had a pre-existing collective agreement with the employer setting a threshold of representativeness for admission to a departmental bargaining council, a threshold that the minority union did not meet.[64] In this case, the majority union, POPCRU, had an existing collective agreement with the employer, and the minority union was SACOSWU, a breakaway union.

POPCRU sought to prevent SACOSWU from obtaining a foothold in the Department of Correctional Services.[65] Be that as it may, section 18(1) of the LRA states:

> 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.

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63 Section 20 of the LRA.
64 *POPCRU v SACOSWU* [1].
65 *POPCRU v SACOSWU* [4].

Section 20 of the LRA clearly states that nothing in this part precludes the conclusion of a collective agreement that regulates organisational rights.[66] SACOSWU requested a proper interpretation of section 20 of the LRA and further argued that section 18 of the LRA could not be read to prevent minority unions that did not satisfy the agreed threshold from acquiring organisational rights.[67] POPCRU, in turn, argued that a section 18 collective agreement was binding under section 23 of the LRA on all parties and other employees and trade unions not party to the threshold agreement.[68] SACOSWU contended that section 20 collective agreements trump a section 18 collective agreement, as section 20 states that nothing in this part of the LRA prevents a minority trade union from concluding a collective agreement with the employer.[69]

POPCRU contended that section 23 of the LRA provides for the threshold agreement, but SACOSWU stated that the issue was irrelevant since the threshold agreement upon which their case was based had been replaced by a subsequent agreement. The court ruled that section 18 of the LRA does not exclude minority trade unions from concluding collective bargaining agreements, even if a threshold condition has been agreed upon between a majority trade union and an employer.[70] From this ruling, it is thus clear that preventing minority unions from exercising their constitutionally guaranteed rights would constitute an unjustifiable limitation.

3.4.3.4 *UASA v Impala Platinum Ltd*[71]

The decision in *UASA v Impala Platinum Ltd* was another example of raising the bar to prevent an emerging union from gaining a foothold in the workplace. NUM had concluded a bilateral agreement raising the threshold for the grant of organisational rights from 35% to 50% plus one membership within the bargaining unit. It was further agreed that the agreement would replace the 1997 threshold agreement and that trade unions currently entitled to organisational rights which did

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66 *POPCRU v SACOSWU* [8].
67 *POPCRU v SACOSWU* [9].
68 *POPCRU v SACOSWU* [64].
69 Section 20 of the LRA.
70 *POPCRU v SACOSWU* [144].
71 *UASA v Impala Platinum Ltd* (2010) 31 ILJ 1702 (LC), [2010] 9 BLLR 986 (LC) (hereinafter *UASA v Impala Platinum*). The judgment of the Labour Appeal Court is in *UASA – The Union v Impala Platinum Limited* [2012] ZALAC 10 (6 March 2012).

not meet the threshold would be afforded three months to do so, failing which their rights would be terminated on 30 days' notice.[72] On 2 April 2007, the first respondent gave the appellant three months' notice in which to meet this threshold.

On 11 May, the appellant declared a dispute in this regard in terms of clause 20 of the 2006 recognition agreement. The nub of this dispute turned on the appellant's contention that clause 4.1 of the 2006 recognition agreement contemplated that a trilateral threshold agreement (involving the company, UASA, and NUM) and not a bilateral threshold agreement (between the company and NUM) would be concluded, which implied that the appellant had to be involved in the conclusion of any such trilateral agreement.[73]

After a dispute resolution meeting on 22 June 2007, five days later the appellants referred the dispute to the CCMA. The dispute was described as concerning the interpretation or application of a collective agreement in terms of section 24 of the LRA. It was common cause that UASA had invoked the provisions of clause 20 of the 2006 recognition agreement in proceeding in this manner. On 4 July, Impala Platinum gave notice to UASA that its organisational rights would be terminated from 31 July. On 19 July, UASA applied to the Labour Court for urgent interim relief, pending the outcome of the CCMA referral. The question was whether clause 4.1 of the recognition agreement justified UASA's contention that a trilateral agreement was in place and that UASA could not be excluded before this agreement was fulfilled.

The fact that Impala Platinum might have raised section 18 of the LRA to justify its interpretation did not mean that the commissioner was restricted to examining the implications of section 18 rather than discharging his overall obligation to interpret clause 4.1. of the 2006 agreement. Not only does this emerge from the case as pleaded but also from the conduct of the parties, particularly UASA's conduct during the CCMA proceedings.[74] The court decided that there was no basis on which to justify the conclusion that the commissioner exceeded his powers in arriving at an interpretation of clause 4.1. The court interpreted the clause, as required. That

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72 *UASA v Impala Platinum* [10].
73 *UASA v Impala Platinum* [25].
74 *UASA v Impala Platinum* [2]

interpretation then provided an answer to the parties' dispute. The appeal was dismissed with costs.

3.4.3.5 *BHP Billiton Energy Coal South Africa Limited v Commission for Conciliation, Mediation and Arbitration*[75]

The case of *BHP Billiton Energy Coal South Africa Limited v Commission for Conciliation, Mediation and Arbitration* is a textbook example of union rivalry and the plight of minority unions. The dispute concerned AMCU's exclusion from the collective bargaining forum because of the raising of thresholds at the instance of the majority union. Before its exclusion in 2007, AMCU and UASA had formed a coalition and jointly applied for membership of the Ingwe forum. The 2006 amendments to industrial relations policy culminated in the demise of collective bargaining at the operational level. A change from the Ingwe forum to the BHP Billiton Energy Coal SA Ltd forum (BECSA) left AMCU out in the cold. Simply put, AMCU was not a party to BECSA, which consisted of BHP Billiton and the NUM. Nevertheless, UASA was invited and joined BECSA pursuant to the proposal to do so by NUM.

Aggrieved by its exclusion, AMCU referred a dispute to the CCMA. Oddly, the outcome of the arbitration hearing was that the applicant was ordered to include AMCU in the negotiations process. In other words, the effect of the commissioner's award was to impose on the company the duty to bargain, a concept not applicable in contemporary South African law. It is worth recalling that the LRA adopts an unashamedly voluntarist approach. Consequently, the LRA does not prescribe to parties whom they should bargain with, what they should bargain about, or whether they should bargain.[76] Recently, Lagrange J reiterated this point in no uncertain terms in *National Tertiary Education Union (NTEU) v Tshwane University of Technology*[77] as follows:[78]

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75 *BHP Billiton Energy Coal South Africa Limited v Commission for Conciliation, Mediation and Arbitration* (2009) 30 ILJ 2056 (LC), [2009] 7 BLLR 643 (LC) (hereinafter *BHP Billiton Energy Coal*).

76 See *Kem-Lin Fashions v Brunton* 2002 (6) SA 497 (LAC) [19]; *Transport and Allied Workers Union of South Africa v Putco Ltd* 2016 (4) SA 39 (CC) [52].

77 *National Tertiary Education Union (NTEU) v Tshwane University of Technology* [2017] ZALCJHB 91 (23 March 2017) (hereinafter *NTEU*).

78 *NTEU* [25].

> The LRA provides support for the institution of collective bargaining and avails unions of the right to strike to allow them to bring economic power to bear on the bargaining process, but the LRA does not bestow a legal entitlement on a union, to a seat at the bargaining table unless it has attained bargaining rights by agreement with the employer or unless it is entitled to be granted such rights in terms of an existing collective agreement, which affords collective bargaining rights to any union satisfying stipulated membership thresholds. In certain instances, the LRA will also permit a minority union to strike in support of the demand to bargain collectively, but the right to engage in collective bargaining with a particular employer is ultimately something that is attained because of one of the mechanisms mentioned.

Returning to *BHP Billiton Energy Coal South Africa Limited v Commission for Conciliation, Mediation and Arbitration*, one should note that BHP Billiton, dissatisfied with the decision, appealed the arbitration procedures and the verdict on various grounds, including (a) the significant irregularities in the conduct of the hearings, (b) the non-joinder of NUM and UASA, and (c) the failure to record the proceedings. Despite being the dominant party before the CCMA, AMCU objected to the review application on qualified grounds. In essence, AMCU argued that the commissioner's judgment was accurate as regards the determination of the facts but admitted that the wording of the relief was insufficient. AMCU argued that the right approach was to correct the award rather than to set it aside.[79] In setting aside the arbitration award and referring the matter for rehearing before another commissioner, the Labour Court found, among other things, that NUM and UASA should have been joined in the proceedings.[80] The relief sought by AMCU was to set aside or render ineffective an agreement to which NUM and UASA were parties.

3.5 Freedom of association and trade union security arrangements

The LRA protects the existence of the majority trade unions and their power, and this becomes evident in peculiar arrangements between employers and majority trade unions, such as agency shop agreements and closed shop agreements, and in the extension of collective agreements in terms of section 32 of the LRA. Section 32 empowers bargaining councils to extend their agreements to all employers in their sector, thereby levelling the competitive playing fields on their own terms. The LRA does not grant protection to freedom of association; instead, it subjects the rights of individuals and minority trade unions to overpowering majority unions. The

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79 *BHP Billiton Energy Coal* [22].
80 *BHP Billiton Energy Coal* [29].

right to freedom of association is a fundamental right recognised and afforded protection by the conventions of the ILO. For example, ILO Convention 87 and Convention 98 have contributed to substantial progress in shaping the constitutional and statutory contours of freedom of association and collective bargaining across many jurisdictions.[81] The international instruments are explored in Chapter 4 of this thesis.

Paragraph 5(1) of the ILO's Collective Agreements Recommendation, 1951 (No. 91) states:

> Where appropriate, having regard to established collective bargaining practice, measures, to be determined by national laws or regulations and suited to the conditions of each country, should be taken to extend the application of all or certain stipulations of a collective agreement to all the employers and workers included within the industrial and territorial scope of the agreement.

And paragraph 5(2)(*c*) states:

> National laws or regulations may make the extension of a collective agreement subject to the following, among other, conditions;
> …
> (c) that, prior to the extension of the agreement, the employers and workers to whom the agreement would be made applicable by its extension should be given an opportunity to submit their observations.

These provisions are not applied in South Africa as such. Collective agreements are imposed on minority trade unions. Only on the extension of collective agreements under section 32 of the LRA can these unions appeal the extension based on affordability.

3.5.1 Agency shop agreement

According to the LRA, a representative trade union and an employer or employers' organisation may enter into a collective agreement known as an agency shop agreement, which requires the employer to deduct an agreed agency fee from the wages of employees identified in the agreement who are not members of the trade union but are eligible for membership.[82] In *Greathead v SA Commercial Catering & Allied Workers Union*,[83] the court made it clear that an agency shop agreement

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81 For incisive analysis, see Anon, 'Introduction: Labour Rights, Human Rights' (1998) 137 ILR 127, 127–33.

82 Section 25 of the LRA.

83 *Greathead v SA Commercial Catering & Allied Workers Union* 2001 (3) SA 464 (SCA).

must meet all the requirements of section 25(3) of the LRA.[84] The decision in *Greathead v SA Commercial Catering & Allied Workers Union* was followed in *Solidarity v Minister of Public Service and Administration*.[85]

In *United Association of SA on behalf of Members v Western Platinum Ltd*,[86] the court had to decide on the validity and enforceability of an agency shop agreement. The agreement was concluded between Lonmin and AMCU as a majority union in the workplace.[87]

On the same day, the Registrar of Labour Relations gave notice in terms of section 106(2B) of the LRA of his intention to cancel AMCU's registration as a trade union on the basis that the union had ceased to function in terms of its constitution.[88] The applicants argued that the agency shop agreement did not comply with section 25(3)(*a*) of the LRA because it did not provide that employees who were not members of AMCU were not compelled to become members.[89] The court concluded that the agreement was invalid and unenforceable. It is evident from this matter that employees who belong to minority unions find themselves paying double trade union fees. In *National Manufactured Employers' Association v Commissioner Bikwani*,[90] the court decided that the duty to pay membership fees to a minority union is no excuse for not paying agency fees.

In *Association of Mineworkers & Construction Union v UASA — The Union on behalf of Members*,[91] the Labour Appeal Court held that in examining the language of section 25(3) of the LRA, it is apparent that an agency shop agreement is binding only if it provides that employees who are not members of the representative trade union are not compelled to become members of that trade union. This provision, according to the court, was mandatory. The agreement reached between AMCU,

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84 *Greathead v SA Commercial Catering & Allied Workers Union* [12].
85 *Solidarity v Minister of Public Service & Administration* (2004) 25 ILJ 1764 (LC) [27].
86 *United Association of SA on behalf of Members v Western Platinum Ltd* (2019) 40 ILJ 2405 (LC), [2019] 11 BLLR 1283 (LC) (hereinafter *United Association of SA v Western Platinum Ltd*).
87 *United Association of SA v Western Platinum Ltd* [1].
88 *United Association of SA v Western Platinum Ltd* [2].
89 *United Association of SA v Western Platinum Ltd* [6].
90 *National Manufactured Employers' Association v Commissioner Bikwani* [1999] 10 BLLR 1076 (LC).
91 *Association of Mineworkers & Construction Union v UASA — The Union on behalf of Members* (2021) 42 ILJ 1893 (LAC), [2021] 10 BLLR 974 (LAC).

the majority union, and the employer stated merely that employees who were not members of any trade union would not be forced to join AMCU. Thus the section provided only for employees who were not union members and forgot to provide for employees who were members of other unions and failed to specify that those employees were not coerced to become members of AMCU. As a result, the agreement did not meet the necessary conditions of section 25(3) of the LRA. As a result, the Labour Appeal Court upheld the Labour Court's decision, which barred the employer from deducting any agency fee in accordance with the agreement in favour of AMCU from the wages of members of the first, second, and third union respondents, UASA, Solidarity, and the National Union of Mineworkers, and ordered the employer to refund all deductions made.

3.5.1.1 *Municipal and Allied Trade Union of South Africa v Central Karoo District Municipality*

In *Municipal and Allied Trade Union of South Africa v Central Karoo District Municipality* (hereinafter *MATUSA*),[92] the issue was whether an agency shop agreement may be interpreted to exempt minority union members from paying agency shop agreement fees in the context of section 21(8C) of the LRA and whether section 21(8C) cannot be read to mean that in granting organisational rights, the commissioner has the power to override agency fees derived from collective agreements. According to the Constitution and the ILO guidelines, agency fees are deducted from employees named in the collective agreement. The CCMA's decision to give stop order privileges to MATUSA replaced the agency shop agreement, according to a contextual and meaningful reading of section 21(8)(C) of the LRA, and the employer was confined to deducting only the subscription costs payable to MATUSA. The claim was essentially that section 25 of the LRA must be read in the light of section 39(2) of the Constitution in order to promote the spirit, purpose, and objects of MATUSA's right to organise and bargain collectively, and to avoid applying any existing agency agreement to employees in its members' positions. The claimant also maintained that the ILO's Freedom of Association and Right to Organise Convention (No 87) supported this claim.

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92 *Municipal and Allied Trade Union of South Africa v Central Karoo District Municipality* [2020] ZALAC 73 (28 May 2020) [16].

The Labour Court decided that section 21(8)(C) of the LRA authorised a commissioner to overrule a section 18 threshold agreement. As a result, the commissioner might grant section 12, 13, or 15 rights to trade unions if those unions do not satisfy the threshold stipulated under a section 18 agreement. The Labour Court ruled in the *MATUSA* case that an agency shop agreement is neither illegal nor invalid since employees must pay an agency fee to a majority trade union in addition to a subscription fee to the minority trade union of which they are members. The Labour Appeal Court concurred with the Labour Court's ruling. It can be argued that the wording of section 21(8C) of the LRA authorises a commissioner to overturn a section 18 threshold agreement that establishes a threshold for minority unions seeking the organisational rights granted by sections 12, 13, and 15 of the LRA. As a result, this wording provides a commissioner with no authority to intervene in a pre-existing agency shop agreement.

3.5.2 Closed shop agreement

A closed shop agreement is a collective agreement in which a majority trade union and an employer agree that all employees must be members of the majority trade union as a condition of employment. Only trade union members who have signed the closed shop agreement are eligible for employment. Section 26(1) of the LRA establishes a closed shop agreement.[93] The constitutional challenge to a closed shop agreement is significantly more serious since it violates the fundamental right to free association. Closed shop agreements serve a purpose similar to agency shop agreements, but they give the dominant union a more potent means of increasing negotiating power. Non-union employees must join the majority union or face dismissal under a closed shop agreement. If a majority union dismisses a member or refuses to allow a new employee to become a union member, and the dismissal or refusal is in conformity with the union's constitution or for a reasonable cause, the employer must dismiss the employee.

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93 Section 26 of the LRA.

In *SA Transport & Allied Workers Union v Servest Security (Pty) Ltd—A Division of Servest Group*,[94] SATAWU was the founding party of and a majority union in the National Bargaining Council for the Private Security Sector (NBCPSS). SATAWU approached the Labour Court for an interdict to prevent the employer from making a double deduction from its members' salary as a result of a closed shop agreement concluded between the employer and the majority union, Kungwini Amalgamated Workers Union (KAWU). SATAWU members who were previously KAWU members were now in the unpleasant position of having to pay double subscriptions to both unions as a result of the closed shop agreement. Because Servest refused to fulfil the closed shop agreement, SATAWU filed an urgent motion with the court, seeking an order prohibiting Servest from unilaterally imposing future double deductions from its members' salaries. SATAWU sought an order declaring the closed shop agreement between Servest and KAWU invalid.

The Labour Court reasoned as follows. It is accepted that closed shop agreements are inherently the strongest form of union security arrangements designed to address the problem of 'free riders' benefiting unduly from the efforts put into collective bargaining by a trade union which is a party to the closed shop agreement. SATAWU further claimed that the multiple deductions clearly violated sections 13 and 26 of the LRA and section 34 of the Basic Conditions of Employment Act 75 of 1997 (BCEA). SATAWU claimed that the threatened dismissal of its members in compliance with the closed shop agreement had far-reaching negative effects on the union and its members.[95] The court further held that an employer cannot simply cease collecting deducted fees in terms of a closed shop agreement unless the provisions of section 13(3) and (4) of the LRA have been met. Employees who have moved to another union must therefore demonstrate that they have revoked the authorisation given in terms of section 13(1) of the LRA by giving the requisite notice to the employer and their previous union.

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94 *SA Transport & Allied Workers Union v Servest Security (Pty) Ltd—A Division of Servest Group* (2022) 43 ILJ 426 (LC), [2021] 12 BLLR 1252 (LC) (hereinafter *SA Transport & Allied Workers Union v Servest Security (Pty) Ltd*).

95 *SA Transport & Allied Workers Union v Servest Security (Pty) Ltd* [16].

3.6 Section 18 of the LRA and recognition agreements in the mining sector

The mining industry has a centralised bargaining forum which operates as a result of agreements between participants and established practice. The forum is open only to members of the Chamber of Mines in the gold and coal mining industries. The majority of gold and coal companies that are not Chamber members are covered by plant level collective agreements, as are diamond and platinum companies as well as iron ore mines. The National Union of Mineworkers (NUM), the United Association of South Africans (UASA), Solidarity, and the South African Equity Workers' Association (SAEWA) are parties to the Chamber. By far the largest and most representative of the unions is NUM.

It is common in the mining sector that the majority trade union appoints full-time shop stewards and full-time office-bearers who are assigned to the region at the cost of the company for the duration of the term, on condition that the union enjoys full organisational rights as well as collective bargaining rights in the bargaining unit. These shop stewards are then released by the companies to carry out full-time trade union activities. The recognition agreement stipulates the issue of full-time shop stewards as follows. Management will recognise a full-time shop steward and a regional office-bearer from the majority union on condition that the number of members of such union is above 50% of the number of employees in the recognised bargaining unit. The full-time shop steward and a full-time office-bearer will perform their functions in terms of the full-time shop stewards' or full-time office-bearers' agreement. Should the number of members of the majority union decrease below 50% of the number of employees in the recognised bargaining unit, this position will be reconsidered. The arrangement explained above can extend so far that if an elected member holds a position at the lower level of the grading system, this position must be regraded to a higher level.

3.7 Litmus test of representivity and extension of collective agreements to non-parties

The gateway to the workplace as well as the threshold for access to organisational rights regulating access to the workplace,[96] stop-order facilities,[97] and time off for union activities[98] is that the union or unions must be 'sufficiently representative'. The LRA makes being 'sufficiently representative' the test for collective bargaining between unions and employers.[99] In fact, collective bargaining begins and ends with a union proving and maintaining its status as 'sufficiently representative'.

In the context of the discussion above, it is evident that majority unions at a workplace are provided with further entitlements in the form of the recognition of shop stewards[100] and the disclosure of information.[101] Once a union has satisfied the threshold requirements for acquiring organisational rights, it plays a dominant and gatekeeping role in the workplace. A majority union has arguably unlimited power to restrict and shut out minority unions or any potential competitor in the workplace.

Undeniably, section 18(1) of the LRA empowers majority unions to conclude collective agreements setting thresholds of representivity for the granting of access, stop-order, and trade-union leave rights to minority unions.[102] The nature and import of this controlling provision are diffuse and far-reaching.[103] Professor

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96 Section 12 of the LRA.

97 Section 13 of the LRA. See *SA Commercial Catering & Allied Workers Union v Speciality Stores Ltd* (1998) 19 ILJ 557 (LAC), [1998] 4 BLLR 352 (LAC); *PTWU obo Members v Sahar Security Services* [2004] 3 BALR 373 (CCMA); *Health & Hygiene Services v Seedat* [1999] 11 BLLR 1153 (LC); *CEPPWAWU v Tekwani Sawmills (Pty) Ltd* [2004] 9 BALR 1094 (CCMA); *National Union of Mineworkers v Paintrite Contractors CC* (2008) 29 ILJ 806 (CCMA).

98 Section 15 of the LRA.

99 Organisational rights are regulated by parts A and B of chap III of the LRA, and the right to strike is regulated by chap IV of the Act.

100 Section 14 of the LRA.

101 Section 16 of the LRA. See *National Police Services Union v National Negotiating Forum* (1999) 20 ILJ 1081 (LC), [1999] 4 BLLR 36 (LC); *NUMSA obo Members v Behr Climate and Control* [2004] 3 BALR 364 (CCMA); *Langa v Active Packaging (Pty) Ltd* (2001) 22 ILJ 397 (LAC), [2001] 1 BLLR 37 (LAC).

102 Section 15 of the LRA.

103 Brassey's views were endorsed in *United Association of SA v BHP Billiton Energy Coal SA Ltd* (2013) 34 ILJ 2118 (LC). For further engagement, see Kruger and Tshoose, 'The Impact of the *Labour Relations Act* on Minority Trade Unions'; Cohen, 'Limiting Organisational Rights of Minority Unions'.

Brassey offers a more succinct, but still robust, conception of section 18. He postulates that the thrust of this provision is[104]

> [t]o enable the parties to put a numerical figure to the otherwise somewhat indeterminate concept of "sufficiently representative" for which the stipulated sections (12, 13 and 15) provide. However, 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....

Brassey further contends that the majoritarian principle is 'too unresponsive' and 'too crude' to adequately consider the welfare of smaller unions.

3.8 Thresholds

To determine whether a union is sufficiently representative, the CCMA is enjoined to consider the factors expressed in Industrial Court decisions dealing with unions' claims to a bargaining entitlement under the Labour Relations Act 1956.[105] As enumerated in *National Union of Metalworkers of SA v Feltex Foam*,[106] these factors would include the history of bargaining relationships in the workplace, whether the workplace is divisible into coherent bargaining units with distinct groupings of employees with separate interests, whether the union can make a meaningful impact on collective bargaining, the union's growth potential, and the attitudes of the majority union. Furthermore, the CCMA had to assess the statute's requirement of 30% membership for the creation of a statutory council.[107]

Where a union's membership declines below the required threshold, the employer may withdraw recognition, regardless of the fact that the union became insufficiently representative as a consequence of the company's corporate reorganisation.[108] What is also clear is that employers must treat unions even-handedly when they seek to withdraw organisational rights. As regards this subject matter, if an employer decides not to recognise a union with a lower threshold, it may be ordered to do so if the employer continues to recognise a union with an equally small

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104 M Brassey, *Commentary on the Labour Relations Act* (Juta 1999) A3-23–24.

105 Sections 14(1) and 16(1) of the Labour Relations Act 28 of 1956.

106 *National Union of Metalworkers of SA v Feltex Foam* (1997) 18 ILJ 1404 (CCMA), [1997] 6 BLLR 798 (CCMA).

107 Section 39(1)(*a*). See also *SA Clothing & Textile Workers Union v Sheraton Textiles (Pty) Ltd* (1997) 18 ILJ 1412 (CCMA) 1419D–E.

108 *Group 4 Falk (Pty) Ltd v DUSWO* [2003] 4 BALR 422 (CCMA).

membership.[109] The LRA permits unions and employers to agree to thresholds of representivity required for access, leave, and stop order rights below those specified in the LRA.

3.9 Extension of collective agreements to non-parties

According to Esitang and Van Eck,[110] section 23 of the Constitution is disproportional to the majoritarian principle because nothing it asserts implies that trade union rights should be reduced through legislation. Two possibilities of extension are envisaged in section 23(1)(*d*) and section 32 of the LRA. Section 23(1)(*d*) provides that a collective agreement binds employees who are not members of the trade union or trade unions that are party to the agreement, provided that three conditions are met: the employees are identified in the agreement; the agreement expressly binds the employees; and the trade union or trade unions concluding the agreement enjoy majority membership of employees employed in that workplace.

Next, section 32 of the LRA permits extending collective bargaining agreements concluded at a sectoral level to persons not directly involved in the collective negotiations and also to persons not party to the agreement concluded in the relevant bargaining council. In terms of sections 32(1) of the LRA, the Minister of Labour must extend the agreement where the following parties voted in favour of such an extension if two requirements are met:

> (a) one or more registered trade unions whose members constitute the majority of the members of the trade unions that are party to the bargaining council vote in favour of the extension; and
> (b) one or more registered employers' organisations, whose members employ the majority of the employees employed by the members of the employers' organisations that are party to the bargaining council, vote in favour of the extension.[111]

The Labour Relations Amendment Act 8 of 2018 came into effect on 1 January 2019. The statute introduced the following amendments.

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109 *Organisation of Labour Affairs (OLA) v Old Mutual Life Assurance Company (SA)*.

110 Temogo Geoffrey Esitang and Stefan van Eck, 'Minority Trade Unions and the Amendments to the LRA: Reflections on Thresholds, Democracy and ILO Conventions' (2016) 37 ILJ 763.

111 Section 32 of the LRA.

> (2) Subject to subsection (2A), the Minister must extend the collective agreement, as requested, by publishing a notice in the *Government Gazette,* within 60 days of receiving the request declaring that, from a specified date and for a specified period, the collective agreement will be binding on the non-parties specified in the notice.
>
> (2A) If the registrar determines that the parties to the bargaining council are sufficiently representative within the registered scope of the bargaining council for the purposes of subsection (5)(a), the Minister must publish the notice contemplated in subsection (2) within 90 days of the request.

A contentious point is the extension of bargaining council agreements to non-parties. This extension is said to hinder small businesses from creating jobs.

Section 32(3)(*b*) and section 32(3)(*c*) of the LRA stipulate that a collective agreement may not be extended unless a majority of the employees fall within the scope of the agreement and are members of the trade unions that are parties to the bargaining council or members of the employers' organisations that are parties to the bargaining council. Under the amended section 32(5)(*a*), a collective agreement may be extended by the Minister where the registrar determines that parties to the bargaining council are sufficiently representative within the bargaining council's registered scope. Under section 32(5A), it became the responsibility of the registrar, and no longer the Minister, to determine whether the parties to the bargaining council are sufficiently representative for the purposes of extending a collective agreement.[112]

One of the complaints against centralised bargaining is that it unnecessarily introduces rigidities and bureaucratisation into the industrial relations picture. These rigidities in the bargaining mechanism can undermine South African industries' competitiveness in worldwide markets. Many of these opinions were reflected in the discussion over whether labour legislation was appropriate for the South African labour market. One argument was that labour market flexibility was insufficient to relate wage increases to greater productivity. The African National Congress government has faced pressure to reconsider key components of the legal

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112 Section 32 of the LRA.

framework that have hampered economic growth and job creation. The main sources of this pressure are globalisation and the desire for increased flexibility.[113]

In *National Employers' Association of South Africa (NEASA) v Minister of Labour*,[114] the National Employers' Association of South Africa ('NEASA') and the Plastic Convertors Association of South Africa ('PCASA') applied to the Labour Court for it to set aside the decision by the Minister of Labour ('the Minister') to extend the Consolidated Registration and Administrative Expenses collective agreement concluded between certain parties in the Metal and Engineering Industrial Bargaining Council (MEIBC) to non-parties, under Government Notice R758[115] in *Government Gazette* 39043 dated 31 July 2015 under section 32(2) read with section 32(5) of the LRA.[116] The applicants requested the court to strike down section 32(5) of the LRA as unconstitutional, in so far as it might be necessary.[117] The court found that the breach of the right to fair administrative action concerned the unlawful exercise of the Minister's power to extend the agreement to non-parties in the absence of there being reasonable grounds for the Minister to be satisfied that certain pre-requisites for exercising her power had been met.[118]

3.9.1 The extent to which the 2018 Labour Relations Amendment Act alleviates the plight of minority parties[119]

The discussion is limited to freedom of association and whether the 2018 amendments alleviated the plight of minorities.

3.9.1.1 Extension of collective agreements

Section 32(2) of the LRA was amended to allow the Minister to extend a collective agreement to non-parties within 60 days of receiving a request to do so. In terms of

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113 Haroon Bhorat, Paul Lundall and Sandrine Rospabe, *The South African Labour Market in a Globalizing World: Economic and Legislative Considerations* (International Labour Office, 2002) 53.

114 *National Employers' Association of South Africa (NEASA) v Minister of Labour* [2018] ZALCJHB 55 (15 February 2018) (hereinafter *NEASA*).

115 Department of Labour, 'Labour Relations Act, 1995: The Metal and Engineering Industries Bargaining Council: Extension to Non-Parties of the Registration and Administration Expenses Collective Agreement' GN R758 in *GG* 39043 dated 31 July 2015.

116 *NEASA* [1].

117 *NEASA* [5].

118 *NEASA* [40].

119 Labour Relations Amendment Act 8 of 2018.

section 32(2A), the registrar determines that parties are sufficiently representative within a bargaining council's registered scope. The Minister's notice in the *Government Gazette* extending the collective agreement must be published within 90 days of the request.

Section 32(3)(*b*) and section 32(3)(*c*) of the LRA provide that a collective agreement may not be extended unless the majority of the employees fall within the scope of the agreement and are members of the negotiating council's trade unions or members of the bargaining council's employers' organisations. Section 32(5)(*a*) of the LRA specifies that the Minister may extend a collective agreement if the registrar considers that the parties to the bargaining council are appropriately represented within the council's registered jurisdiction. The registrar determines whether the parties to a bargaining council are sufficiently representative for the purposes of extending a collective agreement.[120]

3.9.1.2 Picketing

Section 69(4) of the LRA obliges a conciliating commissioner to attempt to secure an agreement between parties on picketing rules in relation to a strike or lock-out before the expiry of 30 days since the referral unless there is a collective agreement binding on the trade union which regulates picketing. Where parties fail to agree or there is no collective agreement, the conciliating commissioner must determine picketing rules in accordance with any default picketing rules prescribed by the CCMA under section 208 of the LRA or the published Code of Good Practice. The commissioner must consider the relevant Code of Good Practice as well as the particular circumstances of the workplace or other premises where it is intended that the right to picket is to be exercised. The commissioner must also consider representations made during conciliation by the parties. The picketing rules may provide for picketing in a place to which the public has access but outside the employer's premises, which is owned or controlled by a person other than an employer if that person was afforded an opportunity by the conciliating commissioner to make representations before the rules are established.

120 Section 32(5A) of the LRA.

If the conciliating commissioner determines that the employer's authorisation has been unfairly denied, the regulations may allow for picketing on the employer's premises. Section 69(6A) of the LRA requires a conciliating commissioner to provide a certificate of impasse in determining the picketing regulations. Section 69(6B) of the LRA authorises a trade union to file a direct application for the immediate decision of picketing regulations if the dispute involves a unilateral change in the terms and conditions of employment, or if an employer has given notice of intent to begin or has begun an unprotected lock-out. Section 69(6C) of the LRA prohibits a picket in support of a protected strike or in opposition to a lock-out unless picketing rules are agreed upon in a collective agreement binding on the trade union or determined by the conciliating commissioner in accordance with any default picketing rules prescribed by the CCMA under section 208 or the published Code of Good Practice.[121] Section 69(12)(*c*) of the LRA provides an additional remedy. The Labour Court may grant an order suspending a picket at one or more of the locations designated in the collective agreement, the agreed rules, or the rules determined by the CCMA. And section 69(15) of the LRA grants a bargaining council commissioner the jurisdiction to conciliate a dispute.

3.9.1.3 Registration requirements for trade unions and employers' organisations duty to keep records and duty to provide information to the registrar

Section 95(9) has refined the definition of 'ballot' to include any system of voting by members that is recorded and in secret for the purposes of section 95(5) of the LRA. Section 95(5) sets out the requirements for the constitution of any trade union or employers' organisation. Under section 95(5)(*q*), that constitution must provide that members may not be disciplined or have their membership terminated for failure or refusal to participate in a strike or lock-out if no ballot was held about the strike or lock-out, or a ballot was held but a majority of the members who voted did not vote in favour of the strike or lock-out. In terms of section 99(*b*), every trade union and employer's organisation must keep the attendance register, minutes or any other prescribed record of its meetings in an original or reproduced form, for three years from the end of the financial year to which they relate. Under section 99(*c*), every trade union and employer's organisation must keep records, the ballot papers or

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121 Section 208 of the LRA.

any documentary or electronic record of the ballot for three years from the date of every ballot. Section 100 includes a further requirement in its new subsection (*f*) that every registered trade union and every registered employer's organisation must furnish the registrar with the records referred to in section 99.

It is argued that the 2019 amendments did not alleviate the plight of the minority parties. They still have to endure the extension of collective agreements in terms of section 32 of the LRA, and the only way out is to apply for an exemption on the basis of affordability.[122] Again, the principle of majoritarianism prevails in section 69(6C) of the LRA. This provision prohibits a picket in support of a protected strike or in opposition to a lock-out unless picketing rules are agreed in a collective agreement binding on the trade union or determined by the conciliating commissioner in accordance with any default picketing rules prescribed by the CCMA under section 208 or the published Code of Good Practice. Minority unions have difficulty in securing organisational rights because the judiciary is challenged in its interpretation and application of majoritarianism. It is apparent that the courts still value majoritarianism. Yet is also evident that the application of this concept is growing increasingly difficult, to the point where a policy change is required.

3.10 Summary

Majoritarianism is both a premise of and a recurrent theme throughout the LRA. From the case law dealing with threshold disputes, it appears that section 18 of the LRA is an instrument insulating the majority union from competition by emerging players in the workplace. The concept 'sufficiently representative' becomes an imprecise yardstick where the majority union renegotiates and diminishes the number of bargaining units by incorporating the bargaining units where minority trade unions, such as Solidarity, are organised into one big bargaining unit.[123] The upshot is that minority unions find it hard to reach the required threshold in the new bargaining structure in circumstances where those unions have regularly done so in terms of the previous bargaining unit structure.

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122 Section 32 of the LRA.

123 For a comprehensive discussion, see Kruger and Tshoose, 'The Impact of the *Labour Relations Act* on Minority Trade Unions' 291–94.

The importance of minimising the proliferation of trade union representation in a single workplace and ensuring orderly collective bargaining can hardly be overstated. At the same time, there is overarching need to level the playing field in order to counter the abuse of dominance by majority unions. Enhancing multi-party democracy at the workplace itself justifies a different approach to determining threshold disputes.

Accordingly, there is merit in the submission that the legislature at the very least should have placed the burden on the dominant parties to section 18 agreements to convince the arbitrator why organisational rights should not be granted to minority applicant trade unions in order to counter the negative effects which their anti-competitive behaviour may have.[124] It is argued that had the phrase 'sufficiently representative' remained an imprecise yardstick to determine membership threshold levels for the acquisition of organisational rights as well as the application of section 18 to minority trade unions which has served to heighten union rivalry, then this phrase would have served a valuable purpose.

The next chapter examines several topics. These include the impact of international instruments on freedom of association; South Africa as a member state of the International Labour Organization (ILO); the Bill of Rights; the state's obligation emanating from ILO membership; and the role of freedom of association as the centrepiece of both political and workplace democracy. A detailed discussion of the ILO is focused on Convention 87 and Convention 98.

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[124] Esitang and Van Eck, 'Minority Trade Unions and the Amendments to the LRA' 773.

CHAPTER 4: INTERNATIONAL INSTRUMENTS ON FREEDOM OF ASSOCIATION

4.1 Introduction

Undeniably, in the contemporary world shaped by the COVID-19 pandemic,[1] in which the individual counts for so little unless cooperating with fellow human beings, freedom of association is more than ever the cornerstone of social and economic rights alike. Within an open and democratic political system, voluntary private associations can increase opportunities for self-realisation, counterbalancing the strength of centralised power.[2]

As regards the freedom of association in the workplace, workers' right to freedom of association is a fundamental labour right. In the workplace, the right to freedom of association is essentially an enabling right entitling workers to form and join workers' organisations of their own choice to promote common organisational interests. For workers, freedom of association is a means of facilitating the realisation of further rights, rather than just a right in itself.[3] As Le Dain J of the Supreme Court of Canada observed,

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1 Suné Payne, 'In a Post-Covid-19 World, How Will South Africa Recover from Massive Job Losses?' *Daily Maverick* (2 October 2020) <https://www.dailymaverick.co.za/article/2020-10-02-in-a-post-covid-19-world-how-will-south-africa-recover-from-massive-job-losses/> accessed 15 October 2020; Suné Payne, 'Emotional Healing after Covid-19 Trauma – The Next Step for Healthcare Workers in the Western Cape' *Daily Maverick* (19 January 2021) <https://www.dailymaverick.co.za/article/2021-01-19-emotional-healing-after-covid-19-trauma-the-next-step-for-healthcare-workers-in-the-western-cape/> accessed 19 January 2021; Shiraaz Mohamed, 'Covid-19 Frontline Fighters: "When Staff Become Patients, It's Heartbreaking"' *Daily Maverick* (15 January 2021) <https://www.dailymaverick.co.za/article/2021-01-09-covid-19-frontline-fighters-when-staff-become-patients-its-heartbreaking/> accessed 15 January 2021; Kgaugelo Sebidi, 'South Africa's Other Covid-19 Pandemic – Our Silent Mental Health Crisis' *Daily Maverick* (07 April 2020) <https://www.dailymaverick.co.za/opinionista/2020-04-07-south-africas-other-covid-19-pandemic-our-silent-mental-health-crisis/> accessed 15 April 2020; Kathryn Cleary, 'South Africa Is Facing a Healthcare Worker Crisis – Thousands More Nurses Will Be Needed' *Daily Maverick* (24 September 2020) <https://www.dailymaverick.co.za/ article/2020-09-24-south-africa-is-facing-a-healthcare-worker-crisis-thousands-more-nurses-will-be-needed/> accessed 15 October 2020.

2 Payne, 'Emotional Healing after Covid-19 Trauma – The Next Step for Healthcare Workers in the Western Cape'; Mohamed, 'Covid-19 Frontline Fighters: "When Staff Become Patients, It's Heartbreaking"'.

3 Section 213 of the LRA.

> [T]he freedom to work for the establishment of an association, to belong to an association, to maintain it, and to participate in its lawful activity without penalty or reprisal is not to be taken for granted.[4]

The constitutional guarantee of freedom of association is closely allied to other cherished fundamental rights[5] which are foundational components of South Africa's nascent constitutional democracy. The creation of the comprehensive collective bargaining and strike framework in the LRA must be understood not only in the context of the constitutional right to fair labour practices in section 23(1) of the Constitution but also against the backdrop of the ILO's venerable conventions such as Convention 87[6] and Convention 98.[7]

The overall purpose of this chapter of the thesis is to analyse the concept of freedom of association in labour relations, and in doing so to demonstrate the importance of the standard-setting work of the ILO. The ILO was created in 1919 as a means to promote social progress and overcome social and economic conflicts of interest through dialogue and cooperation. As labour law students well know, labour legislation in many countries[8] was inspired by these Conventions and also by the Labour Inspection Recommendation, 1947 (No 81).

This is particularly true of the development of freedom of association in its industrial relations environment and the fostering of constructive labour-management relations.[9] The functional understanding of freedom of association is to a large

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4 *Reference Re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88 (SCC), [1987] 1 SCR 313 [143], delivering the judgment of Beetz, Le Dain and La Forest JJ.

5 Constitution of the Republic of South Africa, 1996, ss 9 (equality), 10 (human dignity), 12 (freedom and security of the person), 13 (slavery, servitude and forced labour), 14 (privacy), 15 (freedom of religion and opinion), 16 (freedom of expression), 17 (assembly, demonstration, picket and petition), 19 (political rights) and 22 (freedom of trade, occupation and profession).

6 Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87). This Convention protects three classes of activities: (1) the 'constitutive' right to join with others and form associations; (2) the 'derivative' right to join with others in the pursuit of other constitutional rights; and (3) the 'purposive' right to join with others to meet on more equal terms the power and strength of other groups or entities.

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

8 See eg ss 1, 2(*d*) and 15(1) of the *Canadian Charter of Rights and Freedoms* (1982). See also *Reference Re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88 (SCC), [1987] 1 SCR 313; *RWDSU v Saskatchewan*, 1987 CanLII 90 (SCC), [1987] 1 SCR 460; see generally George W Adams, *Canadian Labour Law: A Comprehensive Text* (Aurora 1985).

9 See Philippe Alby, Jean-Paul Azam and Sandrine Rospabé, *Labour Institutions, Labour-Management Relations and Social Dialogue* (The World Bank 2005) 43, noting the use of the relationship-by-objective process in South Africa. See generally Sonia Bendix, *Industrial Relations in South Africa* (3rd edn, Juta 1996).

extent the product of ILO instruments, and, as will be observed, there is no better way of measuring the 'functional' usefulness of domestic law than to set it alongside the relevant ILO provisions.[10] So there are frequent references to benchmark the ILO instruments and the interpretation of these by competent ILO bodies.[11]

4.2 International instruments on the right to freedom of association

4.2.1 Universal Declaration of Human Rights

In the context of international law, the genesis of the guarantee of freedom of association was provided by the Universal Declaration of Human Rights (UDHR), adopted by the General Assembly of the United Nations in December 1948.[12] Article 20 of the UDHR encapsulates this, stating: 'Everyone has the right to freedom of assembly and association.' This guarantee, in conjunction with the other rights embodied in the UDHR, was made subject only to such limitations as are determined by law solely to secure due recognition and respect for the rights and freedoms of others and of meeting the just requirement of morality, public order, and the general welfare in a democratic society, and to the requirement that it be not exercised 'contrary to the purposes and principles of the United Nations'.[13] Freedom of association must be read together with Article 23 of the UDHR stating that everyone has the right to labour, free choice of a job, just and favourable working conditions, and just and favourable remuneration.[14] For present purposes it is notable that the UDHR recognises everyone's right to create and join trade unions in order to protect his or her interests.[15] The UDHR acknowledges that everyone has the right to freedom of peaceful assembly and of association.[16]

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10 For incisive analysis, see Anon, 'Introduction: Labour Rights, Human Rights' (1998) 137 ILR 127–33.

11 The application of international law is fortified by the 1993 Interim Constitution and the 1996 Constitution. There is also the bolstering effect of authorities of the highest calibre: *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC) [218]; *S v Makwanyane* 1995 (3) SA 391 (CC) [35]; *National Union of Metalworkers of SA v Bader Bop (Pty) Ltd* 2003 (3) SA 513 (CC) [31]–[34] (hereinafter *Bader Bop*).

12 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).

13 Article 29(2) and (3) of the UDHR.

14 Article 23(1)–(3) of the UDHR.

15 Article 23(4) of the UDHR.

16 Article 20(1) of the UDHR.

Equally, the UDHR states that no one may be compelled to belong to an association.[17] The UDHR thus clearly includes both the affirmative and negative rights to freedom of association. Another noteworthy characteristic is that it integrates the rights to freedom of association and peaceful assembly, demonstrating their inseparability. The fact that the UDHR incorporates both civil and political rights, on the one hand, and economic, social, and political rights, on the other, confirms the indivisibility of human rights.

4.2.2 Freedom of Association and Protection of the Right to Organise Convention 87 of 1948

The speed of the subsequent developments was set by the ILO. Of particular interest are the two Conventions. Convention 87 protects the freedom of association of both employers and workers. For instance, Article 2 of Convention 87 provides:

> 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 3(1) places workers' and employers' organisations on a firm legal footing by providing that they 'shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes'.

Article 3(2) then goes further by directing that 'public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof'. Article 6 affirms the right of workers' and employers' organisations to form and join federations and confederations, which in turn have the right to affiliate with international organisations of workers and employers. Convention 87 expressly recognises the right of employers and employees to organise by requiring ILO members to 'take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise'.[18] Dunning correctly observes: 'Freedom to form and join employers' or workers' organizations would be of only limited value if such organizations were subject to governmental or other

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17 Article 20(2) of the UDHR.
18 Article 11 of Convention 87.

external control over their internal administration.'[19] Although Convention 87 does not explicitly provide for the right not to associate with any organisation, this right is implied by the positive right to associate.

4.2.3 Right to Organise and Collective Bargaining Convention 98 of 1949

Convention 98 committed the signatory States to protecting the workers' and employer's 'right to organise'. The primary intention of this instrument was to protect workers against acts of 'anti-discrimination in respect of their employment':[20] to be precise, the 'yellow-dog' contract, whereby a worker is only given employment subject to an undertaking that 'he shall not join a union or shall relinquish trade union membership'.[21] The adequate protection against acts of anti-union discrimination also applied more particularly to acts calculated to 'cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours'.[22] The other provisions of the Convention were mainly concerned with safeguarding the independence of unions and employers' organisations[23] and with the special position of the armed forces and police.[24]

Both employers and employee organisations are guaranteed freedom under Convention 98. This Convention goes on to list acts that amount to employers' interfering with employees' organisations' independence, such as employer dominance of employees' organisations and financial control with the goal of imposing entire control over their activities. Although Article 2(1) appears to protect both employers and employees from each other's interference, Article 2(2) of

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19 Harold Dunning, 'The Origins of Convention No. 87 on Freedom of Association and the Right to Organize' (1998) 137 ILR 149, 150.

20 Article 1(1) of Convention 98.

21 Article 2(a) of Convention 98.

22 Article 1 and 2(*b*) of Convention 98. In South Africa, remnants of 'union bashing' can be seen in *Keshwar v SANCA* (1991) 12 ILJ 816 (IC); *Independent Municipal & Allied Trade Union v Rustenburg Transitional Council* (2000) 21 ILJ 377 (LC), [1999] 12 BLLR 1299 (LC) (hereinafter *IMATU*); *Nkutha v Fuel Gas Installations (Pty) Ltd* (2000) 21 ILJ 218 (LC); *CCEPWAWU v Glass & Aluminium 2000 CC* [2002] 5 BLLR 399 (LAC); *Kroukam v SA Airlink (Pty) Ltd* (2005) 26 ILJ 2153 (LAC), [2005] 12 BLLR 1172 (LAC); *Food and Allied Workers Union v The Cold Chain* (2007) 28 ILJ 1593 (LC), [2007] 7 BLLR 638 (LC).

23 Article 2 of Convention No 98.

24 Articles 5 and 6 of Convention No 98.

Convention 98 purports to protect employees' organisations from employer intervention. Schregle summarises the main aspects of collective bargaining in Convention 98 as including governmental promotion of collective negotiations, the voluntary character of the bargaining procedure, and the autonomy of the bargaining parties.[25]

Conventions 87 and 98 were fortified by the ILO Governing Body's establishing the Fact-Finding and Conciliation Commission on Freedom of Association (FFCC) in 1950 and the Committee on Freedom of Association (CFA) in 1951. The work of these specialist bodies gives meaning to the international protection of freedom of association and collective bargaining.[26] These bodies have made stellar contributions to promotion of social justice, as underscored by the fact that the ILO was awarded the Nobel Peace Prize in 1969.[27] The effectiveness of the ILO's supervisory process may be seen in advancements in issues covered by Convention 87, such as the formation of organisations, their activities, the right to strike, affiliation, and many others. The CFA has taken on the challenge of interpreting the phrase 'organisations of their own choosing' in Article 2 of Convention 87. The CFA said that the statement indicates that individual employees should be permitted to join trade unions of their choosing, without preference for either a united trade union movement or trade union pluralism.[28] The expression 'without distinction whatsoever' in Article 2 of Convention 87 was considered the suitable way to articulate the universal scope of the principle of freedom of association.

The CFA investigates complaints of violations of freedom of association regardless of whether the country concerned has ratified Conventions 87 and 98.[29] According

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25 Johannes Schregle, 'Collective Bargaining and Workers' Participation: The Position of the ILO' (1993) 14 Comparative Labour Law Journal 431, 433.

26 Lee Swepston, 'Human Rights Law and Freedom of Association: Developments through ILO Supervision' (1998) 137 ILR 169; Hilary Kellerson, 'The ILO Declaration of 1998 on Fundamental Principles and Rights: A Challenge for the Future' (1998) 137 ILR 223–27.

27 Gerry Rodgers and others (eds), *The International Labour Organization and the Quest for Social Justice, 1919-2009* (International Labour Office 2009) 9–10.

28 International Labour Organization, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th (rev) edn, ILO 2006) paras 319, 320–21.

29 A useful account of the observations and surveys of the Committee of Experts on issues relating to freedom of association is to be found in International Labour Organization, *Freedom*

to the ILO Constitution, each member state agrees to submit annual reports to the ILO on the steps that the member state has taken to fulfil its obligations under the conventions that it has ratified. The reports should be communicated by the Director-General of the ILO to the employer and employee organisations that represent their constituencies at the International Labour Conference. This provision is fair to employees because it allows them to comment and participate fully in the International Labour Conference. The Committee of Experts reviews the reports before referring them to the International Labour Conference.[30]

4.2.4 ILO's Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998, 2022)

It is worth noting that the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, approved in 1998 and amended in 2022, acknowledges four main areas that must be respected and promoted by all Members, including those who have not ratified the relevant Conventions. Freedom of association and the right to collective bargaining are two of these concepts. This Declaration establishes an annual follow-up concerning non-ratified fundamental Conventions based on reports from all Member States and a Global Report, which aims to provide a global picture regarding each area covered and verifies the effectiveness of ILO's assistance to determine priorities for future actions. When the ILO assesses a state's compliance with freedom of association and effective acknowledgement of the right to collective bargaining, the ILO looks at three types of indicators: the statutory framework, the government's implementation success, and the final results.

An assessment begins with a review of the substance of labour laws governing organising, bargaining, and strike action. Some observers look to see whether a nation has ratified Conventions 87 and 98. However, using the ILO ratifications as a barometer of support for workers' freedom of association has its drawbacks. Many countries are commonly thought to be infringing on workers' rights. The ILO concluded that a supervision system was required to ensure that the relevant

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of Association and Collective Bargaining: General Survey by the Committee of Experts on the Application of Conventions and Recommendations (ILO 1983).

30 David A Waugh, 'The ILO and Human Rights' (1982) 5 Comparative Labour Law 186, 191.

agreements were followed in countries that had not ratified them.[31] Article 20(1) of the UDHR states that everyone has the right to freedom of peaceful assembly and association, and Article 20(2) reiterates that no one may be compelled to belong to an association. According to the ILO's Committee of Experts, the UDHR leaves it up to each state's practice and regulations to determine whether it is sufficient to guarantee workers' right to permit and, where possible, control the use of union protection clauses in practice. The imposition of a scheme of trade union monopoly at the company level or by occupation, for example, legislation making it mandatory to join a specific union or designating a specific trade union as the beneficiary of union dues, is forbidden under the ILO interpretation.

In Africa, the ILO Declaration, adopted in 1998 and amended in 2022, commits the ILO to assisting member states in their efforts to uphold core workplace values and rights, such as freedom of association and collective bargaining. The ILO Declaration establishes a new technical support framework that is yielding positive results. These initiatives range from legal reform guidance to longer-term, multi-faceted enterprises. More than fifty countries had requested technical help, according to the first action plan created under the Follow-up to the Declaration in 2000. Many of them have since negotiated projects or other activities with the ILO, with the help of substantial donor funds. Technical assistance focusing on freedom of association and collective bargaining has helped governments, employers, and workers' organisations improve institutional capacity, thereby strengthening relations between the three parties.[32]

The decisions of the ILO's supervisory bodies amplify the standards set out in Conventions 87 and 98. Internationally accepted ideologies encourage member states to conform to international norms which have set forth standards for workers' freedom of association and trade union rights. These can be found in the United

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31 For the ILO Normlex database, see International Labour Organization, 'NORMLEX - Information System on International Labour Standards' (Ilo.org2024) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0::NO:::> accessed 10 April 2024.

32 As regards the ILO Fact Sheet, Freedom of Association and Collective Bargaining: Africa, see International Labour Organization, 'Freedom of Association and the Right to Collective Bargaining: Africa' (17 May 2004) <https://www.ilo.org/declaration/info/factsheets/WCMS_DECL_FS_1_EN/lang--en/index.htm> accessed 10 April 2024.

Nations instruments, ILO conventions, and regional human rights instruments. The right to freedom of association, which forms the basis of democracy and the rule of law, allows non-state actors to participate effectively in economic and social affairs. This right ensures that both workers and employers have a voice and are represented, as it is critical for the proper functioning of both labour markets and general governance systems in a country. A free and open society requires workers and employers to have the freedom to organise and join groups of their choosing. In many cases, these organisations have played a key part in the democratic transition of their countries.

4.3 State regulation

At the outset, it must be acknowledged that freedom of association was introduced into various international conventions in the aftermath of the First World War, which lasted from 8 July 1914 to 11 November 1918.[33] The then Union of South Africa signed the Versailles Treaty which led to the formation of the ILO.[34] The establishment of the ILO was recognised by most states in the belief that universal and lasting peace can be accomplished only if based on social justice. This became evident in the light of the pronounced suppression of trade union freedom in the subsequent fascist dictatorships of Europe.[35]

Broadly speaking, in constitutional democracies, attempts are rarely made to prohibit freedom of association altogether, but, at the same time, some states may wish to regulate the forms of association, or the organisation structure,[36] or any

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33 International Labour Organization, 'Freedom of Association and the Right to Collective Bargaining: Africa' (17 May 2004) <https://www.ilo.org/declaration/info/factsheets/WCMS_DECL_FS_1_EN/lang--en/index.htm> accessed 10 April 2024.

34 André van Niekerk and others, *Law@work* (2nd edn, LexisNexis 2012) 19.

35 Ferdinand von Prondzynski, *Freedom of Association and Industrial Relations: A Comparative Study* (Mansell 1987) 18.

36 Chapter XX of the General Regulations of the South African National Defence Force and the Reserve (the regulations). The regulations provide for the registration of unions that have a proven membership of 5 000 SANDF members at the time of their application for registration. Once a union has a proven membership of 15 000 SANDF members, it may apply for membership to the Military Bargaining Council (the MBC). As regards the unlawfulness of industrial action by members of the SANDF, see reg 6, which provides: 'No member may participate in a strike, secondary strike or incite other members to strike or to support or to participate in a secondary strike.' See *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC) [65 note 68].
See also s 104(13) of the Defence Act 42 of 2002, which states: 'Any person who recruits or attempts to recruit any member of the Regular Force for membership of any trade union other

other aspects which may affect public life.[37] In some jurisdictions, such control becomes so stringent that freedom of association cannot be easily exercised.[38] If workers are not free to take lawful steps that they see as reasonable to advance their interests, including bargaining and striking, then, as a practical matter, their association is barren and useless. Put another way, 'without the right to strike, collective bargaining is nothing more than collective begging'.[39] It is worth noting that the distinct status of the armed forces and the police constitutes a significant governmental objective that may warrant overriding the exercise of freedom of association to some extent.[40] Until 1999, there was a statutory prohibition on members of the Permanent Force of the South African National Defence Force being members of trade unions.[41]

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than a military trade union which is duly authorised to act as such, or incites or attempts to incite a member of the Defence Force to participate in strikes, demonstrations or protests prohibited in terms of the regulations, is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding five years.' See *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC) [65 note 68].

37 Mothepa Ndumo, 'An Appraisal of Lesotho's Statutory Scheme for Organisational Rights and Collective Bargaining in the Private Sector with an Emphasis on Trade Unions' Participation' in Stefan van Eck, Pamhidzai Bamu and Chanda Chungu (eds), *Celebrating the ILO 100 Years on: Reflections on Labour Law from a Southern African Perspective* (Juta 2020) 55.

38 In this regard, eSwatini continues to buck the trend in the SADC region (see Simphiwe Shabangu, 'The Legal Development of the Right to Freedom of Association in *eSwatini*' in Stefan van Eck, Pamhidzai Bamu and Chanda Chungu (eds), *Celebrating the ILO 100 Years on: Reflections on Labour Law from a Southern African Perspective* (Juta 2020) 39.

39 John Grogan, *Workplace Law* (11th edition, Juta 2014) 495. See also M McGregor and others, *Labour Law Rules!* (4th edn, Siber Ink 2021) 192–202.

40 Article 9(1) of ILO Convention 87 provides: 'The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.'

41 Section 126B of the Defence Act 44 of 1957 provided, among other things: '(1) A member of the Permanent Force shall not be or become a member of any trade union as defined in section 1 of the Labour Relations Act, 1956 (Act No. 28 of 1956): Provided that this provision shall not preclude any member of such Force from being or becoming a member of any professional or vocational institute, society, association or like body approved by the Minister.' See *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC) [2]. That prohibition was declared unconstitutional on 26 May 1999 by the Constitutional Court in *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC) (hereinafter *South African National Defence Union v Minister of Defence* (CC)). For subsequent developments, see also *South African National Defence Union v Minister of Defence* 2003 (3) SA 239 (T) (*SANDU I*); *South African National Defence Union v Minister of Defence; South African National Defence Union v Minister of Defence* 2004 (4) SA 10 (T) (*SANDU II*); *SANDU v Minister of Defence* (TPD) unreported case no 15790/2003 (14 July 2003) (*SANDU III*); *South African National Defence Union v Minister of Defence; Minister of Defence v South African National Defence Union* 2007 (1) SA 402 (SCA) (*South African National Defence Union v Minister of Defence* (SCA)).

4.4 South Africa's compliance with the ILO's Conventions 87 and 98

There can be no doubt that the overall record of South Africa on compliance with Conventions 87 and 98 is commendable. Since the right to fair labour practices has been elevated to the status of a constitutional right, the state has respected and promoted collective bargaining and labour dispute resolution institutions.[42] The right to collective bargaining is embedded in section 23(5) of the Constitution:

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

As already indicated, the labour legislation, including the LRA, sought to bring about a new employment dispensation between employers and employees that would seek to strike a balance between the interests of employers and those of employees. In other words, the labour legislation is intended to bring about a better employment regime which would seek to protect and promote the interests of both employers and employees.[43] It is trite that the drafters of the LRA 1995 were inspired and guided by the ILO instruments.[44]

The starting point in the evaluation exercise is the LRA. The core objectives of the LRA are consonant with the acclaimed ILO conventions. Thus, the first goal of the LRA is to give effect to constitutional rights. Secondly, the LRA expressly states that it is designed to give legislative effect to international treaty commitments resulting from the ratification of ILO agreements.[45] South Africa's international commitments are therefore crucial in interpreting the LRA. Thirdly, the LRA aims to provide a framework in which both employers and employees, as well as their organisations,

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42 Section 7(2) of the Constitution states: 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights.' See also *National Education Health and Allied Workers Union v University of Cape Town* 2003 (3) SA 1 (CC) (hereinafter *NEHAWU v UCT*) [14].

43 *Food & Allied Workers Union on behalf of Gaoshubelwe v Pieman's Pantry (Pty) Ltd* (2018) 39 ILJ 1213 (CC), [2018] 6 BLLR 531 (CC) [79].

44 For a useful discussion, see International Labour Office, *Prelude to Change: Industrial Relations Reform in South Africa: Report of the Fact-finding and Conciliation Commission on Freedom of Association Concerning the Republic of South Africa* (International Labour Office 1992); Ministerial Task Team, Department of Labour, 'Explanatory Memorandum to the Draft Labour Relations Bill, 1995' (1995) 16 ILJ 278.

45 Preamble to the LRA.

can engage in collective bargaining and the creation of industrial policy.[46] Finally, the LRA aims to foster orderly collective bargaining, with bargaining at the sectoral level, employee engagement in workplace decisions, and effective labour dispute resolution.[47]

The LRA fortified the core principles on freedom of association and the right to organise and collective bargaining despite the demise of the general duty to bargain.[48] The LRA promotes and encourages collective bargaining by conferring particular organisational rights on sufficiently representative or majority trade unions,[49] by encouraging and/or enforcing centralised or sectoral bargaining. Collective bargaining with regard to wages, conditions of employment, and other matters of mutual interest is the preferred means for maintaining good labour relations and resolving labour disputes. Yet the argument can be stated more strongly:

> At the least, the process of bargaining endows the parties with equal status. It also rests on the presuppositions that neither party is completely wrong, that concessions by either party do not necessarily signify weakness in that party and that, while the individual goals of the parties may be important, the ultimate achievement of these goals should not occur at the cost of disrupting the organisation as a whole. For these reasons collective bargaining, though not ideal, has hitherto served as the most feasible and mutually beneficial method

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46 Peter Limb, 'The Anti-Apartheid Movements in Australia and Aotearoa/New Zealand' in South African Democracy Education Trust, *The Road to Democracy in South Africa* vol 3, International Solidarity, pt 3 (Pan African University Press 2018) 907, 910.

47 Limb, 'The Anti-Apartheid Movements in Australia and Aotearoa/New Zealand' 912.

48 See *National Union of Mineworkers v East Rand Gold & Uranium Co Ltd* 1992 (1) SA 700 (A); *Mutual and Federal Insurance Company Ltd v Banking Insurance Finance and Assurance Workers Union* 1996 (3) SA 395 (A); *Black Allied Workers Union v PEK Manufacturing Co (Pty) Ltd* (1990) 11 ILJ 1095 (IC) (hereinafter *PEK*). See also Clive Thompson, 'A Bargaining Hydra Emerges from the Unfair Labour Practice Swamp' (1989) 10 ILJ 808.

49 Section 21 of the LRA provides, among other things, as follows: '(1) Any registered trade union may notify an employer in writing that it seeks to exercise one or more of the rights conferred by this Part in a workplace.

(2) The notice referred to in subsection (1) must be accompanied by a certified copy of the trade union's certificate of registration and must specify–

(*a*) the workplace in respect of which the trade union seeks to exercise the rights;

(*b*) the representativeness of the trade union in that workplace, and the facts relied upon to demonstrate that it is a representative trade union; and

(*c*) the rights that the trade union seeks to exercise and the manner in which it seeks to exercise those rights.

(3) Within 30 days of receiving the notice, the employer must meet the registered trade union and endeavour to conclude a collective agreement as to the manner in which the trade union will exercise the rights in respect of that workplace.'

> of resolving basic and ongoing conflicts between the parties to the labour relationship.[50]

The right to strike is essential to the system of collective bargaining. This purpose is articulated as follows:

> The ultimate objective of collective bargaining is industrial peace. It is one of the ironies of collective bargaining that the attainment of the object of industrial peace should depend on the threat of conflict. The reason for this dependence is a functional one. The freedom to threaten strike action and, if needs be, to carry out the threat, is protected because, in an imperfect world, the system of collective bargaining requires it.[51]

The first Constitutional Court *Certification* judgment[52] stressed the importance of the right to strike. Among other labour-related matters that fell to be decided was the contention that a lock-out should be given the same importance as the right to strike.[53] The court rejected the contention, and consequently found the right to strike to be of supreme importance compared to a lock-out.[54] The court went on to explain that 'employers enjoy greater social and economic power than individual workers'.[55] The net effect of the judicialisation of labour relations is that collective bargaining is enforced to counteract the imbalances between employer and employee.[56] It is common for parties in a labour setting to invoke economic power as a means to counter each other.[57] It has been held that the right to strike is a vital mechanism with which employees could assert their bargaining power in the working environment.[58] It is a bulwark against the impairment of workers' dignity, and it functions as an instrument for asserting the demands of employees who may otherwise face intimidation from the employer.

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50 Bendix, *Industrial Relations in South Africa* 69.
51 JF Myburgh, '100 Years of Strike Law' (2004) 25 ILJ 962, 966.
52 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC).
53 *Ex parte Chairperson of the Constitutional Assembly* [64].
54 *Ex parte Chairperson of the Constitutional Assembly* [66].
55 *Ex parte Chairperson of the Constitutional Assembly* [66].
56 *Food & Allied Workers Union v Spekenham Supreme* (1988) 9 ILJ 628 (IC).
57 DC Subramanian and JL Joseph, 'The Right to Strike under the *Labour Relations Act* 66 of 1995 (LRA) and Possible Factors for Consideration that Would Promote the Objectives of the LRA' (2019) 22 PELJ 1, 4.
58 *Bader Bop* [13].

4.5 Union rivalry, strike violence, and Marikana: Retrospect and prospects

Although, on paper, South Africa 'ticks all the boxes' with regard to both Conventions 87 and 97, its compliance record is still tarnished by adversarial labour-management relations marked by intense union rivalry and strike violence culminating in the Marikana bloodshed. No doubt, the tragic events at the platinum belt in August 2012 have brought to the fore the problems associated with collective bargaining framework established 25 years ago.[59] The consequences of these developments for labour relations and labour law are captured by the authors of an authoritative labour text as follows:[60]

> Some took the view that the country's labour relations had regressed to the state under apartheid. There was also a perception that aspects of the legislative framework had continued to intensified adversarialism and a rising tide of violence prone strikes. However, its arguable that the crisis in the labour relations system manifested in the aftermath of Marikana, if it is indeed a crisis, has much more to do with slow economic growth, continuing high unemployment, rising inequality and persistent poverty than with the legislative framework for labour relations

The leadership conflicts within COSATU and some of its affiliates, and worker dissatisfaction with COSATU, led to the emergence of rival unions. However, the tense relationship between COSATU and the African National Congress (ANC), as well as the ANC's deteriorating reputation as a result of well-publicised transgressions or misconduct by prominent politicians, have all added to the crisis-like atmosphere.[61] To put things into perspective, the reaction to the tragic Marikana events has encouraged a renewed focus on the labour relations framework and the LRA itself.[62]

In dealing with the impact of the LRA on minority unions, some commentators make the point that:

> When a minority union is faced with a situation where it loses recognition (in circumstances where it has constantly reached the threshold that existed in the previous collective agreement) due to the fact that the majority trade union and

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59 Martin Brassey, 'Labour Law after Marikana: Is Institutionalised Collective Bargaining in SA Wilting? If So, Should We Be Glad or Sad?' (2013) 34 ILJ 823, 836.

60 Darcy du Toit and others, *Labour Relations Law: A Comprehensive Guide* (6th edn, LexisNexis 2015) 69.

61 Du Toit and others, *Labour Relations Law* 69.

62 Emma Fergus, 'Reflections on the (Dys)functionality of Strikes to Collective Bargaining: Recent Developments' (2016) 37 ILJ 1537.

> the employer raised the threshold for a trade union to be regarded as sufficiently representative in an new collective agreement, such union could consider the option of approaching the Labour Court for a declaratory order to the effect that the Constitutional right of freedom of association of its members has been infringed due to the loss of recognition brought by the raising of the threshold in a manner that is contrary to international standards. If this application is refused the matter should be taken through stages of appeal, through the Labour Appeal Court, the Supreme Court of Appeal, and to the Constitutional Court, if necessary.[63]

Be that as it may, the questions that need to be answered concern the impact that the Labour Relations Amendment Act 6 of 2014 has on collective bargaining. Is it likely to be a positive impact on labour-management relations? Or are the amendments likely to facilitate the granting of organisational rights to minority trade unions? These questions are not merely academic. The acrimonious labour relations climate around the platinum belt and violent inter-union rivalry have an adverse impact on the social fabric. It bears mentioning that the emergence of militant trade unionism marked by violent strikes is rooted in the struggle for acquiring organisational rights.[64]

It will be recalled that Convention 98 does not define collective agreements but sketches their fundamental aspects in Article 4, the provisions of which are relevant in this context:

> Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

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63 J Kruger and CI Tshoose, 'The Impact of the *Labour Relations Act* on Minority Trade Unions: A South African Perspective' (2013) 16 PELJ 285, 317.

64 See eg *Chamber of Mines of SA acting in its own name and on behalf of Harmony Gold Mining Co Ltd v Association of Mineworkers & Construction Union* (2014) 35 ILJ 3111 (LC) (hereinafter *Chamber of Mines/AMCU I*) [46]; *Association of Mineworkers & Construction Union v Chamber of Mines of SA acting in its own name & on behalf of Harmony Gold Mining Co (Pty) Ltd* (2016) 37 ILJ 1333 (LAC) (hereinafter *Chamber of Mines/AMCU II); Amcu v Chamber of Mines of South Africa* 2017 (3) SA 242 (CC) (hereinafter *Chamber of Mines/AMCU III*).

The voluntary nature of collective bargaining is expressly laid down in Article 4 of Convention 98. The CFA has also made it clear that measures to promote collective bargaining exclude recourse to measures of compulsion.[65]

It is also important to note that Article 2 of the ILO's Collective Bargaining Convention, 1981 (No 154), defines 'collective bargaining' as follows:

> For the purpose of this Convention the term ***collective bargaining*** extends to all negotiations which take place between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more workers' organisations, on the other, for—
> (a) determining working conditions and terms of employment; and/or
> (b) regulating relations between employers and workers; and/or
> (c) regulating relations between employers or their organisations and a workers' organisation or workers' organisations.

Moreover, in *Ram Prasad Vishwakarma v The Chairman, Industrial Tribunal*,[66] the Supreme Court of India remarked on

> the great importance in modern industrial life of collective bargaining between the workman and the employers. It is well known how before the days of collective bargaining labour was at a great disadvantage in obtaining reasonable terms for contracts of service from his employer. As trade unions developed in the country and collective bargaining became the rule the employers found it necessary and convenient to deal with the representatives of workmen, instead of individual workmen, not only for the making or modification of contracts but in the matter of taking disciplinary action against one or more workmen and as regards all other disputes.

The CFA has also, in equal measure, turned its attention to the adverse effect of proliferation of trade unions in any collective bargaining system. It is unarguable that small and weak trade unions militate against the unity of workers, thereby undermining collective bargaining. Nonetheless, the CFA is opposed to the unification of the trade union movement inspired by legislative enactments. Such

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65 For detailed discussion, see Bernard Gernigon, Alberto Odero, and Horacio Guido, 'ILO Principles Concerning Collective Bargaining' (2000) 139 ILR 33.

66 1961 AIR 857, 1961 SCR (3) 196 [33].

measures would violate the deeply entrenched principle enshrined in Articles 2 and 11 of Convention 87. The CFA has indicated that:[67]

> A provision authorizing the refusal of an application for registration if another union, already registered, is sufficiently representative of the interests which the union seeking registration proposes to defend, means that, in certain cases, workers may be denied the right to join the organisation of their own choosing, contrary to the principles of freedom of association.

While noting that member countries are at liberty to delineate between the most representative trade union and other trade unions, the CFA has maintained that 'such a system should not have the effect of preventing minority unions from functioning and at least having the right to make representations on behalf of their members and to represent them in cases of individual grievances'.[68]

The CFA has confronted the more daunting task of the threshold of representativeness, from the premise that such an arrangement would not encounter any challenge provided that the criteria for determining representivity 'must be based on objective, pre-established and precise criteria so as to avoid any possibility of bias or abuse'.[69] The critical questions that arise are: how does the South African template of workplace democracy measure up against the revered ILO norms? More specifically, do section 18 agreements in terms of the LRA and the custom of setting thresholds with bargaining councils raise problems in respect of the right to freedom to associate and to organise? Esitang and Van Eck contend that section 18 of the LRA falls short of the requirements of the specialist committees of the ILO which require objective and precise criteria to obviate the scope of impartiality against minority unions. The authors acknowledge:

> These limitations not only exclude smaller unions from membership of bargaining councils, but also limit the right of trade union members to be represented by their representatives during individual grievance and disciplinary proceedings. Added to this, clear guidelines have not been

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67 International Labour Organization, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th (rev) edn, ILO 2006) para 328.

68 International Labour Organization, *Freedom of Association: Digest of Decisions* para 974.

69 International Labour Organization, *Freedom of Association: Digest of Decisions* para 354.

established by the amendments pertaining to the notions of "a significant interest" or a trade union that represents a "substantial number of employees".[70]

4.6 International perspective on the right to freedom of association

International labour standards emanate from the legal documents developed by the ILO's stakeholders, which comprise governments, employers, and employees.[71] These documents lay out fundamental principles and rights at work. Member states are committed to implementing the conventions in national law and practice, as well as regularly reporting on their implementation.[72] The core labour standards are a set of four fundamental, universal and indivisible human rights: freedom from forced labour, freedom from child labour, freedom from discrimination at work, and freedom to form and join a union and to bargain collectively.[73]

The right to freedom of association in the workplace is protected mainly by the Constitution and the ILO's Conventions 87 and 98. These instruments have been thoroughly discussed in previous chapters. The main focus here is on the aspects that have not been dealt with, such as the ILO's Constitution (1919), the Universal Declaration of Human Rights (1948), the ILO's Declaration of Philadelphia (1944), and the ILO's Declaration on Fundamental Principles and Rights at Work (1998).

The value of collective bargaining in the twenty-first century stems from its potential as a powerful tool for addressing economic and social concerns between employers and workers' organisations. It has the potential to strengthen marginalised voices while also reducing poverty and socio-economic disadvantage. This improvement can be accomplished by tailoring collective bargaining to the interests of the parties

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70 Temogo Geoffrey Esitang and Stefan van Eck, 'Minority Trade Unions and the Amendments to the LRA: Reflections on Thresholds, Democracy and ILO Conventions' (2016) 37 ILJ 763, 765.

71 Anon, 'Statement on The Wiehahn Commission Report and Its Implications Issued by FOSATU after its Central Committee Meeting on the 18 and 19 May 1979' (1980) 5(6) South African Labour Bulletin 12 <https://disa.ukzn.ac.za/sites/default/files/pdf_files/LaMar80.0377.5429.005.006.Mar1980.5.pdf> accessed 11 April 2024.

72 NE Wiehahn and South Africa Department of Manpower Utilisation, *Report of the Commission of Inquiry into Labour Legislation* (Directorate of Communication, Dept of Labour 1980) 22.

73 The eight fundamental conventions have meanwhile been ratified by between 150 and 175 countries (International Labour Office, *The International Labour Organization's Fundamental Conventions* (International Labour Office, 2002) 7–8.

and encouraging voluntary agreements that benefit individuals and businesses alike.[74]

The International Labour Conference adopted two significant resolutions that serve as guidelines for ILO policy, urging member countries to use their freedom to strike, and those are recommendations as well as conventions and protocols.[75] Recommendations are merely non-binding instructions, but conventions and protocols are legally binding international treaties that member states may ratify. A convention establishes the fundamental rules that ratifying nations must follow, but a related recommendation enhances the convention by offering more specific instructions on how it should be implemented. Moreover, recommendations may be independent of conventions. Adopted annually at the International Labour Conference, conventions, protocols, and recommendations are drafted by government, employer, and worker representatives.

The ILO advocates the concept of the tripartite alliance and social dialogue, and most member states that have ratified Conventions 87 and 98 feature this concept. The ILO further encourages dialogue and consultation which inform the engagement between the government, employers, and organised labour. The ILO structure is based on the concept of tripartism, which makes it a constitutional requirement that states, employers and employees are equally represented in its organs.[76] All ILO members are represented in the Conference by two government representatives, one employers' representative, and one employees' representative. Equal representation ensures that all interests are represented in the conference. Each delegate to the International Labour Conference is allowed to

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74 ILO Declaration on Fundamental Principles and Rights at Work (1998).

75 See the Resolution Concerning the Abolition of Anti-Trade Union Legislation in State Members of the International Labour Organisation (1957) 783; and the Resolution Concerning Trade Union Rights and their Relation to Civil Liberties (1970) 735-736; Bernard Gernigon, Alberto Odero, and Horacio Guido, 'ILO Principles Concerning Collective Bargaining' (2000) 139 ILR 33; Jane Hodges-Aeberhard and Alberto Odero de Dios, 'Principles of the Committee on Freedom of Association Concerning Strikes' (1987) 126 ILR 543; John Dugard and others, *International Law: A South African Perspective* (5th edn, Juta 2019) 19; Cohen T and Matee L, 'Public Servants' Right to Strike in Lesotho, Botswana and South Africa – A Comparative Study' (2014) 17 PELJ 1630, 1632.

76 M Budeli, 'The Protection of Workers' Right to Freedom of Association in International and Regional Human Rights Systems' 2009 De Jure 136.

be accompanied by two advisers, and where issues related to women are to be discussed, at least one of the advisers should be a woman.[77]

This requirement ensures that representatives of parties, particularly employees, are well guided in making decisions which affect them, including those decisions that are relevant to their right to freedom of association. Delegates to the International Labour Conference who are government representatives and their advisers must be chosen with the consent of industrial organisations which are most representative of employers or working people in their respective countries. The provision favours big trade unions which have a say on who should represent a particular country at the Conference. Critically, the International Labour Conference has the power to make international conventions and recommendations.

The adoption of a convention or recommendation requires a two-thirds majority of votes cast by delegates. The ILO consists of the International Labour Conference, the Governing Body, and the International Labour Office. The ILO provides for international regulation of labour standards based on social justice. Freedom of association gives rise to the establishment of democratic institutions such as trade unions that promotes democracy in the workplace and the society at large.[78] Convention 87 provides that workers and employers without distinction shall have a right to establish and join organisations of their own choice. Convention 98 aims at protecting workers and their representatives against victimization.

To avoid precise prohibitions being formed against valid types of strike action, the ILO has refrained from defining strike action. Owing to the lack of a definition, the right has been contested by employers' representatives at the ILO's tripartite body in particular. They have also questioned the CEACR's power to interpret Convention 87 in the way it has, claiming that the ILO's tripartite constituents never intended this right to be adopted.[79] According to the South African Constitutional Court in the first *Certification* case, strike action is the primary mechanism through which workers exercise collective power, and the right to strike enables workers to

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77 Article 3 of the ILO Constitution.

78 AA Landman, 'Freedom of Association in South African Labour Law' [1990] Acta Juridica 89.

79 Ruth Ben-Israel, *International Labour Standards: The Case of Freedom to Strike* (Kluwer Law and Taxation Publishers 1988) 103. There are various compensatory methods that can be used, which range from binding arbitration, to third party advisory awards, to minimum wages.

bargain effectively with their employers. The ILO Conventions are designed to provide member nations with the flexibility to incorporate them into their own individual legal systems. The ILO's supervisory and expert committees, on the other hand, have offered vital guidance on collective bargaining methods and the rights of minority trade unions within such frameworks.[80]

4.6.1 ILO's Constitution 1919

Allied powers expressed recognition of the principle of freedom of association in part XIII (Labour) of the Treaty of Versailles, which became the Constitution of the ILO.[81] The main functions of the ILO are the development and promotion of standards for national legislation as well as the protection and improvement of working conditions and standard of living. The cornerstones of the ILO Constitution are freedom of association and the effective recognition of the right to collective bargaining, the abolition of forced or involuntary labour, the abolition of child labour child labour abolition, and the abolition of employment and occupation discrimination. Trade union rights are a measure to improve working conditions and thus ensure labour peace. Through the acceptance of the principle of freedom of association, the ILO aims to ensure that peace, harmony, and advances in work circumstances are maintained across the world. The inclusion of the right to freedom of association in the ILO Constitution means that states formally recognising it are bound by this principle, regardless of whether they have ratified freedom of association accords.

The ILO has the authority to enforce international treaty compliance. Article 22 of the ILO Constitution about annual reports on ratified Conventions states:

> Each of the Members agrees to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party. These reports shall be made in such form and shall contain such particulars as the Governing Body may request.

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80 *Ex parte Chairperson of the Constitutional Assembly* [66].

81 Treaty of Peace with Germany (Treaty of Versailles) June 28, 1919; Charles I Bevans (compiler), *Treaties and Other International Agreements of the United States of America* vol 2 (Multilateral Treaties, 1918-1930) (Department of State 1969) 43. Part XIII of this treaty stated the Constitution of the International Labour Organisation: see Bevans (compiler), *Treaties and Other International Agreements of the United States of America* vol 2 241.

These reports are then reviewed by the Committee of Experts on the Application of Conventions and Recommendations (CEACR) for any inconsistencies between the ratified conventions and the national law and practice. Trade unions may also inform the ILO about possible inconsistencies between the requirements of conventions or recommendations and the domestic situation of member states.[82] The ILO Constitution states that universal peace can be established only if based upon social justice.[83]

The ILO Constitution does not have a complaints procedure, but complaints handling arose from a 1950 agreement between the ILO and the United Nations Economic and Social Council. The procedure is based on the commission of inquiry system.[84] The Fact Finding and Conciliation Commission was established in 1950, with the mandate to investigate complaints relating to ILO member states' violations of trade union and employers' organisations' rights that were referred to the Commission. However, the Commission could only investigate a case if the defendant government consented, which created difficulties that led to the formation of the CFA in 1951 to supplement the work of the Fact Finding Conciliation Commission.

4.6.2 ILO's Declaration of Philadelphia 1944

The Declaration of Philadelphia, dated 10 May 1944, restated the ILO's traditional objectives and then branched out in two new directions: the centrality of human rights to social policy and the need for international economic planning.[85] In 1946, the Declaration was annexed to the ILO Constitution, resulting in the approval of a new Preamble recognising the importance of freedom of association in maintaining social justice and long-term world peace. The Declaration reaffirmed the fundamental ILO principles that peace must be based on social justice, that poverty anywhere constitutes a danger to prosperity, and that freedom of expression and association are essential to sustained progress. It was intended to make social

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82 Nicolas Valticos, *International Labour Law* (Kluwer 1979) 268.

83 Section I of the ILO Constitution in Part XIII of the Treaty of Versailles.

84 Article 28 of the ILO Constitution; see International Labour Organization, 'ILO Constitution' <https://normlex.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO#A28> accessed 29 April 2024.

85 See generally Swepston, 'Human Rights Law and Freedom of Association'.

justice the cornerstone of the international juridical order. In 1947, the ILO adopted the Right of Association (Non-Metropolitan Territories) Convention, 1947 (No 84), which refers not only to the right of employers and workers to associate for any legal purpose but also to collective agreements, consultations, and the solution of labour conflicts.

The Declaration of Philadelphia (1944) enshrined fundamental principles such as the decommodification of labour as a commodity, the recognition of freedom of expression and association as essential to long-term progress, and the recognition that poverty in any part of the world poses a threat to prosperity everywhere. The notion of collective bargaining was also recognised in the Declaration of Philadelphia, as was the participation of employers and employees in matters affecting the employment relationship.

4.7 The changing dynamics of the collective bargaining environment

The National Minimum Wage Act 9 of 2018 was promulgated in South Africa to advance economic development and social justice by improving the wages of the lowest-paid workers and reducing wage inequality.[86] The statute further provides that the national minimum wage shall be reviewed annually and adjusted each year if deemed necessary.[87] The statute also allows for the establishment of the National Minimum Wage Commission to review the national minimum wage and make recommendations for adjustments.[88] The Minimum Wage Commission plays an important role in investigating the impact of the national minimum wage on the economy, collective bargaining, and income differentials. The Department of Labour and the CCMA are responsible for enforcement where there are issues of non-compliance. If an employer cannot afford the prescribed rates, it may apply for an exemption from paying those rates.[89] The exemption from paying the national minimum wage may be granted for a period not exceeding one year.[90] The exemption would only be granted if the employer confirmed compliance with applicable statutory payments and obligations, including but not limited to the

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86 Section 2 of the National Minimum Wage Act 2018.
87 Sections 6 and 7 of the National Minimum Wage Act 2018.
88 See chap 3 of the National Minimum Wage Act 2018.
89 Section 15(1) of the National Minimum Wage Act 2018.
90 Section 15(1)(*a*) of the National Minimum Wage Act 2018.

Unemployment Insurance Fund, the Compensation Fund, and any applicable Bargaining Council Main Collective Agreement. Introducing a minimum wage in vulnerable sectors such as farmworkers, domestic workers, and forestry workers changed the dynamics of the collective bargaining environment.

The ILO's Minimum Wage-Fixing Machinery Convention 1928 (No 26) regulates the concept of a minimum wage and has been ratified by almost 90 per cent of the member states. According to the ILO, minimum wages are intended to protect vulnerable workers, overcome poverty, and reduce inequality. Under Article 4(1) of Convention 26, each member that ratifies the convention must take the necessary measures, by way of a system of supervision and sanctions, to ensure that the employers and workers concerned are informed of the minimum rates of wages in force and that wages are not paid at less than these rates in cases where they are applicable.[91] Article 4(2) states that a worker to whom the minimum rates apply and who has been paid wages at less than these rates shall be entitled to recover, by judicial or other legalised proceedings, the amount by which he has been underpaid, subject to such limitation of time as may be determined by national laws or regulations.

Introducing a minimum wage has negatively affected collective bargaining in vulnerable sectors and limited collective bargaining. Under section 36 of the South African Constitution, the constitutional protection of freedom of association and fair labour practices can, of course, be limited, but such a limitation must be reasonable and rational.[92] Closed shop and agency shop agreements negotiated in accordance with sections 25 and 26 of the LRA, as well as legislative measures restricting organisational rights to majority unions, are instances of such reasonable and legitimate constraints on the right to freedom of association.[93]

In South Africa, the introduction of the Code of Good Practice on Collective Bargaining, Strike Action, and Picketing (2017) was intended to provide practical guidance on collective bargaining, the resolution of disputes of mutual interest, and the resort to industrial action. Section 64(1) of the LRA stipulates that '[e]very

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91 National Minimum Wage Act 2018.
92 Section 36(1) of the Constitution.
93 Sections 12, 13 and 15 of the LRA. See Darcy du Toit and others, *Labour Relations Law* 192.

employee has a right to strike, and every employer has recourse to lock-out'. The code is intended to mitigate violent strikes which are somehow a limitation to the right to strike. The code requires that the strike action should be preceded by a ballot in terms of the trade union's constitution; but this does not render a strike unlawful. The constitutional obligation emanates from the requirement in section 95(5)(*p*) of the LRA that for a trade union or employers' organisation to be properly registered, its constitution must provide for a secret ballot before a strike is called.

In *Mahle Behr SA (Pty) Ltd v National Union of Metalworkers of SA*,[94] the employer petitioned the Labour Court for an order interdicting a strike on the grounds that the trade union had not conducted a secret ballot of its members before going on strike. It was common cause that the trade union was registered and that its constitution did not require a 'recorded and secret ballot' before going on strike. It was also common cause that the trade union did not follow the requirements of section 95(5)(*p*) or section 95(5)(*q*) of the LRA. Under these provisions, the constitution of a trade union that intends to register must

> (*p*) provide that the trade union or employers' organisation, before calling a strike or lock-out, must conduct a ballot of those of its members in respect of whom it intends to call the strike or lock-out;
> (*q*) provide that members of the trade union or employers' organisation may not be disciplined or have their membership terminated for failure or refusal to participate in a strike or lock-out if-
> (i) no ballot was held about the strike or lock-out; or
> (ii) a ballot was held but a majority of the members who voted did not vote in favour of the strike or lock-out.[95]

The employer approached the Labour Court in *Air Chefs (SOC) Limited v NUMSA*[96] to interdict an intended strike until the union conducted a secret ballot as required by the new LRA amendments. The fact that a ballot was cast was not disputed, but the court determined that the ballot was flawed based on the evidence presented. The union and the employer have a recognition agreement, but they work under the auspices of the Restaurant, Catering, and Allied Trades Bargaining Council.

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94 *Mahle Behr SA (Pty) Ltd v National Union of Metalworkers of SA* (2019) 40 ILJ 1814 (LC) (hereinafter *Mahle Behr*).

95 See also *Association of Mineworkers and Construction Union v Minister of Employment and Labour* [2021] ZAGPPHC 187 (6 April 2021); (2021) 42 ILJ 1538 (GP), discussed by Johan Olivier, Jessica Braum and Shane Johnson, 'Strike Guidelines Set Aside By High Court' <https://www.polity.org.za/article/strike-guidelines-set-aside-by-high-court-2021-05-10> accessed 7 June 2024.

96 *Air Chefs (SOC) Ltd v National Union of Metalworkers of SA* (2020) 41 ILJ 428 (LC).

According to the terms of the agreement, the parties are bound by its provisions and prohibited from engaging in any strike or strike-related activity.

Collective bargaining is a key means through which employers, their organisations as well as trade unions can establish fair wages and working conditions. The LRA discarded the duty to bargain in favour of voluntary collective bargaining underpinned by majoritarianism. The LRA allows collective agreements concluded between the employer and the majority trade union to be extended to bind minority trade union and the non-unionised employees who fall within the bargaining unit.[97] The LRA does not address the plight of the minority trade union whose fate is determined by majority trade unions and employers in collective bargaining without the minority union's consent. This is evident in collective agreements signed under section 23 of the LRA.

The Marikana tragedy in August 2012 reflected minority trade unions' frustration. An unprotected strike pursued outside recognised bargaining structures breached the two-year wage agreement concluded between NUM and Lonmin which was signed in 2011 and extended to non-parties in terms of section 23(1)(*d*) of the LRA. Section 23(1)(d) states:

> (1) 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 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.[98]

Majoritarianism has an element of infringing on minority trade unions' rights, as indicated by the extension of collective agreements under sections 23 and 32 of the

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97 Dikgang Moseneke, 'Transformative Constitutionalism: Its Implications for the Law of Contract' (2009) 20 Stell LR 3, 4.

98 Section 23(1)(*d*) of the LRA.

LRA. In the case of *Chamber of Mines of South Africa v AMCU*,[99] AMCU members were bound by a collective agreement entered into by the Chamber of Mines. The Labour Court concluded that the wage agreement contained a series of section 23(1)(*d*) extensions on a per employer basis, which is permissible. The mining sector's inter-union rivalry has thwarted the South African economy and led to loss of lives.

4.8 Summary

ILO Convention 87 protects the freedom of association of both employers and employees. Article 2 of Convention 87 states that employees should have the right to create and, subject solely to the norms of the organisation concerned, to join organisations of their own choosing without prior permission. Article 3 of this convention grants trade unions and employers' organisations legal standing by stating that they shall have the right to set up their constitutions and regulations, to elect their representatives in complete freedom, to organise their administration and operations, and to design their programmes.

The genius of the ILO Conventions lies in their using the Committee on Freedom of Association (CFA) and the Committee of Experts on the Application of Conventions and Recommendations (CEACR) to monitor the implementation of the key conventions. The effectiveness of the ILO's supervisory process may be seen in advances in issues covered by Convention 87, such as the formation of organisations, their activities, the right to strike, affiliation, and many others.[100] Consequently, the work of the specialist bodies gives meaning to freedom of association and collective bargaining. The CFA has taken up the task of interpreting the expression 'organisation of their own choosing' in Article 2 of Convention 87.[101] The CFA indicated that the expression means that individual employees should be allowed to associate with trade unions of their own choice without giving preference

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99 *Chamber of Mines of South Africa v AMCU* [2014] 3 BLLR 258 (LC).

100 Swepston, 'Human Rights Law and Freedom of Association' 169; Kellerson 'The ILO Declaration of 1998 on Fundamental Principles and Rights' 223–27.

101 International Labour Organization, *Freedom of Association: Digest of Decisions* para 327, and generally paras 309–68.

to either a unified trade union movement or trade union pluralism.[102] The CFA investigates complaints of violations of freedom of association regardless of whether the country concerned ratified Conventions 87 and 98. The discussion now turns to an international and comparative analysis of the right to freedom of association.

[102] International Labour Organization, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th (rev) edn, ILO 2006) paras 319, 320–21.

CHAPTER 5: AN INTERNATIONAL AND COMPARATIVE ANALYSIS OF THE RIGHT TO FREEDOM OF ASSOCIATION

5.1 Introduction

In a discussion of this nature, it is desirable, if not indispensable, also to consider the jurisprudence of other jurisdictions, at the very least because the South African Constitution is still at its nascent stage with the result that the body of corresponding constitutional case law is evolving. To confine the discussion to homegrown jurisprudence would be self-limiting. In 1998, the ILO adopted the Declaration on Fundamental Principles and Rights at Work, which defines the conventions of decent work. Member states that have ratified this Declaration should adhere to the declaration and its principles.[1]

Additionally, the Bill of Rights in the South African Constitution affirms the democratic values of human dignity, equality, and freedom and further enshrines the rights of all people in South Africa;[2] with that came the freedom of association. The Bill of Rights forms the basis of the Constitution. The Constitution ushered in a new dispensation and transformed the country from an apartheid regime to a democratic *Rechstaat*. The Constitution is the supreme law of the land, binding on all organs of state at all levels of government. South Africa is a state founded on the principles of constitutional democracy. The Constitution is regarded as transformative, intended to bring about change through the interpretation of employment law, and it embodies a changed legal culture in the constitutional dispensation.[3]

The Constitution ensures everyone's right to equality and protects everyone from discrimination. The Constitution pioneered change in all facets of life, including the social, economic, and political spheres. In the context of this thesis, it is proposed to draw analogies with comparable jurisdictions that have a similar legal history of judicial interpretation of the right to freedom of association. To this end, this chapter

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1 CI Tshoose, 'Appraisal of Selected Themes on the Impact of International Standards on Labour and Social Security Law in South Africa' (2022) 5 PELJ 1.

2 See s 1 of the Constitution.

3 Dikgang Moseneke, 'Transformative Constitutionalism: Its Implications for the Law of Contract' (2009) 20 Stell LR 3, 4.

examines the principle of freedom of association in South Africa and draws a comparative analysis with other countries that have a legal history of judicial interpretation in the context of the right to freedom of association. In this connection, it is noted that the traditional approach of South African jurisprudence has been to essentially draw from western common law or civil law jurisdictions but to overlook the jurisprudence that has been developed by judges and scholars in other African countries closer to home such as Botswana, Lesotho, and Namibia, and further afield such as Malawi. This is both a paradox and a serious omission not least because these countries share in many respects a common historical, legal, cultural, or socio-economic heritage with South Africa.

The discussion seeks, among other things, to make good this omission and include African jurisdictions in the comparative analysis. In addition, as part of this analogical approach, the discussion will draw from international human rights instruments including the Universal Declaration of Human Rights (1948) (the UDHR),[4] the International Covenant on Civil and Political Rights (the ICCPR),[5] the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (the ECHR),[6] and the African Charter on Human and Peoples' Rights (1981) (the African Charter).[7] The right to freedom of association is emphatically acknowledged in an array of ILO Conventions. With regard to international law on freedom of association at the workplace, the Constitutional Court observed in *National Union of Metalworkers of SA v Bader Bop (Pty) Ltd* (*Bader Bop*):[8]

> An important principle of freedom of association is enshrined in art 2 of the Convention on Freedom of Association and Protection of the Right to Organise which states:

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4 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 10.

5 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 14(1).

6 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 6(1).

7 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter) art 7(1). This charter is also known as the Banjul Charter.

8 *National Union of Metalworkers of SA v Bader Bop (Pty) Ltd* 2003 (3) SA 513 (CC) (*Bader Bop*) [31].

> "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."

The Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the Committee on Freedom of Association (CFA) have considered this provision to capture an important aspect of freedom of association in that it affords workers and employers an option to choose the particular organisation they wish to join. A case in point is the ILO's 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 concept of the tripartite alliance and social dialogue features in the ILO and it refers to the dialogue and consultation that inform the engagement between government, employers, and labour. Tripartism acknowledges the importance of balancing the interests and needs of the different social partners, especially in and around the employment relationship.

5.2 Rationale for embarking on international and comparative analysis

South Africa has sought to reform itself through implementing a Constitution that preserves conventional civil and political rights while also addressing more fundamental aspects of justice. South Africa's jurisprudence has developed sweeping dignity and equality protections, as well as the only somewhat comprehensive, affirmative social rights jurisprudence of an African country. Sarkin states that the Constitution incorporates numerous human rights concepts from the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights, as well as many democratic ideals and structures found in the United States Constitution.[9]

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[9] Jeremy Sarkin, 'The Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and Interpretation of Human Rights Provisions' (1998) 1 University of Pennsylvania Journal of Constitutional Law 176. The Bill of Rights of the Interim Constitution was codified in full in chap 2 of the 1996 Constitution, with the addition of some socio-economic rights.

5.2.1 African jurisdictions in comparative analysis

This section of the discussion focuses on the jurisprudence that has been developed by judges and scholars as well as the Constitutions of Botswana, Lesotho, Namibia, and further afield such as Malawi, and examines the extent to which the right to freedom of association is protected. The right to strike, a cornerstone of freedom of association, is essential to effective labour relations and a free and democratic society.[10] To assess the influence and impact of the ILO standards on freedom of association in African countries, one first needs to examine whether the relevant ratified agreements have been implemented in national legislation and practice. This implementation can be validated by the ILO's reports on its supervisory system based on ratified Conventions, as well as the annual follow-up and Global Reports for non-ratified Conventions. The right to freedom of association is important to bring a balance of powers in the workplace. The ILO's Expert Advisers who are reputed legal experts of high national and international standing state that there can be no progress in connection with the other categories of principles without respect for the principle and right of freedom of association and effective acknowledgement of the right to collective bargaining.

Africa has its own regional system of human rights. At the continental level, the African Charter of Human and People's Rights (the African Charter, otherwise known as the Banjul Charter) protects human rights, including the right to freedom of association.

The Southern African Development Community (SADC) is a regional intergovernmental organisation based in Gaborone, Botswana. Its mission is to promote regional socio-economic cooperation and integration, as well as political and security cooperation among 16 southern African countries.[11] The members of SADC are Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, Republic of South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. Leaders of the Frontline

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10 T Cohen and L Matee, 'Public Servants' Right to Strike in Lesotho, Botswana and South Africa – A Comparative Study' (2014) 17 PELJ 1631.

11 Luis L Schenoni, 'The Southern African Unipolarity' (2018) 36 Journal of Contemporary South African Studies 207.

States in Southern Africa originally founded SADC in April 1980 as the Southern African Development Coordination Conference (SADCC).

The SADC Charter of Fundamental Social Rights (SADC Charter) protects human rights within SADC member states. The implementation of the SADC Charter is the responsibility of national tripartite institutions and regional structures. These structures should promote the SADC Charter's implementation through legislation and equitable growth within SADC. Furthermore, regional mechanisms must be in place to assist SADC members in complying with the ILO's reporting system. As a result, the SADC systems are designed to ensure compliance with the ILO system, which protects employees' right to free association on a global scale.[12] On 18 August 2014, SADC signed a protocol on employment and labour intending to place decent employment and social security at the centre of macroeconomic and sectoral policies at global, regional, and national levels.[13]

The discussion of this protocol is limited in so as far as freedom of association is concerned. However, the purpose of the protocol was to create a mechanism whereby member states could formulate and implement projects of common interest to reduce their economic dependence, particularly but not only on the Republic of South Africa. Article 6 of the protocol refers to freedom of association and collective bargaining and states that state parties shall ensure that employers and workers have the right to form and join employer's associations and trade unions and to participate freely in the activities of such associations. In line with Conventions 87 and 98 of the ILO, state parties must ensure that trade unions and employer's organisations have a right to take collective action in the event of a dispute remaining unresolved which includes, amongst others, the right to collective bargaining, right to resort to lawful strikes and remedies consistent with national laws in response to a strike.[14]

Article 7 of the SADC Protocol on Employment and Labour deals with equal treatment and provides that state parties must promote equality of opportunity in employment and labour market policies and legislation in order to eliminate all forms

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12 Article 4 of the SADC Charter.
13 Southern African Development Community, Protocol on Employment and Labour (2014).
14 Article 6 of the SADC Protocol on Employment and Labour.

of discrimination, either directly or indirectly. SADC National Committees, which comprise trade unions and member states, play a major role in the implementation of this protocol at the national level of bargaining. Currently, there is no monitoring of compliance within the SADC region. The SADC Protocol on the Southern African Development Community Tribunal outlines the tribunal's composition, powers, functions, procedures, and other related matters, and it was signed in Windhoek, Namibia on 7 August 2000. The tribunal found Zimbabwe found guilty on various occasions and in breach of the human rights of its citizens regarding its land repossession policies. The SADC Tribunal and the SADC Summit proved to be ineffective in acting against Zimbabwe. The tribunal was suspended in 2010.

Compliance with the SADC labour protocol is contingent on the Summit's political will. When a SADC member state fails to comply with a Tribunal ruling, the matter is referred to the Tribunal. If the Tribunal finds that such a failure occurred, it will submit its findings to the Summit, who will then take necessary action. The overall norm, however, was that the Summit functions on a consensus basis. This meant that any member who was unable to comply with the Tribunal's judgment had to criticise its conduct.[15]

The next part of this chapter examines freedom of association in the SADC Region and compares it to South Africa.

5.2.1.1 Freedom of association in Botswana

5.2.1.1.1 Introduction

Botswana is situated in the centre of Southern Africa and extends approximately 965 km from north to south. Its eastern and southern borders are marked by river courses and an old wagon road, and its western borders are lines of longitude and latitude through the Kalahari Desert. It shares borders with South Africa, Namibia, Zambia, and Zimbabwe. Its population was 2 411 313 in October 2021. After 80 years as a British protectorate, Bechuanaland gained self-government in 1965, becoming the independent Republic of Botswana on 30 September 1966. It is a

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15 See Southern African Development Community, 'Protocol on the Tribunal and Rules Thereof 2000' (SADC) <https://www.sadc.int/document/protocol-tribunal-and-rules-thereof-2000> accessed 11 April 2024.

multi-party democracy, with elections held every five years. The president is the Head of State.[16]

5.2.1.1.2 Legal framework on freedom of association

Employment law in Botswana underwent a major shift in 1992. The changes influenced collective bargaining and played a significant role in the determination of wages and terms and conditions of employment.[17] Botswana is a member of the ILO, and, in 1997, it ratified Conventions 87 and 98. By ratifying these treaties, member states agree to extend to their citizens the rights and freedoms enshrined in or created by the conventions. Section 13 of the Constitution of Botswana 1966 on the protection of freedom of assembly and association reads:

> (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests.
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—
> (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;
> (b) that is reasonably required for the purpose of protecting the rights or freedoms of other persons;
> (c) that imposes restrictions upon public officers, employees of local government bodies, or teachers; or
> (d) for the registration of trade unions and associations of trade unions in a register established by or under any law, and for imposing reasonable conditions relating to the requirements for entry on such a register (including conditions as to the minimum number of persons necessary to constitute a trade union qualified for registration, or of members necessary to constitute an association of trade unions qualified for registration) and conditions whereby registration may be refused on the grounds that any other trade union already registered, or association of trade unions already registered, as the case may be, is sufficiently representative of the whole or of a substantial proportion of the interests in respect of which registration of a trade union or association of trade unions is sought, and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

Section 13 of the Constitution of Botswana guarantees freedom of association and allows the reasonable limitation of that right in the interest of defence, public safety,

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16 Southern African Development Community, 'Botswana' (SADC, 2022) <https://www.sadc.int/member-states/botswana> accessed 11 April 2024.

17 B Molatlhegi, 'Workers' Freedom of Association in Botswana' (1998) 42 J Afr L 64.

public order, public morality, or public health. Section 13(2) allows the government to prohibit public officers, employees of local government bodies and teachers from joining trade unions. Section 13(2)(*d*) grants the government the power to impose conditions under which registration of trade union may be denied if any other trade union or association of trade unions is sufficiently representative of the whole or of a substantial proportion of the interests in respect of which registration is sought.[18]

Similarly, section 13 of the Constitution of Botswana is stated in terms almost identical to Article 11 of the European Convention on Human Rights 1950, which came into effect on 3 September 1953 and provides protection for a number of fundamental rights and freedoms, including freedom of association. Article 11(1) of that Convention states that '[e]veryone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests'. Article 11(2) of the Convention provides that freedom of association may be restricted in the interest of national security or public safety, protection of health or morals or for the protection of the rights and freedoms of others.[19]

The ILO endorses the limitation of this right in the context of public servants in the *Freedom of Association, Digest of Decisions and Principles*, which states that

> the right to strike can be restricted or even prohibited in the public service or in essential services in so far as a strike there could cause serious hardship to the national community and provided that the limitations are accompanied by certain compensatory guarantees.[20]

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18 Molatlhegi, 'Workers' Freedom of Association in Botswana' 67.

19 Article 11 of the European Convention on Human Rights (1950).

20 International Labour Organization, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th (rev) edn, ILO 2006) para 573. See also Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87); Right to Organise and Collective Bargaining Convention, 1949 (No 98); Workers' Representatives Convention, 1971 (No 135) (and accompanying Workers' Representatives Recommendation, 1971 (No 143)); Rural Workers' Organisations Convention, 1975 (No 141) (and accompanying Rural Workers' Organisations Recommendation, 1975 (No 149)); Labour Relations (Public Service) Convention, 1978 (No 151) (and accompanying Labour Relations (Public Service) Recommendation, 1978 (No 159)); Collective Bargaining Convention, 1981 (No 154) (and accompanying Collective Bargaining Recommendation, 1981 (No 163)); Right of Association (Non-Metropolitan Territories) Convention, 1947 (No 84); Right of Association (Agriculture) Convention, 1921 (No 11).

The Committee on Freedom of Association (CFA) proposes that, particularly in cases where member states are prone to employ discretionary powers to enact amendments prohibiting strikes in vital services, such actions be confined to the ILO's narrow definition of only strikes in essential services.[21] Before 2003, the law on strikes in Botswana was, in most respects, similar to that of the United Kingdom. There was no express legislative reference to a right to strike, with reference being made only to unlawful industrial action.[22] Strikes were lawful unless declared otherwise, except for essential service providers, and there were no set procedures or preconditions to be satisfied before workers could embark on a strike.

5.2.1.1.3 Jurisprudence of the courts on the interpretation of the right to freedom of association

The Government of Botswana, whilst providing wide protection to strike action in theory, still exercised, in reality, the power to declare any industrial action as unlawful. This power potentially amounted to a severe restriction on the right to strike. The Trade Dispute Act 2004 (hereinafter the TDA) provided that, 'Every party to a dispute of interest has the right to strike or lock-out where the procedure for a lawful strike has been followed'.[23] Public officials were included in the TGA's scope by the definition of an employee as an individual who had engaged into a contract of employment for the hiring of his labour, except members of the disciplined forces and prison services.

In *Attorney General on behalf of Director of Public Service Management v Botswana Landboards and Local Authorities Workers' Union*,[24] the Botswana Court of Appeal noted that

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21 Emmanuel Kodzo and Bediaku Ntumy, 'Emerging Trends in Employment Relations: The Case of Essential Services in the Botswana Public Sector' (2015) 15(7) Global Journal of Human-Social Science Research 1.

22 Trade Disputes Act (CAP 48:02) (hereinafter TDA).

23 Section 39 of the TDA; *Botswana Landboards & Local Authorities Workers' Union v The Attorney General (for and on behalf of the Director of Public Service Management)* (High Court of Botswana, Lobatse) unreported case no MAHLB-00063-11 (21 June 2012) [10] (Dingake J). The decision was appealed in *Attorney General v Botswana Landboards & Local Authorities Workers' Union* (2013) 34 ILJ 1875 (BotCA), [2013] 6 BLLR 533 (BWCA) (hereinafter *Attorney General v Botswana Landboards & Local Authorities Workers' Union*).

24 *Attorney General v Botswana Landboards & Local Authorities Workers' Union* (2013) 34 ILJ 1875 (BotCA), [2013] 6 BLLR 533 (BWCA).

> following the ratification by Botswana in 1997 of the two key Freedom of Association instruments of the International Labour Organization (the ILO), namely Convention 87 on Freedom of Association and Protection of the Right to Organize and Convention 98 on the Right to Organize and Collective Bargaining, a new Trade Disputes Act 15 of 2004 (the TDA) and a new Public Service Act 30 of 2008 (the PSA) were promulgated, which domesticated some of the provisions of those conventions. For the first time public officers were accorded the right to strike, and also (by an amendment to the Trade Unions and Employers' Organizations Act cap 48:01), the right to unionize.[25]

Section 13(2) of the Constitution of Botswana depicts an element of discrimination in the treatment of employers and workers in that restrictions imposed by the Constitution apply only to workers. ILO Convention 98 forbids trade union discrimination in the workplace and safeguards trade unions from employer intervention, but section 13(2) of the Constitution of Botswana is contrary to this principle. The judgment in *Attorney General on behalf of Director of Public Service Management v Botswana Landboards and Local Authorities Workers' Union* took the view that natural justice is an important part of South African law and that the *audi alteram partem* rule is significant.[26]

In *Botswana Public Employees' Union v Minister of Labour and Home Affairs*, four registered trade unions representing various categories of public sector employees sought orders declaring invalid section 49 of the TDA and the amendment, effected through Statutory Instrument No. 57 of 2011 ('SI 57') by the Minister of Labour and Home Affairs, of the schedule to the TDA which set out the list of essential services.[27] With this amendment, the list of essential services was broadened to include 'veterinary services, diamond cutting, sorting and selling services, and teaching services'.

Section 56 of the Trade Unions and Employers' Organisations Act, (Chapter 48:01), 2004 provides the right to freedom of association of employees and states that

> (1) No employer shall make it a condition of employment of any employee that the employee shall not be or become a member of any registered trade union

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25 *Attorney General v Botswana Landboards & Local Authorities Workers' Union* 544. Section 39 of the TDA gives employees who are a party to a dispute of interest a right to strike, provided that the procedure for a lawful strike has been followed.

26 *Attorney General v Botswana Landboards & Local Authorities Workers' Union* passim (per Kirby JP, with the concurrence of Foxcroft JA, Lord Abernethy JA, Lesetedi JA and Gaongalelewe JA).

27 *Botswana Public Employees' Union v Minister of Labour and Home Affairs* (High Court of Botswana, Lobatse) unreported case no MAHLB-000674-11 (9 August 2012) [4].

> or other organisation representing employees in any industry or of a particular registered trade union or other such organisation or participate in the activities of a registered trade union or other such organisation.
>
> (2) Notwithstanding anything to the contrary in any enactment, no employer shall prohibit an employee from being or becoming a member of any registered trade union or other organisation such as is referred to in subsection (1) or of a particular registered trade union or other such organisation or subject him to any penalty by reason of his membership or participation in the activities of a registered trade union or other such organisation.
>
> (3) Any employer who contravenes this section and any other person who is knowingly a party to the contravention shall be guilty of an offence and liable to a fine not exceeding P200 or to imprisonment for a term not exceeding 12 months, or to both.[28]

The High Court upheld the applicants' position that section 49 of the TDA was unconstitutional since the Constitution assigns the power to legislate to Parliament. The court then addressed the three arguments put forward by the applicants regarding the invalidity of SI 57.[29] First, the applicants argued that SI 57 was '*ultra vires* Section 49 of the TDA, because, on a proper interpretation, that section does not empower the Minister to publish an order – as he did – which is incompatible with Botswana's ILO obligations'.[30] The court observed that '[i]n this country, the courts take the broad view that constitutional and statutory provisions must be construed to uphold international law'.[31] The court then noted that Botswana had ratified the Freedom of Association and Protection of the Right to Organise Convention (No 98) and the Right to Organise and Collective Bargaining Convention (No 98), and that

> [o]n the matter of what constitutes "essential services" Convention 87 confines "essential services for the purpose of limiting the right to strike, to "services the interruption of which would endanger life, personal safety or the health of part of or the whole population." (**See 1994 Committee of Experts Report, para 136-151)**.[32]

Moreover, the court observed that the CEACR's 'opinions are generally regarded as a source of international labour law'[33] and that the CEACR had also addressed

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28 Section 56 of the Trade Unions and Employers' Organisations Act 48:01 of Botswana.
29 Kodzo and Ntumy, 'Emerging Trends in Employment Relations' 1.
30 *Botswana Public Employees' Union* [5].
31 *Botswana Public Employees' Union* [28.4].
32 *Botswana Public Employees' Union* [222].
33 Bots*wana Public Employees' Union* [224].

an observation to the Government of Botswana in which it expressed the view that 'the new categories added to the Schedule do not constitute essential services in the strict sense of the term and [had requested] the Government to amend the Schedule accordingly'.[34] In this context, the court concluded that section 49 of the TDA, assuming its constitutional validity, should be interpreted as not authorising a Minister to pass a statutory instrument that violates Botswana's international law obligations.

The court then examined whether the argument according to which the list of essential services was in breach of section 13 of the Constitution, which guarantees freedom of association but also permits limitations which are reasonably justifiable in a democratic society. The court observed that since it was not clear whether, under section 13, freedom of association includes the right to strike, 'it is incumbent upon this court … to interpret the said section in a manner that is consistent with international law',[35] and it noted that '[t]he right to freedom of association in international law includes the right to strike'.[36] Moreover, 'international law does not accept the prohibition of strike action to safeguard economic interests as a limitation that is reasonably justifiable in a democratic society',[37] which was the alleged justification for most of the added categories of essential services; and the ILO committee of experts seems to accept that it is reasonably justifiable in a democratic society to restrict the right to strike only to the extent that meets its definition of 'essential services'.[38] Therefore, SI 57 was unconstitutional.

The court finally turned to the applicants' contention that they had a legitimate expectation that the executive would make decisions consistent with Botswana's international obligations.[39] In this regard, the court took the view that '[t]he act of [ratifying ILO Conventions by signing them] gave rise to an expectation that the officers of the Executive would not act in a manner that contradicts the letter and

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34 *Botswana Public Employees' Union* [225] (original bolding removed). See Kodzo and Ntumy, 'Emerging Trends in Employment Relations' 1.

35 Section 13 of the TDA; see *Botswana Public Employees' Union* [249].

36 *Botswana Public Employees' Union* [250].

37 *Botswana Public Employees' Union* [252].

38 *Botswana Public Employees' Union* [252]; compare International Labour Organization, *Rules of the Game: A Brief Introduction to International Labour Standards* (Revised Edition 2014) 9 (ILO, 2014) <http://www.ilo.org/global/standards/information-resources-and-publications/publications/WCMS_318141/lang--en/index.htm> accessed 12 April 2024.

39 *Botswana Public Employees' Union* [259].

spirit of those Conventions unless they (applicants) have been afforded the opportunity to argue to the contrary'.[40] Therefore, the promulgation of SI 57 was null. Thus, relying on Conventions 87 and 98 and the pronouncements of the ILO Committee of Experts, the court decided that SI 57, which broadened the list of essential services, was invalid and of no force or effect.[41]

5.2.1.2 Freedom of association in Lesotho

5.2.1.2.1 Introduction

The Kingdom of Lesotho is situated in the south-eastern region of Southern Africa, covering an area of 30 355 km², and is an enclave surrounded by South Africa. In 2011 its population was about 1 879 000. The British protectorate of Basutoland formally achieved its independence from the United Kingdom on 4 October 1966.[42]

5.2.1.2.2 Legal framework on freedom of association

Lesotho is a dualist state, which means that when international treaties are ratified, they do not instantly become part of domestic law and must be incorporated into municipal legislation to become legally enforceable. The concept was explained by the Botswana High Court in *Botswana Public Employees' Union*:[43]

> In dualist States, such as Botswana, a treaty is not directly a part of domestic law. Instead, international treaties have to be incorporated into the national law for their provisions to be legally binding. For a country that embraces dualism, an "act of transformation" by an appropriate State organ is needed before the provisions of a treaty can operate within the national legal system. Transformation takes various forms, such as parliamentary enactment incorporating directly the treaty norms into domestic law, or a statute copying all or part of the treaty.

Section 2 of the Constitution of Lesotho 1993 states that it 'is the supreme law of Lesotho and if any other law is inconsistent with this Constitution, that other law shall, to the extent of its inconsistency, be void'. Section (4)(1)(l) of the Constitution entitles every person in Lesotho to freedom of association.

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40 *Botswana Public Employees' Union* [276].
41 International Labour Organization, *Rules of the Game* 22.
42 South African History Online, 'Lesotho' <https://www.sahistory.org.za/place/lesotho> accessed 12 April 2024.
43 *Botswana Public Employees' Union* [190].

Under section 16 of the Lesotho Constitution on freedom of association, the right to join trade unions denotes the following:

> (1) Every person shall be entitled to, and (except with his own consent) shall not be hindered in his enjoyment of freedom to associate freely with other persons for ideological, religious, political, economic, labour, social, cultural, recreational and similar purposes.
>
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of any law to the extent that the law in question makes provision–
>
> (a) in the interests of defence, public safety, public order, public morality or public health;
>
> (b) for the purpose of protecting the rights and freedoms of other persons; or
>
> (c) for the purpose of imposing restrictions upon public officers.
>
> (3) A person shall not be permitted to rely in any judicial proceedings upon such a provision of law as is referred to in subsection (2) except to the extent to which he satisfies the court that that provision or, as the case may be, the thing done under the authority thereof does not abridge the rights and freedoms guaranteed by subsection (1) to a greater extent than is necessary in a practical sense in a democratic society in the interests of any of the matters specified in subsection (2)(a) or (c).

5.2.1.2.2.1 Labour Code Order 1992

Having attained its sovereignty, Lesotho acceded to all international obligations. It reaffirmed its commitment to the ILO and subsequently ratified ILO Conventions 87 and 98. Section 6 of the Labour Code Order 1992 provides that '[f]reedom of association shall be guaranteed for all workers, employers and their respective organisations in accordance with the provisions of the Code, in particular Parts XIII to XX'. In support of this provision, section 168(1) states:[44]

> Workers and employers, without any 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 the previous authorization of the Government.

Workers and employers in all sectors of the economy, including agriculture, have the freedom to organise as alluded to in section 168(2):

> (2) The right of association referred to in subsection (1) is guaranteed to workers and employers in all sectors of the economy, including agriculture. All

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44 Section 168 of the Labour Code Order, 1992.

> persons engaged in agriculture, in whatever manner, shall enjoy the same rights of association and combination as workers in other sectors.

In addition to the Labour Code Order 1992, a separate piece of legislation, the Public Service Act 1995, was subsequently enacted to govern public servants.[45]

Section 3 of the Labour Code Order 1992 acknowledges collective bargaining as an essential instrument for settling issues between employers and employees.[46] According to section 168(1) of the Labour Code Order 1992, every employee has the right to join a trade union.[47]

5.2.1.2.2.2 Public Service Act 2005

The Public Service Act 2005 clearly excludes public officials from 'the scope of the Labour Code's applicability', with section 30 of the Act expressly stating that the 'Labour Code Order 1992 shall not apply to public officers'. Under section 31(1) of the Public Service Act 2005, '[p]ublic officers may form and establish a staff Association or staff associations under the provisions of the Societies Act 1966'.[48] And under section 31(2) of the Public Service Act 2005, '[n]otwithstanding any other law, public officers shall not become members of any trade union registered under the Labour Code Order 1992'.[49] As a result, the Lesotho Union of Public Employees (LUPE) contested the validity of these two sections of the Public Services Act mentioned above.

5.2.1.2.3 Jurisprudence of the courts on the interpretation of the right to freedom of association

The ILO recognises that 'in the case of members of the police and armed forces, some public agents 'exercising authority' in the name of the state, and workers in critical services, the right to strike may be legitimately restricted or forbidden'.[50] Much work has gone into assessing the scope of the prohibition on public officers

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45 This statute is available at http://www.commonlii.org/ls/legis/num_act/psa1996152.pdf.
46 Section 6 of the Labour Code Order, 1992.
47 Section 196 of the Labour Code Order, 1992.
48 Cohen and Matee, 'Public Servants' Right to Strike in Lesotho, Botswana and South Africa' 1637.
49 Cohen and Matee, 'Public Servants' Right to Strike in Lesotho, Botswana and South Africa' 1637.
50 Cohen and Matee, 'Public Servants' Right to Strike in Lesotho, Botswana and South Africa' 1634.

exercising authority in the name of the state: much depends upon the nature of the public servants' functions, the impact of such services on the public, and the specific legal system involved.

In *Lesotho Chamber of Commerce and Industry v Commissioner of Police*,[51] the Lesotho Chamber of Commerce and other trade unions requested an injunction finding the Commissioner of Police's refusal to issue them with a parade licence unconstitutional. The High Court of Lesotho held, among other things, that the police, when exercising their powers under the Act, should be inclined to grant permission to hold the meeting or procession unless there are exceptional and compelling circumstances indicating that a threat to peace, public safety, public security, or public order is likely.[52] The court declare that people who exercise this privilege have a responsibility to do so responsibly, with restraint, and reasonableness.[53]

A settlement between the parties was reached, however, and the procession was allowed to take place on a later date than was prayed for in the application. It was reiterated that freedom of association is guaranteed under section 16 of the Constitution, which states that an individual is free to associate freely with others, unless with that individual's consent this right has been limited.[54] Further, it was noted that the Constitution guarantees the individual's 'freedom to associate freely with other persons for ideological, religious, political, economic, labour, social, cultural, recreational and similar purposes'. The grounds for legitimate limitation of this right are similar to those in sections 14 and 15 dealing with the freedoms of expression and assembly, respectively.[55]

The purpose of the application was to request the court to declare that the foregoing two parts were unconstitutional since they contradicted section 16 of the Lesotho Constitution.[56] Section 3 of Lesotho's Constitution states that 'the Constitution is the

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51 *Lesotho Chamber of Commerce and Industry v Commissioner of Police* [2011] LSHC 127 (29 August 2011) (hereinafter *Lesotho Chamber of Commerce and Industry*).
52 *Lesotho Chamber of Commerce and Industry* [28].
53 *Lesotho Chamber of Commerce and Industry* [27].
54 Section 16 of the Lesotho Constitution.
55 Sections 14 and 15 of the Lesotho Constitution.
56 On s 16 of the Lesotho Constitution, see Cohen and Matee, 'Public Servants' Right to Strike in Lesotho, Botswana and South Africa' 1631, 1638–41.

highest law'.[57] The second question was whether the limits imposed on public servants were proportional, because the applicant believed that the government had failed to strike a proper balance between their rights to organise or join a trade union and the general interest of maintaining the country's economy.

Section 32(1) provides for the establishment of the Public Service.[58] In their founding affidavit, deposed to by the applicant's President, Nthakeng Selinyane, they argued that it is alleged that for the government and/or any law to restrict or curtail a fundamental right such as the freedom to associate. Section 16(3) of the Constitution states that such an abridgement must be necessary in a practical sense in a democratic society.[59] The Constitution states that the abridgement must not be more extensive than is required in a democratic society in order to impose restraints on public servants.[60] The deponent further claimed that such legislation was essential to defend the rights of the greater society and that it was created in pursuit of a legitimate goal.[61]

The said clauses are not made in pursuit of a legitimate aim, as the law only protects a certain employer against the interests of its employees. The deponent contended that 'the term democratic society denotes that Government's action or law be proportional to interests protected and a fair balance be made between societal interests and individual rights'.[62] It further argued that in the present case, the obvious deregistration of the applicant and the violation of international conventions that Lesotho had ratified and incorporated in the Labour Code Order 1992 far outweighed the hidden motive pursued by section 31(2).[63] The court opined that the impugned legislation pursued the legitimate aim listed in section 16(2)(*c*) of the Constitution.[64] The court ruled that the state might impose restrictions on public employees under section 16(2) of the Constitution if the restrictions are justified.[65]

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57 Section 3 of the Lesotho Constitution.
58 Section 32(1) of the Public Service Act.
59 Section 16(3) of the Lesotho Constitution.
60 Cohen and Matee, 'Public Servants' Right to Strike in Lesotho, Botswana and South Africa' 1638.
61 *Lesotho Union of Public Employees* [6].
62 *Lesotho Union of Public Employees* [7].
63 Section 31(2) of the Labour Code Order 1992.
64 Section 16(2)(*c*) of the Lesotho Constitution.
65 Section 16(2) of the Lesotho Constitution. See also *Lesotho Union of Public Employees* [35].

The court determined that sections 31 and 35 served the legitimate goal of preserving a healthy economy and did not go beyond what is essential in a democratic society in limiting the rights secured by section 16(1).[66] The court noted that freedom of association is not an absolute right in Lesotho, and constitutionally recognised limitations include the 'interests of defence, public safety, public order, public morality, public health, and protection of others' rights and freedoms, and in the case of public sector employees, freedom of association may also be limited for the purpose of imposing restrictions on public officers'.[67] As a result, the court denied the application, concluding that the challenged statute achieves the legitimate goal mentioned in section 1(2)(*c*) of the Constitution.[68]

It appears to me that there is a reasonable balance between the applicant's interests in creating a staff association or associations in order to enjoy the fundamental human right of freedom of association and the broad public interest in maintaining the country's economy.

5.2.1.3 Freedom of Association in Namibia

5.2.1.3.1 Introduction

Namibia is situated on Africa's south-western seaboard. Its neighbouring countries are Angola to the north, Botswana and Zimbabwe to the east, and South Africa to the south. Namibia is bordered by the Atlantic Ocean in the west. The country covers 825 615 km², with a population of 2 598 768 on 6 October 2021.

The government is a multi-party democracy with checks and balances provided by the state institutions of the executive, legislative, and judicial branches.[69] General, presidential, regional, and local elections are held every five years.[70] The Republic of Namibia was a German Protectorate in 1884 and a Crown Colony in 1890, and thereafter became known as South West Africa.[71] The territory remained a German

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66 Section 16(3) of the Lesotho Constitution.
67 *Lesotho Union of Public Employees* [12].
68 Section 1(2)(*c*) of the Lesotho Constitution.
69 Jan Theron, 'Trade Unions and the Law: Victimisation and Self-Help Remedies' (1997) 1 LDD 11, 18.
70 Southern Africa Development Community, 'Namibia' (*SADC*, 2022) <https://www.sadc.int/member-states/namibia> accessed 12 April 2024.
71 Theron, 'Trade Unions and the Law' 12.

colony from 1884 until 1915 when it was occupied by South African forces.[72] From 1920 onwards the territory became a Protectorate, or a Mandated Territory of South Africa in terms of the Peace Treaty of Versailles. Namibia gained its independence in 1990 after a long and protracted struggle, on both diplomatic and military fronts, for the achievement of self-determination and sovereignty.[73] 'Namibia gained independence from South Africa on 21 March 1990', following the Namibian War of Independence.[74]

5.2.1.3.2 Legal framework on freedom of association

Namibia is a member of the ILO and ratified Conventions 87 and 98 on 3 January 1995. The Labour Act 6 of 1992, which later repealed and replaced by Labour Act 11 of 2007,[75] purported to promote sound labour relations and fair employment practices by encouraging freedom of association by way of, among other things, the formation of trade unions to protect workers' rights and interests, and to promote the formation of employers' organisations.[76]

Freedom of association is embedded in section 6 of the Labour Act 11 of 2007. Section 8 deals with the registration of trade unions and employers' organisations. It states that a trade union or employers' organisation's pending application before the Labour Commissioner under section 54(1) of the previous Act (that is, the Labour Act 6 of 1992), or for the replacement or modification of its constitution under section 61(2) of the previous Act, must be carried out in accordance with this Act (the Labour Act 11 of 2007). Section 9 refers to collective bargaining, in that the exemption from a collective agreement, granted under section 69(3) of the previous Act, which was in force, shall maintain its status.

The law above emanates from Articles 22 and 144 of the Constitution of the Republic of Namibia 1990 (hereinafter the Namibian Constitution). Article 21(1)(*e*) of this Constitution, which deals with fundamental freedoms, provides that

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72 Theron, 'Trade Unions and the Law' 13.
73 John M MacKenzie, 'A History of Malawi, 1859–1966' (2013) 102 The Round Table 312.
74 Southern Africa Development Community, 'Namibia'.
75 See s 142 of the Labour Act 11 of 2007.
76 Labour Act 1992.

'[e]veryone shall have the right to … freedom of association, which shall include freedom to form and join associations or unions, including trade unions and political parties',[77] and 'the right to withhold their labour without being exposed to criminal penalties'.[78] Moreover, Article 95, on promotion of the welfare of the people, states that '[t]he State shall actively promote and maintain the welfare of the people by adopting, *inter alia*, policies aimed at the following:

> (c) active encouragement of the formation of independent trade unions to protect workers' rights and interests, and to promote sound labour relations and fair employment practices;
> (d) membership of the International Labour Organisation (ILO) and, where possible, adher[e]nce to and action in accordance with the international Conventions and Recommendations of the ILO.'

Article 144 acknowledges the binding nature of international law in Namibia. It further states that '[u]nless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia'.[79]

Under Article 131, the rights and freedoms contained in Chapter 3 are entrenched, and the provisions may not be repealed or amended in so far as such repeal or amendment diminishes or detracts from such rights and freedoms.[80] Under Article 25, the courts are given the power to declare invalid any law or any action of the executive and agencies of the government that is inconsistent with the provisions of Chapter 3.[81] Nonetheless, the Constitution distinguishes between rights and liberties. As for the latter, Article 21(2) states that the fundamental freedoms mentioned in Article 21(1)

> shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by [Article 21(1)], which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.[82]

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77 Article 21(1)(*e*) of the Namibian Constitution.
78 Article 21(1)(*f*) of the Namibian Constitution.
79 Article 144 of the Namibian Constitution.
80 Article 131 of the Namibian Constitution.
81 Article 25 of the Namibian Constitution.
82 Article 21(2) of the Namibian Constitution.

Trade unions serve on a number of tripartite committees, including the Labour Advisory Council. These bodies are made up mostly of non-union representatives and are advisory in nature. The Labour Advisory Council was established through the Namibian Labour Act 1992 and maintained through the Labour Act 2007.[83] The Council and its subcommittees were created as an organisational representation of tripartism, with the primary objective of advising the Minister of Labour on labour legislation and other labour-related issues. While the Council's composition and administration have not changed, its powers and functions have been expanded to complement the new conflict prevention and resolution system that has been implemented. The Council brings together government, employer, and labour representatives to investigate and advise the Minister of Labour and Social Welfare on labour-related issues, including collective bargaining, the prevention and reduction of unemployment, and issues arising from the ILO.

The Labour Advisory Council has two permanent statutory committees: the Committee for Dispute Prevention and Resolution (CDPR) and the Essential Services Committee.[84] In addition, the Council may establish other committees to assist it, which must include at least two of its own members.[85] In recent years, both business and labour have expressed their dissatisfaction with the limited set-up which in itself limits power play.

Namibia's labour movement has a long and rich history. Since its formation, it has supported the liberation struggle and shaped economic and social development since independence. The colonial laws did not allow black workers to form their trade unions, and early attempts by workers to organise themselves were crushed by the colonial regime.

After independence, the National Union of Namibian Workers (NUNW), Namibia's largest trade union federation, retained its ties with the South West African People's Organisation (SWAPO) through an affiliation agreement making the federation an associate of the ruling party. The existence of this relationship sparked intense disputes both within and outside the federation. Internally, at the 1993 and 1998

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83 Labour Act 2007.
84 Section 6 of the Labour Act 2007.
85 Section 14 of the Labour Act 2007.

congresses, the affiliation to SWAPO was disputed, with some NUNW affiliates pressing for stronger trade union relations. At both these congresses, the majority of NUNW delegates believed that a continued affiliation would be beneficial, helping the federation to influence policies.

The Namibian labour movement is driven by divisions and has fallen short of the declared ideal of one country, one federation, and one industry, one union. In the fishing, construction, and security industries, for example, a large number of trade unions organised themselves into three federations to compete for membership. Owing to the political divisions, unions find it difficult to cooperate even on matters of common interest, and this lack of cooperation often has detrimental effects on workers. Chapter 2 of the Labour Act 2007 stated that 'all workers and employers have the right to freely form and join organisations, to promote and defend their interests, without interference from one another and the state'.

5.2.1.3.3 Jurisprudence of the courts on the interpretation of the right to freedom of association

As stated in its Article 1(6), the Constitution is the Supreme Law of Namibia. It serves as the pattern against which all statutes are assessed.[86] According to Article 25(2), aggrieved persons who claim that a fundamental right or freedom guaranteed by the Constitution has been infringed or threatened may approach a competent Court to enforce or protect such a right or freedom, and may also approach the Ombudsman for any legal assistance or advice that they require.[87] In response, the Ombudsman in his or her discretion can give any legal or other help that he or she may consider expedient.

5.2.1.4 Freedom of association in Malawi

5.2.1.4.1 Introduction

Malawi, a landlocked country in south-eastern Africa, is distinguished by its highlands divided by the Great Rift Valley and the massive Lake Malawi. In colonial times, the territory was ruled by the British, under whose control it was known first

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86 Article 1(6) of the Namibian Constitution.
87 Article 25(2) of the Namibian Constitution.

as British Central Africa and later Nyasaland.[88] Malawi gained independence on 6 July 1964 before becoming a republic and a one-party state in 1966. Malawi was ruled by the dictatorial Malawi Congress Party government until it was transformed into a multi-party democracy in 1994. Its population was 21 475 962 on 13 April 2024.[89]

5.2.1.4.2 Legal framework on freedom of association

Malawi ratified the ILO's Convention 87 in 1999 and Convention 98 in 1965. Section 32(1) of the Constitution of the Republic of Malawi 1994 as amended (hereinafter the Malawi Constitution) on freedom of association states that '[e]very person shall have the right to freedom of association, which shall include the freedom to form associations'. Subsection (2) further states that '[n]o person may be compelled to belong to an association'.[90]

This position is reiterated in the Malawi Labour Relations Act 16 of 1996 (Cap. 54:01), part II of which deals with freedom of association. Part II deals with the right to form a group. No one is forced to join a labour union, and no one is discriminated against for doing so.[91] Organisations are prohibited from discriminating against any person on the grounds of race, colour, nationality, ethnic or social origin, national extraction, religion, political opinion, language, sex, marital status, family responsibilities, age, disability, property or birth.[92] Part IV relates to collective bargaining and organisational rights. In this part of the statute, section 25 deals with enterprise level bargaining, and section 25(1) prescribes that if at least 20% of an employer's employees at one or more workplaces, or a specific category or categories of employees with a significant community of interest, are members of a particular trade union or more than one acting jointly, the employer must recognise that trade union or those trade unions for collective bargaining purposes.[93]

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88 MacKenzie, 'A History of Malawi, 1859–1966' 312.

89 Worldometer, 'Malawi Population (2024) <https://www.worldometers.info./world-population/malawi-population/> accessed 13 April 2024.

90 Malawi Constitution 1994.

91 Section 6 of the Malawi Labour Relations Act 16 of 1996.

92 Section 7(2) of the Malawi Labour Relations Act 16 of 1996.

93 Section 25(1) of the Malawi Labour Relations Act 16 of 1996.

It is important to note that the LRA was enacted

> [t]o promote sound labour relations through the protection and promotion of freedom of association, the encouragement of effective collective bargaining, and the promotion of orderly dispute settlement, conducive to social justice and economic development.[94]

This Act signified a major transformation by making adequate provisions to enhance freedom of association,[95] collective bargaining,[96] dispute settlement,[97] and the right to strike.[98]

The Act's requirements for parties to negotiate in good faith, produce written and duly signed collective agreements, the legal enforceability of collective agreements, submission of copies of collective agreements to the Registrar, and disclosure of information by parties to the negotiation have the potential to improve collective bargaining and protect workers' and employers' interests.[99]

5.2.1.4.3 Jurisprudence of the courts on the interpretation of the right to freedom of association

On 20 March 2020, the President of Malawi, Mr Peter Mutharika, declared a State of National Disaster in response to the COVID-19 pandemic. The declaration was purportedly made under section 32 of the Disaster Preparedness and Relief Act 24 of 1991.[100] A group of individuals and civil society organisations approached the court, arguing that the Rules which the Minister of Health enacted under the Public Health Act had not been properly implemented and severely infringed a range of constitutionally protected rights, including the rights to freedom of conscience, religion and association.[101] The High Court of Malawi held that the lockdown rules implemented in response to the coronavirus pandemic so significantly impacted

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94 The preamble to the Malawi Labour Relations Act 16 of 1996.
95 Section 4 of the Malawi Labour Relations Act 16 of 1996.
96 Part IV of the Malawi Labour Relations Act 16 of 1996.
97 Part V of the Malawi Labour Relations Act 16 of 1996.
98 Section 46 of the Malawi Labour Relations Act.
99 Section 31 of the Malawi Labour Relations Act.
100 Section 32 of the Disaster Preparedness and Relief Act 24 of 1991 (Cap 33:05).
101 *R (oao Kathumba) v President of Malawi (Constitutional Reference 1 of 2020)* [2020] MWHC 29 (3 September 2020) [2.1] (hereinafter *R (oao Kathumba) v President of Malawi*).

fundamental rights that they constituted a derogation of those rights and were therefore unconstitutional.[102] The court determined that the restrictions negated the essential content of the rights and thus constituted derogations rather than mere limitations of the rights.[103] The court held that the Rules were unconstitutional because derogations were only permitted when a state of emergency was declared, and the rights to freedom of conscience, religion, and association could never be derogated.[104] The court ruled that the Minister of Health was not empowered to make Rules under the Public Health Act which 'substantially and significantly affected or would affect the fundamental freedoms recognised by the Constitution',[105] and declared that the restrictions on rights imposed by the Rules exceeded the limits permitted in section 44 of the Constitution and therefore constituted the unlawful imposition of a state of emergency 'through the back door'.[106]

In *Malawi Law Society v State (Misc Civil Cause 78 of 2002)*,[107] the facts were that on 28 May 2002, the President of Malawi held a rally and issued an oral directive prohibiting all forms of protest against a proposed constitutional amendment that would remove section 83(3) of the Malawi Constitution limiting the terms of office of the President and the two Vice-Presidents terms to two consecutive terms.[108] The Law Society and other concerned civil society organisations petitioned the court for redress, requesting an order declaring the directive unconstitutional and prohibiting law enforcement personnel from enforcing it.[109] The key question before the court was whether the President's decree infringed on constitutionally protected fundamental human rights such as freedom of expression, association, assembly, and demonstration. It said that as the directive had been made at a rally, it could not constitute a law as required by the Constitution's general limitation clause in section 44, and it could not be a permissible limitation.[110] Section 44(2) stated that

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102 *R (oao Kathumba) v President of Malawi* [10.1.1].
103 *R (oao Kathumba) v President of Malawi* [7.8].
104 *R (oao Kathumba) v President of Malawi* [7.8], [7.9].
105 *R (oao Kathumba) v President of Malawi* [10.1.4].
106 *R (oao Kathumba) v President of Malawi* [10.1.5].
107 *Malawi Law Society v State (Misc Civil Cause 78 of 2002)* [2002] MWHC 54 (21 October 2002) (hereinafter *Malawi Law Society v President*); see https://malawilii.org/akn/mw/judgment/mwhc/2002/54/eng@2002-10-21/source.pdf.
108 Section 83(3) of the Malawi Constitution 1994.
109 *Malawi Law Society v President* 1–2.
110 *Malawi Law Society v President* 4.

'no restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than prescribed by law, which are reasonable, recognised by international human rights standards and necessary in an open and democratic society'.[111]

One of the first issues addressed by the court was how the word 'demonstration' should be interpreted. The Law Society and the President had accepted the definition set out in *British Airports Authority v Ashton* (1983),[112] which had defined demonstration as 'a public manifestation of feeling; often taking the form of a procession and mass meetings'.[113] However, the High Court of Malawi (per Twea J) preferred the definition provided in *Black's Law Dictionary* (6th edition), which was wider than the one given in the *Ashton* case and defined 'demonstration' as 'a show or display of attitudes towards a person, cause or issue'. Twea J held that 'the element of procession or mass rally is not a necessary ingredient at all' in a demonstration and that the definition in *Black's Law Dictionary* is 'wide enough to catch any manifestation of attitudes or feeling towards a person, cause or issue'.[114]

Twea J applied *Black's* definition to conclude that

> the directive is too wide, and, as was admitted, shouting of slogans and display of placards is done at the President's own rallies, would be impossible to enforce. If enforced at all, it would completely take away the rights enshrined in S.32, 33, 34, 35, 38 and 40,[115] as anyone who shows or displays an attitude towards the subject would be dealt with.[116]

Twea J looked at the directive's constitutionality and considered whether it followed the conditions set down in section 44(2) of the Constitution. He conducted a thorough examination of what constitutes 'prescribed by law' in the context of section 44, and whether the President's oral declaration at a rally might meet that criterion.[117] He pointed to the constitutional articles that govern the President's role,

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111 *Malawi Law Society v President* 4.
112 *British Airports Authority v Ashton* [1983] All ER 6 (QBD) (hereinafter *Ashton*).
113 *British Airports Authority v Ashton* 12*d* defined demonstration as 'a public manifestation of feeling: often taking the form of a procession and mass meeting'.
114 *Malawi Law Society v President* 3.
115 The listed sections deal with the rights to freedom of association, assembly, expression, conscience, and opinion, and political rights.
116 *Malawi Law Society v President* 3.
117 Section 44(2) of the Malawi Constitution; *Malawi Law Society v President* 5–6.

concluding that under the Constitution, the President serves as both the Head of State and Head of Government.

He added that the President is also the leader of his political party, and then concluded that as nothing further was done after the issuance of the directive, the President issued the directive in his capacity as a politician and not as Head of State or Government. Twea J concluded that 'the directive of the President at a political rally to limit such rights does not amount to law'.[118] He added that 'the banning "all form of demonstrations" was unreasonable as such a ban is too wide and not capable of enforcement'.[119] Accordingly, Twea J, granting the relief sought by the Law Society, declared the directive unconstitutional, quashed it, and prohibited law enforcement officials from carrying it out.[120] This judgment confirmed that limitations to the rights to freedom of expression and association cannot be limited by a President issuing oral directives. The judgment enforced the protection of fundamental rights by ensuring that rights are only limited in terms of the Constitution's limitation clause.

In summation: without exception or justification, public officials in Lesotho are denied the ability to join trade unions or strike.[121] Furthermore, there is no effective framework in place in Lesotho to ease the final resolution of conflicts of interest in the public sector. The Namibian Constitution does not precisely define the difference between rights and freedoms, but it may be argued that the difference lies in the extent of permissive derogation. Article 25 of the Namibian Constitution empowers the courts to declare invalid any law or action of the executive and government agencies that conflict with the provisions of Chapter 3.[122] In the last decade, the establishment of a Constitutional Court in South Africa as the highest court of appeal in all constitutional matters has resulted in dynamic constitutional litigation unparalleled on the continent.[123] Certain rights, however, that are frequently emphatically declared on the basis of universal principles, only exist on

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118 *Malawi Law Society v President* 8.
119 *Malawi Law Society v President* 9.
120 *Malawi Law Society v President* 10.
121 Ernest Manamela and Mpfari Budeli, 'Employees' Right to Strike and Violence in South Africa (2013) 46 CILSA 308, 309.
122 Article 25 of the Namibian Constitution.
123 Martin Nicol, 'Legislation, Registration, Emasculation' (1980) 5 South African Labour Bulletin 44.

paper due to the legal constraints that they are dependent on, constraints that are either vague and indeterminate or, on the contrary, extremely precise.[124]

Unlike in South Africa, the freedom not to associate is protected in Malawi, as is evident in section 25(2) of the Malawian Constitution which states that no person may be compelled to belong to an association.[125] Collective bargaining is a voluntary process that takes place between representatives of trade unions and employer's associations.[126] It usually focuses on the negotiation of terms and conditions of employment, such as wages, working hours, conditions, grievance procedures, and the rights and responsibilities of each party. Collective bargaining in Malawi is not voluntary as it is in South Africa.[127] The voluntary nature of collective bargaining is expressly laid down in Article 4 of ILO Convention 98.[128] The CFA has made it clear that measures to promote collective bargaining exclude recourse to measures of compulsion.

The CFA adds that, where necessary, steps adequate to national conditions must be implemented to foster and support the full development and usage of machinery for voluntary bargaining to regulate terms and conditions of employment through collective agreements. Section 11(2) of the Constitution of Malawi enjoins the judiciary to have regard to current norms of public international law and comparative law.[129] The Southern Africa Coordination Council (SATUCC), founded in 1983, is a regional trade union organisation that represents all the major trade union federations in the SADC region.[130] The main idea was to establish a strong regional trade union body that could play a role in the political liberation struggle and influence regional policy in favour of workers. Today, SATUCC is the SADC's only formally recognised representative regional trade union confederation with special status.[131] The Charter of Fundamental Social Rights in SADC, which was initiated

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124 Nicol, 'Legislation, Registration, Emasculation' 56.
125 Article 25(2) of the Namibian Constitution.
126 Article 25 (1) of the Namibian Constitution.
127 Section 25(1) of the Malawi Labour Relations Act 16 of 1996.
128 Article 4 of Convention No 98.
129 Section 11(2) of the Constitution of Malawi.
130 See SATUCC, 'About Us' (*Satucc.org*, 2021) <https://satucc.org/about-us> accessed 6 July 2024.
131 See International Trade Union Confederation, 'Trade Union Development Projects Directory' <https://projects.ituc-csi.org/> accessed 13 April 2024: 'For trade unions, development

by SATUCC and its affiliates and was adopted in 2003, is one such major achievement. SATUCC currently has 22 affiliates in 14 of the 16 SADC member states.[132]

5.2.2 Freedom of association in the United States of America

Freedom of association is not expressly guaranteed in the United States Constitution, but the United States Supreme Court has on several occasions confirmed that freedom of association is implied by freedom of assembly.[133] The United States Constitution was written in 1787, ratified in 1788, and came into effect in 1789.[134] It is the world's longest-surviving written charter of government. It is the first Constitution to give effect to the concept of human rights by making them justiciable and enforceable through the instrumentality of the courts.[135] The opening words of its Preamble, 'We The People of the United States', affirm that the government of the United States exists to serve its citizens.[136] The US Supreme Court first recognised the right of people to associate freely for expressive purposes in 1958 in *NAACP v Alabama*.[137] Although the US government voted in favour of approving ILO Convention 87 at the ILO, the government has not yet ratified this convention. Convention 87 is still sitting on the Senate shelf over sixty years later,[138] the Senate Committee on Foreign Relations' longest-pending treaty.

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cooperation is a part of our commitment to fight poverty, promote sustainable social development and improve working and living conditions for all.'

132 Union of International Associations, 'Southern African Trade Union Coordination Council' UIA Yearbook Profile <https://uia.org/s/or/en/1100055359> accessed 13 April 2024.

133 Anna F Steyn, *Groepsdinamika as Sosiologiese Teorie* (RAU 1969) 5–7; Kingsley Davis, *Human Society* (Macmillan 1970) 24–31; SJ Stoljar, *Groups and Entities: An Inquiry into Corporate Theory* (Australian National University Press 1973) 6–24; Gerritt Johannes Pienaar, 'Die Gemeenregtelike Regspersoon in die Suid-Afrikaanse Privaatreg' (LLD thesis, Potchefstroom University for Christian Higher Education 1982) 1–2.

134 Gerrit Pienaar, 'Regsosiologie: Sentimentele Humanisme of Nugtere Realisme?' [1988] TSAR 184, 187–89; *Morrison v Standard Building Society* 1932 AD 229, 235.

135 William B Lockhart and others, *Constitutional Law: Cases, Comments, Questions* (6th edn, West Pub Co 1986) 431–54; Ronald D Rotunda, *Modern Constitutional Law: Cases and Notes* (3rd edn, West Pub Co 1989) 593–690.

136 On the rights of aliens, see Lockhart and others, *Constitutional Law* 1272–80; Rotunda, *Modern Constitutional Law* 541–54.

137 *NAACP v Alabama* 357 US 449 (1958).

138 Steve Charnovitz, 'The ILO Convention on Freedom of Association and Its Future in the United States' (2008) 102 American Journal of International Law 90, 90, 91; Richard J Byrne, 'Civil Rights' (1988) 38 Drake Law Review 157; Paula J Finlay, 'Prying Open the Clubhouse Door: Defining the Distinctly Private Club After *New York State Club Association v. City of New York*' (1990) 68 Washington University Law Quarterly 371, 381–97.

The US Congress passed the National Labor Relations Act (NLRA) in 1935 as part of its ability to regulate interstate commerce under the Commerce Clause of the United States Constitution.[139] The NLRA is the chief statute that governs collective bargaining. It is often referred to as the Wagner Act and it expressly provides employees with the right to join trade unions and engage in collective bargaining.[140] In the United States, unions are the largest and most powerful employee organisations. The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the Strategic Organizing Center (SOC), formerly known as the Change to Win Federation (CtW), are the umbrella organisations for the majority of trade unions.[141] The United States Chamber of Commerce is the largest employers' organisation in the country, dedicated to representing employers' interests through lobbying campaigns.[142] Employers can and do form multi-employer negotiating organisations to jointly negotiate the terms of collective bargaining agreements with employee-elected unions in certain heavily unionised sectors.[143]

Unsurprisingly, the ILO is the United Nations' most effective advocate for human rights, given its tripartite organisation and long-established apparatus for regulating the enforcement of the ILO norms.[144] The United States' credibility in its long-running efforts to use trade policy to promote respect for globally recognised worker rights has been harmed by its failure to ratify key ILO treaties.[145] Unlike the rights of religion, expression, press, assembly, and petition, freedom of association is not specified in the First Amendment to the US Constitution but is recognised as a fundamental right by the courts and guaranteed by all modern and democratic legal systems, including in the United States Bill of Rights.

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139 Article I, Section 8, Clause 3 of the US Constitution.
140 National Labor Relations Act of 1935.
141 Kenneth L Karst, 'The Freedom of Intimate Association' (1980) 89 Yale LJ 624.
142 See the authority stated by JD van der Vyver, *Die Juridiese Funksie van Staat en Kerk: 'n Kritiese Analise van die Beginsel van Soewereiniteit in Eie Kring* (Butterworths 1972) 104–107.
143 Section 17 of the NLRA.
144 Steven H Shiffrin and Jesse H Choper, *The First Amendment*: *Cases, Comments, Question* (West Pub Co 1991) 509.
145 Steve Charnovitz, 'The ILO Convention on Freedom of Association and Its Future in the United States' 101 (Statement of Elizabeth Dole, Secretary of Labor).

The NLRA outlines processes for choosing a labour organisation to represent a group of employees in collective bargaining.[146] Employers are prohibited from meddling with this process under the law. The NLRA mandates the employer to bargain with the employee's designated representative.[147] It does not force either party to accept a proposal or make compromises, but it does set procedures for bargaining in good faith. Collective bargaining may not be allowed for proposals that would violate the NLRA or other laws.[148] The NLRA also specifies rules for the methods such as strikes, lock-outs, and picketing that each side may use to achieve their negotiation goals. State laws further regulate collective bargaining and make collective agreements enforceable under state law.[149]

In 1886 the American Federation of Labor was created, and it provided unprecedented bargaining ability for various employees.[150] In the USA, collective bargaining has a long history, although it was not authorised and safeguarded by legislation until the 20th century.[151] In the early 20th century, the United States community began focusing on federal law to address ongoing labour disputes and to create a united federal strategy for collective bargaining in the private sector.[152] Collective bargaining in the public sector was regulated later in the second half of the 20th century. The result is a collective bargaining agreement that sets the rules of employment. Members of the union pay for the cost of this representation by way of union fees.[153]

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146 Section 17 of the NLRA.

147 Steyn, *Groepsdinamika as Sosiologiese Teorie* 5–7; Davis, *Human Society* 24–31; Stoljar, *Groups and Entities* 6–24; Pienaar, 'Die Gemeenregtelike Regspersoon in die Suid-Afrikaanse Privaatreg' 1–2.

148 M Glenn Abernathy, *The Right of Assembly and Association* (2nd ed, rev 1st paperback ed, University of South Carolina Press 1981) 173; Aviam Soifer, 'Freedom of Association: Indian Tribes, Workers, and Communal Ghosts' (1989) 48 Maryland Law Review 350, 353–55.

149 Lockhart and others, *Constitutional Law* 431-54; Rotunda, *Modern Constitutional Law* 593–690.

150 Steyn, *Groepsdinamika as Sosiologiese Teorie* 5–7; Davis, *Human Society* 24–31; Stoljar, *Groups and Entities* 6–24; Pienaar, 'Die Gemeenregtelike Regspersoon in die Suid-Afrikaanse Privaatreg' 10–12.

151 Gerrit Pienaar, 'Die Reg insake Verbode Organisasies – 'n Regsvergelykende Studie' (1986) 1 SA Publiekreg / SA Public Law 71 regarding freedom of association in Greek and Roman law.

152 Shiffrin and Choper, *The First Amendment* 509.

153 Leo Troy, *Beyond Unions and Collective Bargaining* (Sharpe 1999) 205.

5.2.2.1 Railway Labor Act of 1926

Congress enacted the Railway Labor Act of 1926 to avoid labour disputes. This statute required employers to bargain collectively with unions.[154] In 1936, Congress applied the Railway Labor Act to the airline industry. Airlines were perceived as comparable to the railroads, a national transportation system in which strikes could negatively impact the market. In the USA, collective agreements cover 60% of airline employees and railroad employees.[155] The federal agency called the National Mediation Board (NMB) whose three representatives are chosen by the President of the United States controls this process. Strikes cannot take place unless the NMB 'releases' the parties from the mediation and arbitration process. Practically speaking, the procedure may sometimes take years to reach a solution. The President has authority to declare a national emergency and make an order that strikers should resume work even if the NMB releases the parties and a strike takes place.[156]

The American Convention on Human Rights is an international human rights treaty. It was ratified by a large number of Western Hemisphere countries on 22 November 1969 in San José, Costa Rica.[157] Also known as the Pact of San José, it entered into force on 18 July 1978, when the eleventh instrument of ratification (that of Grenada) was placed.[158] According to Article 16 of the Convention, '[e]veryone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes'.[159] The exercise of this right is subject solely to legal restrictions that are necessary in a democratic society, in the interests of national security, public safety, or public order, or to preserve public health, morals, or others' rights and freedoms.

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154 Section 32 of the Railway Labor Act.

155 Jon O Shimabukuro, 'Collective Bargaining and Employees in the Public Sector' (2011) Congressional Research Service (CRS) Report for Members and Committees of Congress R41732 1, 25 <https://crsreports.congress.gov/product/pdf/R/R41732/2> accessed 29 April 2024.

156 See the authority stated by Van der Vyver, *Die Juridiese Funksie van Staat en Kerk* 104–107.

157 Steyn, *Groepsdinamika as Sosiologiese Teorie* 5–7; Davis, *Human Society* 24–31; Stoljar, *Groups and Entities* 6–24; Pienaar, 'Die Gemeenregtelike Regspersoon in die Suid-Afrikaanse Privaatreg' 1–2.

158 Pienaar, 'Regsosiologie' 187–89.

159 Article 16 of the Railway Labor Act.

The provisions of Article 16 of the Convention do not prevent the imposition of legal restrictions (including even the deprivation of the exercise of the right of association) on members of the armed forces and police.[160] Swepston claims that Article 8 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1999) (usually known as the 'Protocol of San Salvador') develops this in a way that is similar to the provisions of the UN International Covenant on Economic, Social, and Cultural Rights (1966) (ICESCR).[161] Paragraph 3 of this Article 8 is a provision that is not included in any of the other standards reviewed here, stating that '[n]o one may be compelled to belong to a trade union'. As a result, trade union security clauses and practices violate this additional protocol.[162]

5.3 Summary

ILO Conventions 87 and 98 are two of the ILO's eight fundamental conventions, which means that even if the ILO Member States have not ratified the relevant ILO conventions, all ILO Member States must respect, promote, and implement freedom of association and effectively recognise collective bargaining, as is stated in the ILO's Declaration on Fundamental Principles and Rights at Work. Organisations that collaborate with unions have fewer employee grievances to deal with, a more motivated staff, and fewer strike days. Strong trade unions with solid working connections with management enable the ongoing resolution of problems as they arise, rather than allowing them to build into major media stories. Conventions 87 and 98 are two of the most important ILO Conventions, and the ones most valued by workers around the world. Convention 87 stipulates that all workers and employers, without exception, have the freedom to form and join organisations of their choosing,[163] and it includes guarantees that those

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160 Hacker (1987) 489–90; Byrne, 'Civil Rights' 157; Finlay, 'Prying Open the Clubhouse Door' 381.

161 Article 8 of the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights (1999). See 'Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights; Protocol of San Salvador; Signed at San Salvador, El Salvador, on November 17, 1988, at the Eighteenth Regular Session of the General Assembly' (1988-1993) Pan American Union Treaty Series.

162 Swepston, 'Human Rights Law and Freedom of Association' 174.

163 ILO Convention 87.

organisations and any federations that may be formed will be able to carry on their operations without interference from the government.

Member States that ratify the convention are expected to take all necessary and appropriate measures. Social conversation is essential for resolving conflicts fairly and expeditiously. Since these agreements are two of the ILO's eight fundamental conventions, and even if they have not ratified the relevant ILO conventions, all ILO Member States must respect, promote, and implement freedom of association and effectively recognise collective bargaining. Recognising trade unions helps long-term corporate growth. Workers that are meaningfully engaged with can resolve grievances in unionised workplaces, leading to a more devoted and productive workforce with reduced absenteeism, lower turnover, timely delivery, and a higher percentage of retained clients.

The USA has three major reasons for not ratifying Conventions 87 and 98. First, national labour policy in the USA is well-established, maintains a delicate balance between business and labour interests, and should not be disrupted to meet the wishes of an international organisation. Secondly, the USA has a responsibility as a member of the ILO, regardless of whether it has ratified the conventions, to uphold the spirit of Conventions 87 and 98, based on the recent ILO Declaration on Fundamental Principles and Rights at Work (1998) and long-standing ILO policy. As the USA mostly fulfils that responsibility, actual ratification is superfluous.

Thirdly, the federal system of the USA, which reserves certain rights to the states, impedes ratification because the conventions would affect the employees of state and local governments and others falling outside the coverage of federal labour statutes.[164] Protecting individual rights and freedoms in the USA is based on a system of checks and balances. Meaningful restrictions on freedom of association exist for the benefit of the community. The US Supreme Court plays a significant role in maintaining the balance between individual rights and state intervention on behalf of the community.

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164 NLRA; Railway Labor Act; and Civil Service Reform Act of 1978.

Rounding off this thesis, the following chapter takes stock of the shortcomings of the South African Constitution and its interpretation or implementation through statutory enactments or legal infrastructure. That chapter also makes recommendations, including redrafting of the relevant provisions of the LRA that constrain the exercise of freedom of association.

CHAPTER 6: CONCLUSION AND RECOMMENDATIONS

6.1 Introduction

In the first place, this chapter assesses the shortcomings of the South African Constitution and its interpretation or implementation through statutory enactments or other legal infrastructure.

Secondly, this chapter makes recommendations, including redrafting the relevant provisions of the LRA that have a constraining effect on the exercise of freedom of association. It is hoped that, by now, some useful lessons would have been drawn from the two decades of constitutional enterprise and labour adjudication.

Finally, it is submitted that a discussion of this nature cannot be complete without attempting to highlight areas of shortcoming and suggesting remedial measures where appropriate. In this regard, the focus is on two areas: (a) the provisions of the Constitution and the interpretation thereof by the courts, and (b) the provisions of the LRA. In the paragraphs that follow, the chapter presents conclusions and recommendations that will lead to strategic as well as tactical changes in the way the constitutional right to freedom of association conferred on trade unions ought to be interpreted and applied.

Section 1 of the Constitution states that South Africa is established on the principles of human dignity, equality, and the growth of human rights and freedom, as well as the supremacy of the Constitution, regular elections, and a multi-party democratic governance system. The Constitution's vision of multi-party democracy promotes and assures the principle that minority political parties have a voice in the established political party arena. This is not reflected in the multiplication of political parties, but rather in the fact that political parties maintain their existence and importance via their members' votes.

The Bill of Rights incorporated in Chapter 2 of the Constitution is considered the cornerstone of democracy in South Africa since it enshrines the rights of all individuals in our nation and promotes the democratic principles of human dignity, equality, and freedom. The Constitution of the Republic of South Africa, 1996 seeks, among other things, to guarantee freedom of association, the rights of

employees to form and join trade unions and to strike, and the rights of trade unions, employers, and employers' organisations to bargain collectively. Chapter 3 of this thesis has given the background of the source of organisational rights in South African labour legislation and how a registered trade union acquires these rights.

If organisational rights are exercised in the workplace, it is critical to comprehend the concept of a 'workplace' before deciding on the representativity of a union. Using decided cases and arbitration rulings, Chapter 3 of the thesis examined what defines a 'workplace' under section 213 of the LRA. Chapter 4 of the thesis then began by discussing the relevant international instruments. A crucial insight is that comprehending freedom of association in the present labour law environment must start with the major source of South African labour law, the ILO Conventions. Chapter 5 of the thesis compared selected similar jurisdictions having a legal history of judicial interpretation of the right to freedom of association. The chapter examined, analysed, and derived some important conclusions on the right to free association.

6.2 Conclusion

It is critical to note that the LRA's primary purpose is to advance economic development, social justice, labour peace, and the democratisation of the workplace. In terms of the LRA, the primary means of achieving these objectives is through the encouragement of collective bargaining, especially centralised or industrial level collective bargaining. The LRA further states that it purports to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution.[1]

Section 1 of the South African Constitution endorses pluralism by promoting a democratic system founded on basic values such as equality, freedom, and a multi-party government. This system generates a multi-party democracy paradigm, which is particularly visible in the political realm, where all people are free to associate and are treated equally on the basis of their preferences. Minorities are also given a voice in political parties. This has been argued to be true in labour relations as

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1 Section 1 of the LRA.

well. The utilitarian principle at the heart of majoritarianism, according to Malan, is undemocratic because it only benefits the majority. Malan further claims that section 23 of the South African Constitution must be read in the context of section 1, implying that collective bargaining should be performed equally.[2] Additionally, Kruger and Tshoose state that minority unions are instrumental in equalising bargaining power. The rights in section 23 of cannot but be interpreted in the light of the provisions of section 1 of the Constitution. The founding principle of equality, as mentioned above, therefore entails that the right of a trade union to engage in collective bargaining should be regarded as an equal right.[3]

6.2.1 Provisions of the South African Constitution and their interpretation by the courts

The South African Constitution is the supreme law of the Republic; any law or conduct that contradicts it is unconstitutional, and the obligations imposed by it must be met.[4] The South African position with a Constitution that is supreme[5] encourages the participation of 'minority political parties' in political discourse. It is argued that this constitutional dispensation should on the same premise form the basis to consider allowing minority trade unions to enjoy organisational rights. Although the Constitution expressly caters for minority interests, the principle of majoritarianism still prevails where there is an unwillingness to provide for the recognition of minority trade unions which might be inclined towards the listed categories protected by the Constitution. Section 18 of the Constitution protects the rights of all citizens, stating that everyone has the right to freedom of association.[6] Everyone has the right to fair labour practices under section 23 of the Constitution, and every worker has the right to form and join a trade union.[7]

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2 Koos Malan, 'Observations on Representivity, Democracy and Homogenisation' [2010] TSAR 427.

3 J Kruger and CI Tshoose, 'The Impact of the *Labour Relations Act* on Minority Trade Unions: A South African Perspective' (2013) 16 PELJ 284, 312.

4 Section 2 of the Constitution.

5 Section 2 of the Constitution.

6 Section 18 of the Constitution.

7 Section 23 of the Constitution.

Section 9 of the Constitution provides:

> (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
> (2) Equality includes the full and equal enjoyment of all rights and freedoms.

Paragraph 5(2)(*c*) of the ILO's Collective Agreements Recommendation 1951 (No 91) states that, prior to the extension of the agreement, the employers and workers to whom the agreement would be made applicable by its extension should be given an opportunity to submit their observations.[8]

6.2.2 Section 23(6) of the South African Constitution and its impact on trade union security arrangements

According to section 23(6) of the Constitution, national legislation may recognise union security provisions specified in collective agreements. Consequently, the LRA recognises both agency shop and closed shop agreements. While union security arrangements are not exempt from constitutional examination, a petitioner seeking to bring a constitutional claim confronts a significant challenge. In this regard, *Greathead v Metcash Trading Ltd* made it pertinently clear that to succeed in having an agency shop agreement declared unconstitutional, section 25 of the LRA must first be declared unconstitutional.[9] It is settled law that it is not competent for a litigant to bypass legislation (such as the LRA) and rely directly on the Constitution in claiming that a collective agreement (such as an agency shop agreement) is unconstitutional. This explanation reflects the position that in South Africa, even though freedom of association is guaranteed by the Constitution, the freedom not to associate is not protected at all and the majoritarian approach always prevails.

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8 International Labour Organization, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th (rev) edn, ILO 2006) 6.

9 *Greathead v Metcash Trading Ltd* (WLD) unreported case no 97/24313; *UASA – The Union v BHP Billiton Energy Coal SA* (2013) 34 ILJ 1298 (LC), [2013] 1 BLLR 82 (LC) [23].

6.2.3 How agency shop and closed shop agreements impact freedom of association

6.2.3.1 Agency shop agreements

Section 25(1) of the LRA states:

> A representative trade union and an employer or employers' organisation may conclude a collective agreement, to be known as an agency shop agreement, requiring the employer to deduct an agreed agency fee from the wages of employees identified in the agreement who are not members of the trade union but are eligible for membership thereof.

Section 25(4)(*a*) of the LRA provides that despite the provisions of any law or contract, an employer may deduct the agreed agency fee from the wages of an employee without the employee's authorisation.[10]

6.2.3.2 Closed shop agreements

Section 26 of the LRA stipulates that a closed shop agreement may be concluded between a registered trade union and a registered employers' organisation in respect of a sector and area to become binding in every workplace in which

> (a) a ballot of the employees to be covered by the agreement was held, and (b) two-thirds of the employees who voted have voted in favour of the agreement.[11]

No trade union that is a party to a closed shop agreement may refuse an employee membership or expel an employee from the trade union unless the refusal or expulsion is in accordance with the trade union's constitution and the reason for the refusal or expulsion is fair, including, but not limited to, conduct that undermines the trade union's collective exercise of its rights.[12] The LRA states that it is not unfair to dismiss an employee for refusing to join a trade union party to a closed shop agreement if the employee is refused membership of that trade union and the refusal accords with section 26(5) of the LRA.[13] The employees at the time that a closed shop agreement takes effect may also not be dismissed for refusing to join a trade union party to the agreement; and employees may not be dismissed for refusing to join a trade union party to the agreement on the grounds of conscientious

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10 Section 25(4)(*a*) of the LRA.
11 Section 26(4) of the LRA.
12 Section 26(5) of the LRA.
13 Section 26(6) of the LRA.

objection.[14] These employees may be required by the closed shop agreement to pay an agreed agency fee, in terms of the LRA.[15]

The constitutionality of these provisions remains untested. Yet they can be regarded as expressions of majoritarianism as defined in *Putco*. In *SA Airways (SOC) Ltd (In Business Rescue) v National Union of Metalworkers of SA on behalf of members*,[16] the Labour Appeal Court held that where legislation has been enacted to give effect to a constitutional right, a party may not rely directly on the general provisions of the constitutional right to fair labour practices in section 23 or the equality clause in section 9 of the Constitution. This ruling is consistent with the subsidiarity principle, which states that when legislation is enacted to give effect to specific constitutional rights, reliance must first be placed on the provisions of the specific legislation, and they must be challenged if they do not adequately give effect to the constitutional rights in question.[17]

6.2.4 Right to engage in collective bargaining

The LRA gives legislative expression to the constitutional right to fair labour practices. Its scope covers the interests of both employers and employees.[18] Section 23(5) of the Constitution provides that every trade union, employer's organisation, and employer has the right to engage in collective bargaining. The Constitution does not refer to the fact that the right to engage in collective bargaining belongs exclusively to trade unions that meet a particular threshold. The issue of thresholds only emanates from the LRA, which purports to give effect to section 23 of the Constitution. Section 23 of the Constitution states that '[e]veryone has the right to fair labour practices'. Additionally, Cheadle argues that 'the term everyone should be interpreted broadly, in the sense that it should be understood to refer to all the parties mentioned in the aforementioned constitutional provision',[19] thus including employers, trade unions, and employers' organisations. Section 23(2) of

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14 Section 26(7) of the LRA.
15 Section 26(8) of the LRA.
16 *SA Airways (SOC) Ltd (In Business Rescue) v National Union of Metalworkers of SA on behalf of members* 2021 (2) SA 260 (LAC) (hereinafter *SA Airways (SOC) Ltd (In Business Rescue)*).
17 *SA Airways (SOC) Ltd (In Business Rescue)* [38].
18 *SA Airways (SOC) Ltd (In Business Rescue)* [38].
19 MH Cheadle, 'Labour Relations' in MH Cheadle, DM Davis and NRL Haysom, *South African Constitutional Law: The Bill of Rights* (Issue 11, LexisNexis 2011) 18-3.

the Constitution grants an employee the right to join a trade union of his or her choice, thereby exercising the right to freedom of association guaranteed by section 18 of the Constitution.

6.2.5 Dismissal in terms of section 26(6) of the Labour Relations Act

Section 26(6) of the LRA provides that it is not unfair to dismiss an employee for refusing to join a trade union party to a closed shop agreement. It also provides that it is not unfair to dismiss an employee who is expelled or refused membership of a trade union party to a closed shop agreement. This position is problematic where an employee is dismissed for a reason not related to work, especially in situations where the employee has very scarce skills. This position can also affect the recruitment budget, especially if such an employee was recruited by a recruitment agency.

6.2.6 Collusion between an employer and a majority union to prevent another union from acquiring access by raising thresholds

An employer and a majority union can collude to prevent a union, which is otherwise sufficiently representative, from acquiring access and stop order rights by raising thresholds. That possibility is suggested by the award in *Oil Chemical General & Allied Workers Union and Volkswagen of SA (Pty) Ltd*.[20] In this case, NUMSA and VWSA entered into a collective agreement in terms of section 18 of the LRA, setting the threshold for acquisition of the rights that OCGAWU sought at 30% of the company's hourly rated workforce. The commissioner ordered NUMSA to disclose a list of the names of its members. VWSA took that order to the Labour Court, contending that the CCMA had acted irregularly because NUMSA had an obvious interest in the order and had not been joined in the proceedings. The court referred the matter back to the CCMA. Another commissioner was assigned to hear the matter. Shortly before the dispute was set down for arbitration, NUMSA and VWSA concluded a further agreement, this time raising the threshold to 40% of the hourly rated workforce. OCGAWU had to prove that it had 40% or more membership in the hourly rated workforce. OCGAWU could not prove that percentage, and it

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[20] *Oil Chemical General & Allied Workers Union and Volkswagen of SA (Pty) Ltd* (2002) 23 ILJ 220 (CCMA), [2002] 1 BALR 60 (CCMA) (hereinafter *OCGAWU v VWSA*).

attacked the validity of threshold on three grounds. First, NUMSA and VWSA were not empowered by LRA to enter into a threshold agreement because NUMSA was not a majority union in the workplace. Secondly, VWSA had deducted and paid over union dues to another minority union, Mineworkers Solidarity, even though the union did not qualify under either of the threshold agreements. Thirdly, OCGAWU's latest threshold agreement was invalid because it had been entered into in bad faith after OCGAWU had referred the matter to the CCMA solely for the purposes of thwarting the application. The commissioner said that the introduction of so high a threshold for trade unions that had traditionally enjoyed majority support among hourly paid employees would have constituted a radical departure from the rights won by many unions in their historical bargaining constituencies.

The legislature clearly sought to promote 'majoritarianism' when it passed the LRA. However, it is unlikely that the legislature intended to limit the rights of unions that had established majority status in accepted bargaining units by doing so. The likelihood that the legislature had this intention recedes still further when the LRA is read, as it must be read, in the light of the promotion of orderly collective bargaining. That the legislature did not wish to deprive recognised unions of their existing rights is also apparent from item 13 of Schedule 7 to the LRA, which preserves collective agreements concluded before the LRA commenced. In *OCGAWU v VWSA*, the commissioner ruled that the threshold agreement could not be declared invalid on the ground that NUMSA lacked membership sufficient to make it a majority union in VWSA's entire workforce.

The commissioner noted that VWSA and NUMSA had been brutally honest about their motive for concluding the agreements simply to keep OCGGAWU out of the VWSA plant. That objective, said the commissioner, was precisely what any agreement under section 18 is designed to achieve. It was, therefore, irrelevant that NUMSA and VWSA had entered into their agreement only after OCGAWU had referred the dispute to the CCMA. Although it might appear distasteful that the respondent parties to arbitration should be able to alter the threshold to ensure that the applicant could not qualify for the claimed rights, nothing in the LRA precluded a majority union and an employer from doing so. Such provision is not compatible with Article 3 of ILO Convention 87 because it infringes the very concept of freedom

of association with others and it also implies that freedom not to associate with others or not to join unions is not protected.

The interplay of the constitutional rights to freedom of association highlights the conflict over minority unions' acquiring organisational rights.[21] The establishment of a threshold is a regulatory mechanism used to acquire certain organisational rights. However, majority trade unions and employers tend to exclude minority trade unions from organising by setting excessively high thresholds. This behaviour has ramifications for other trade unions, as they may be barred from obtaining certain organisational rights. As a result, it becomes unreasonably difficult for other trade unions to represent their members effectively. This could be considered as collusion and abuse of power. Section 18 of the LRA promotes a collective bargaining system in which majority unions' positions are strengthened while minority unions' positions are marginalised. 'Pluralism and diversity, which should be respected in a democracy, are being stifled through the application of section 18 of the *LRA*.'[22]

6.2.7 Lapse of a collective agreement

As mentioned earlier, it is common practice that the union and the employer may agree on the terms and conditions of the new relationship by entering into a collective agreement after a union has been recognised in a workplace. This agreement would usually include a clause which states that when a union's membership percentage decreases to such an extent that that union is no longer entitled to certain organisational rights, the employer may give that union a notice of termination for three months to try to increase its membership. Should the status quo remain the same or worsen after three months, derecognition must be applied, and this step results in a change to the rights that that union was entitled to when the collective agreement was signed.

The question then remains whether an employer, in the absence of a collective agreement, may inform a union of the withdrawal of specific organisational rights

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21 Sean Snyman, 'The Principle of Majoritarianism in the Case of Organisational Rights for Trade Unions – Is It Necessary for Stability in the Workplace or Simply a Recipe for Discord?' (2016) 37 ILJ 865.

22 J Kruger and CI Tshoose, 'The Impact of the *Labour Relations Act* on Minority Trade Unions: A South African Perspective' (2013) 16 PELJ 285, 288.

as a result of the decrease in membership in the workplace. The organisational rights acquired by a collective agreement are no longer enjoyed by the union when this collective agreement has lapsed. This position is problematic when the union members would like to proceed to enjoy such organisational rights, such as the representation of members in hearings. The sudden change and the loss of organisational rights enjoyed by the union can negatively affect the employment relationship because the employees will be used to a different state of affairs and such a change can create conflict and disputes. Some of the policies depend on the existence of that collective agreement and, when it lapses, they are no longer operative.

In most instances, the collective agreements enhance what is provided by employment law, and, when they lapse, provisions of the labour legislation apply. In most cases, this becomes the source of conflict in the workplace which often results in disputes and industrial actions. Section 21(11) of the LRA provides that '[a]n employer who alleges that a trade union is no longer a representative trade union may apply to the Commission to withdraw any of the organisational rights conferred by this Part [of the LRA].'

It is argued that majoritarianism in the LRA is driven by the conclusion of threshold agreements concluded in terms of section 18 of the LRA which then culminates in collective agreements. After collective agreements have been signed off and implemented, the legislative requirements listed under sections 23 and 32, respectively, are usually met: this then allows the extension to non-parties who fall within the bargaining unit. Section 31 of the LRA regulates the binding nature of collective agreements signed at the bargaining council. In terms of section 31, such agreements bind only the contracting parties and their members. Therefore, the legislature included section 32, which confers on a bargaining council the privilege to request the Minister of Labour to extend a collective agreement to members not party to the collective agreement but within its registered scope. It is argued that section 31 does not differ from section 23 except for the fact that it considers the structure and the identity of the bargaining council.

Section 31(*a*) of the LRA provides that a collective agreement concluded at the bargaining council is binding only on the parties to the bargaining council who are

parties to the collective agreement. According to section 23(1)(*d*) of the LRA, a collective agreement binds employees who are not members of the registered trade union or trade unions party to the agreement if the employees are identified in the agreement which expressly binds the employees and such trade union or unions have as their members the majority of employees employed by the employer in the workplace.[23]

In the mining sector, the majority union's signing the collective agreement leads to the signing of other collective agreements regulating medical incapacity which is then extended to the minority unions and the rehabilitation of medically unfit employees. The majority union will remain the prominent member of the medical incapacity committee. The rehabilitation agreement would then require that only members of the majority union can stand for full time election even if the majority union is in a coalition with another union. It is submitted that the majority union in a coalition calls the shots and the minority union becomes the puppet for the sake of retaining the space at the negotiation table.

It is worth noting that section 65(1) of the LRA states:

> No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if—
> (*a*) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute;
> (*b*) that person is bound by an agreement that requires the issue in dispute to be referred to arbitration;
> (*c*) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act or any other employment law….'[24]

This position reflects the fact that, through extensions of collective agreements, minority rights are somewhat trampled upon. Section 80 of the LRA allows majority unions to give instructions to the employer for the establishment of workplace forums. Workplace forums are committees of employees elected by their co-workers. They regularly consult with employers about workplace issues. The forums do not replace collective bargaining but deal instead with issues that are better resolved through consultation rather than collective bargaining. These issues do

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23 Section 23(1)(*d*) of the LRA.
24 Section 65 of the LRA.

not include matters of mutual interest but working conditions such as restructuring processes and the introduction of new technologies.

However, workplace forums are set up to promote the interests of all employees in the workplace, to improve workplace efficiency, to consult employees on certain issues, and to include employees in joint decision-making on other issues. This description in itself, again, shows how minority unions are overpowered by the majority unions. The South African workplace forum system is largely consultative, with some issues requiring joint decision-making. The limitations of real decision-making are obvious, as the issues listed for joint decision-making are constrained by the legislative framework. Although it is possible to expand the list of issues through negotiation, section 23 of the LRA requires the support of the established trade union for the agreement to have a binding effect as a collective agreement. Another limitation that predates the former is that the establishment of a workplace forum is subject to approval by trade unions under the statutory system.

The binding nature of collective agreements is evident in *Imperial Cargo (Pty) Ltd v Democratised Transport Logistics & Allied Workers Union*.[25] The appellant and its employees fell within the registered scope of the National Bargaining Council for the Road Freight and Logistics Industry (NBCRFLI) and were, therefore, bound by its main collective agreement. Under that agreement, strikes were prohibited at the plant level in furtherance of demands involving cost and affecting the wage packets of employees. The union had given notice of its intention to strike at the plant level over four separate demands. On the grounds that the main collective agreement of the bargaining council prohibited strike action in support of requests involving serious difficulties at the plant level, the employer sought intervention from the Labour Court in the form of an interdict. The main agreement defined 'substantive issues' as 'all issues involving cost and affecting the wage packet of employees'.[26] As a result, industrial action at the plant level in support of cost-related demands that affected employees' pay packets was prohibited.[27] According to the main agreement, collective bargaining and industrial action on substantive concerns

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25 *Imperial Cargo (Pty) Ltd v Democratised Transport Logistics & Allied Workers Union* (2019) 40 ILJ 2499 (LAC) (hereinafter *Imperial Cargo v DETAWU*).
26 *Imperial Cargo v DETAWU* [5].
27 *Imperial Cargo v DETAWU* [4].

were reserved for centralised collective bargaining. While that demand might be legitimate and understandable, it comprised a substantive issue as defined by the main agreement and was thus a bargaining topic to be negotiated at the bargaining council. The Labour Appeal Court upheld the supremacy of the collective agreement.

Paragraph 5 of the ILO's Collective Agreements Recommendation 1951 (No 91) states:

> (1) Where appropriate, having regard to established collective bargaining practice, measures, to be determined by national laws or regulations and suited to the conditions of each country, should be taken to extend the application of all or certain stipulations of a collective agreement to all the employers and workers included within the industrial and territorial scope of the agreement.
> (2) National laws or regulations may make the extension of a collective agreement subject to the following, among other, conditions;
> (a) that the collective agreement already covers a number of the employers and workers concerned which is, in the opinion of the competent authority, sufficiently representative;
> (b) that, as a general rule, the request for extension of the agreement shall be made by one or more organisations of workers or employers who are parties to the agreement;
> (c) that, prior to the extension of the agreement, the employers and workers to whom the agreement would be made applicable by its extension should be given an opportunity to submit their observations.

The focus in relation to this discussion is on paragraph 5(2)(*c*) of the Collective Agreements Recommendation. The status quo is not the same in South Africa, as is shown in the various judgments discussed in this thesis.

Minority unions' rights are recognised and protected by the ILO. According to Kruger and Tshoose, minority unions may approach the ILO on the grounds that the LRA encourages a majority trade union monopoly, which violates international rules of freedom of association.[28]

In *UASA - The Union and Others v Western Platinum (Pty) Ltd and Others*,[29] the employer had previously recognised the National Union of Mine Workers, Solidarity, and the United Association of South Africa. NUM was previously the majority union and had since lost its membership. Although the bargaining unit had since been

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28 Kruger and Tshoose, 'The Impact of the *Labour Relations Act* on Minority Trade Unions' 316.

29 *UASA - The Union and Others v Western Platinum (Pty) Ltd and Others* (JA61/2019) [2020] ZALAC 65 (13 November 2020; (2021) 42 ILJ 371 (LAC).

expanded, granting the unions the requested organisational rights would not redefine the new bargaining unit. Acting jointly, NUM, Solidarity and UASA sought organisational rights conferred by sections 12, 13, and 15 of the LRA. Membership numbers of NUM, Solidarity and UASA were, respectively, 1 067; 736; and 417 in a total workforce of 22 689, and AMCU's membership was 18 969. The commissioner stated that section 18 of the LRA makes it legal for majority unions and employers to reach agreements that set the bar for acquiring the organisational rights outlined in sections 12, 13, and 15. Section 21(8C) of the LRA authorises unions to be granted those organisational rights even if their membership falls short of the required threshold. The commissioner further stated that this is only applicable if they represent a sizable number of employees.

Section 21(8C) of the LRA departs from the traditional method of establishing representativeness solely through numbers. The question was whether unions should be able to represent and defend members' significant, important, and meritorious occupational interests. The commissioner determined that a 'substantial number' is one that is not insignificant. As a result, he determined that the applicant unions represented a sizable number of workers, but he declined to rule on whether they represented a sizable interest. As a result, the unions were granted access to the workplace, a debit order facility for their membership subscriptions, and trade union leave for their respective activities. The employer was further advised to submit more information about how those rights should be exercised.

6.2.8 Number of leave days for union activities

Section 15 of the LRA provides 'that an employee is entitled to take reasonable leave during working hours for the purpose of performing the functions of that office'. Section 15 does not state how many hours or days of leave can be taken or the conditions attached to that leave. These aspects are left in the hands of the employer and the union, and they become problematic when the union requests an unreasonable number of days or when the employer offers an unreasonable number of leave days for union activities. This has been an issue in several disputes brought forward for adjudication. Majority trade unions are afforded several leave days in order to attend to their activities, and they may range up to a pool of 80 days per annum.

6.2.9 Renegotiation of bargaining unit

Through recognition agreements, majority unions renegotiate the bargaining unit to include the supervisory level: that is, the Paterson Grading C5. The South African mining sector is characterised by this type of bargaining. Most employers incorporate the principle of majoritarianism into their recognition policy but only a few recognise minority unions which are sufficiently representative in a workplace. Dealing with minority unions opens the door to multi-unionism and fragmented bargaining with competing unions negotiating on behalf of the same category of workers. This situation can be very problematic in the workplace. On the other hand, neglecting such a minority union in negotiations can be futile because a small workforce with influence could cripple a company if the union members take industrial action to force the employer to negotiate with the union.

6.3 Principle of majoritarianism versus minoritarianism in the interpretation of the right to freedom of association

Majoritarianism is not defined in the LRA, but the Constitutional Court has explained that '[i]n essence the principle of majoritarianism states that the will of the majority prevails over that of the minority'.[30] This part of the discussion examines the impact that the principle of majoritarianism has on the ability of minority unions to exercise their constitutional right to freedom of association. Section 18(1) of the LRA authorises an employer and a majority trade union in the workplace to enter into a collective agreement establishing representativeness thresholds for the exercise of the organisational rights outlined in sections 12, 13 and 15 of the LRA. As stated in Chapter 3 of this thesis, the LRA allows unions and employers to agree on representivity thresholds for access, leave, and stop order rights that are lower than those specified in the LRA. It is unclear whether a union must have a majority of the employees in the workplace as a whole, or whether a majority membership in the applicable bargaining unit is sufficient to acquire rights under sections 14 (on shop stewards) and 16 (on information).

In *Fakude v Kwikot (Pty) Ltd*, the Labour Court held that majoritarianism provides a trade union with the ability and authority to decide how a conflict is settled for the

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30 *Transport and Allied Workers Union of South Africa v Putco Ltd* 2016 (4) SA 39 (CC) [61].

advantage of the majority, regardless of whether the minority suffers as a result of the decision.[31] In *United Transport & Allied Trade Union/SA Railways & Harbours Union v Autopax Passenger Services (SOC) Ltd*, the benefit of majoritarianism over prejudice against minority trade unions was also emphasised.[32] It is impossible to overestimate the importance of limiting the number of trade union representation in a particular workplace and guaranteeing orderly collective bargaining. In the same vein, there is an overarching need to level the playing field to counter majority unions' abuse of dominance. Improving multi-party democracy at work justifies a different approach to determining threshold disputes. The rationale for the support of dominant trade unions can furthermore be seen in *Kem-Lin Fashions v Brunton*.[33] The Labour Appeal Court held that this is a policy choice made by the legislature as an aspect advantageous for orderly collective bargaining and for the democratisation of the workplace and sectors. The implication to be drawn from these cases is that the courts recognise and prefer the 'majority rules' principle. Collective bargaining is a voluntary process where employees represented by trade unions and the employers negotiate matters of mutual interest such as working conditions and remuneration.

It is submitted that the phrase '[e]very trade union' in section 23(4) of the South African Constitution must be emphasised, because it implies that even minority trade unions are now recognised as deserving of these rights. However, it is usually majority unions that are afforded a place at the collective bargaining table. Collective bargaining is largely adversarial as the parties conduct their negotiations in a rather hostile manner in order to come to a mutual resolution. The argument advanced in Chapter 3 of this thesis is that the significance of limiting the number of trade union representations in a single workplace and ensuring orderly collective bargaining cannot be overstated. In the same breath, there is an overarching need to level the playing field in order to counter majority unions' abuse or dominance. Improving multi-party democracy at work justifies a different approach to determining threshold disputes. As a result, there is merit in the argument that the

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31 *Fakude v Kwikot (Pty) Ltd* (2013) 34 ILJ 2024 (LC) [24].

32 *United Transport & Allied Trade Union/SA Railways & Harbours Union v Autopax Passenger Services (SOC) Ltd* (2014) 35 ILJ 1425 (LC) [51].

33 *Kem-Lin Fashions v Brunton* 2002 (6) SA 497 (LAC).

legislature should have placed the burden on the dominant parties to section 18 agreements to convince the arbitrator why minority applicant trade unions should not be granted organisational rights in order to offset the negative effects of the dominant parties' anticompetitive behaviour.

6.3.1 *Amcu v Royal Bafokeng Platinum Ltd*[34]

Majoritarianism enables majority trade unions to advance in the workplace, and it further limits some of the minority's rights. This was evident in *Amcu v Royal Bafokeng Platinum Ltd*. The Constitutional Court was asked to rule on whether the exclusion of minority trade unions from retrenchment negotiations violated the right to fair labour practices guaranteed by section 23(1) of the Constitution and whether the provisions of section 189(1) of the LRA were constitutionally valid. In this case, the employer concluded a collective agreement with the majority trade union, NUM, and extended it to bind the members of a minority union, AMCU. The nature of the 'collective agreement' governs who the employer should consult with during a large-scale retrenchment process.

This collective agreement was signed by the union UASA. Before retrenching, employers must consult with anyone who is required to be consulted under any collective agreement that may be in effect. If there is no collective bargaining agreement, meetings with all employees who may be affected by the retrenchment should be held. This matter concerned the unfortunate reality of retrenchments, where a company chooses to dismiss a portion of its workforce in order to remain economically viable or competitive. The employer had a valid business case for considering layoffs and issued a retrenchment notice in terms of section 189(3) notice to all of its employees. The employer conducted the required consultations with NUM and UASA as it was contractually obliged. AMCU was not included. It is worth noting that AMCU at the time had 11% membership of employees falling within the bargaining unit.

The consultation process resulted in a new collective agreement between the employer, NUM, and UASA, outlining all the terms of the retrenchments, including

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34 *Amcu v Royal Bafokeng Platinum Ltd* 2020 (3) SA 1 (CC) (hereinafter *Amcu v Royal Bafokeng Platinum*).

the identity of retrenchees and the severance pay. In accordance with 'section 23(1)(*d*) of the LRA',[35] this collective agreement was also extended to AMCU members and non-unionised employees.

On the basis set out above, AMCU was not allowed to represent its members, and AMCU members were thus served with notices of termination of employment on the grounds of retrenchment and denied access to their workstations, as their chosen trade union had been barred from representing their interests during retrenchment consultation with the employer. AMCU's initial challenge to the employer's use of a fair procedure was dropped once it became clear that the employer relied on a valid collective agreement in accordance with section 189(1) of the LRA. This collective agreement stated that in the absence of a workplace forum, any applicable collective agreement indicating whom the employer must consult with applied, even if it excluded the minority union, AMCU.

The court *a quo*, the Labour Appeal Court, earlier held that exercising power under clause 23(1)(*d*) is a public act. As a result, every renewal of a collective bargaining agreement struck between an employer and a union or unions representing a majority of the workers is subject to scrutiny. An inclusive consultation process will allow minority unions to contest the extension of collective agreements forged especially to their harm. A minority union, on the other hand, will find it difficult to claim that a genuine majority union conspired with an employer to achieve a retrenchment agreement to their harm when they were privy to the consultation process. The court held that '[t]he philosophy of the [LRA] is in favour of voluntarism and is by and large abstentionist in its approach'.[36] The court determined that the LRA's ideology favours voluntarism and is, on the whole, abstentionist in its approach. It is up to the parties to agree on workplace regulations and employment contracts. Collective agreements are prioritised as part of the trade-off since collective bargaining is primarily aimed at reaching a collective agreement. Collective bargaining agreements are sufficiently fundamental to the framework of

35 *Amcu v Royal Bafokeng Platinum Ltd* [10].
36 *Amcu v Royal Bafokeng Platinum Ltd* [24].

the LRA that they are authorised to take precedence over the requirements of the LRA.[37]

In the Constitutional Court proceedings, the first judgment, by Ledwaba AJ, and concurred in by Mogoeng CJ, Jafta J, and Madlanga J, held that section 189(1) of the LRA was unconstitutional. The first judgment held that the section unjustifiably limited the right to fair labour practices guaranteed in section 23(1) of the Constitution.[38] This is because section 189(1) of the LRA codified the fair procedure for retrenchment dismissals. The first judgment held that the legislative decision of privileging majority unions in the consultation process was unreasonable. Such a policy failed to meet the statutory purpose of consultation, being, amongst other things, to avoid dismissal, minimise dismissals, or lessen the negative effects of dismissals. Majoritarianism was also not implicated but rather preserved on the basis of the court's previous finding that section 23(1)(*d*) of the LRA was a constitutionally compliant limitation of the right to strike. This judgment held that the same reasoning must apply to any limitation in this case.

The judgment further held that whilst an employer is obliged to consult inclusively, it can still lawfully conclude and extend a retrenchment agreement with the majority union, binding all employees in the workplace. This appropriately balances the rights of individual employees and those of the employer.

The second judgment (the majority one), by Froneman J, was concurred in by Cameron J, Khampepe J, Mhlantla J and Theron J. Although it agreed that the constitutional challenge to section 23(1)(*d*) of the LRA should be dismissed, it held that section 189(1) of the LRA was constitutionally valid and did not limit the right to fair labour practices. This is a consequence of the fact that the right to fair labour practices does not explicitly or implicitly guarantee the right to individual consultation in retrenchment proceedings. This judgment also decided that the right not to be unjustly dismissed is derived from the LRA rather than the Constitution. It also held that the LRA itself distinguishes between what is fair for dismissals based

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37 *Amcu v Royal Bafokeng Platinum Ltd* [24].
38 *Amcu v Royal Bafokeng Platinum Ltd* [65], [85], [99].

on misconduct and incapacity, on the one hand, and what is fair for 'no-fault' dismissals relating to operational requirements, on the other hand.

The judgment held that a further distinction is made where the former class of dismissals require individual enquiry, whilst the latter is suited to objective factors. It held that because the decision to retrench is not based on individual conduct, there can be no need for individual consultation. The judgment found that this has been consistently affirmed by the Labour Courts for the past twenty years.

The judgment has sparked a debate and reflects the conflict between the Constitution and the LRA as well as the impact of the LRA on freedom of association. The split in the judgment of the Constitutional Court reflects the difficult terrain that must be navigated when balancing constitutional rights, employment law, and economic interests whilst operating in the shadow of a historically politicised industry. The question that needs to be addressed is whether the LRA should be reviewed and aligned with the Constitution, taking into account its primary purpose. The Constitutional Court remarked: 'Academics and labour lawyers alike have pointed to these examples of industrial strike action as exposing the deficiencies that stem from a "winner-takes-all" approach to labour relations.'[39] It is worth noting that in Chapter 4 of this thesis there was a discussion that the Committee on Freedom of Association (CFA) has also, in equal measure, turned its attention to the adverse effect of the proliferation of trade unions in any collective bargaining system. It is unarguable that small and weak trade unions militate against the unity of workers, thereby undermining collective bargaining. Nonetheless, the CFA is opposed to the unification of the trade union movement inspired by legislative enactments. Such measures would violate the deeply entrenched principle enshrined in Articles 2 and 11 of ILO Convention 87. While noting that member countries are at liberty to delineate between the most representative trade union and other trade unions, the CFA has maintained that 'such system should not have the effect of preventing minority unions from

39 *Amcu v Royal Bafokeng Platinum Ltd* [26].

functioning and at least having the right to make representations on behalf of their members and to represent them in cases of individual grievances'.[40]

6.4 Recommendations

As mentioned in Chapter 1, 'the primary aim of this study is to inquire into the impact of the Labour Relations Act 66 of 1995 on freedom of association. The study not only examines the constitutional and statutory context of freedom of association but also the contours of freedom of association as exemplified in seminal labour law cases of recent vintage'.[41] To obtain a broader and clearer scope of the impact of the LRA on freedom of association, it is equally important to consider international instruments, ILO Conventions and Recommendations, and Bills of Rights of comparable jurisdictions. The discharge of this second task forms the main corpus of the thesis.

Finally, it is submitted that a discussion of this nature cannot be complete without attempting to highlight areas of any shortcomings and suggesting remedial measures where appropriate. The emphasis is on two areas in this regard: (a) the provisions of the Constitution and their interpretation by the courts, and (b) the provisions of the LRA. It is, therefore, critical that the remedial exercise not be limited to the Constitution and/or its interpretation alone but also extended to the relevant provisions of the LRA.

One of the main aims of the LRA is the democratisation of the workplace. International instruments also emphasise the consultation process of people who will be affected by decisions taken by majority unions. Based on the above, it is recommended that prior to threshold agreements being concluded in terms of section 18 of the LRA which culminate in collective agreements, minority unions should be consulted on decisions that will impact them, and this should be a mandatory process. Section 18 of the LRA should impose a duty to act in the public

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40 International Labour Organization, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th (rev) edn, ILO 2006) para 974.

41 See paras 1.1 and 1.3.1 in chap 1 of this thesis.

interest on the employers, and section 18 of the South African Constitution should protect the right not to associate.

6.4.1 Some provisions of the Labour Relations Act 66 of 1995 should be repealed

6.4.1.1 Esitang and Van Eck recommend scrapping section 18 of the LRA[42]

Section 18(1) of the LRA does not support the ILO's interpretations of freedom of association discussed above. This provision is unconstitutional and violates international norms to the extent that 'it allows the effective exclusion of minority unions through manipulation by majority unions in collusion with the employer of recognised collective bargaining units'.[43]

6.4.1.2 Section 23(1)(*d*) of the Labour Relations Act

Section 23(1)(*d*) of the LRA states:

> 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 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.

Section 23(1)(*d*) of the LRA imposes a limitation on the right to freedom of association and the right to strike, as it binds the minority unions to decisions made by majority unions. Section 18 of the South African Constitution states that '[e]veryone has a right to freedom of association', yet the LRA appears to be given full rein to infringe this right. Despite the fact that section 9 of the South African Constitution grants everyone equality before the law, it appears that such equality for all trade unions is not always observed in practice.

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42 Temogo Geoffrey Esitang and Stefan van Eck, 'Minority Trade Unions and the Amendments to the LRA: Reflections on Thresholds, Democracy and ILO Conventions' (2016) 37 ILJ 763, 777.

43 Kruger and Tshoose, 'The Impact of the *Labour Relations Act* on Minority Trade Unions' 319.

6.4.1.3 Section 65(1)(*b*) of the Labour Relations Act

Strikes are an important bargaining tool for workers and trade unions, and they are protected by sections 23(2)(*c*) of the Constitution and 64(1) of the LRA. This restriction is triggered by section 65(1)(*b*) of the LRA, which prohibits any person from participating in a strike 'if that person is bound by an agreement that requires the issue in dispute to be referred to arbitration'.

6.4.1.4 Sections 25 and 26 of the Labour Relations Act

It is submitted that sections 25 and 26 of the LRA need to be scrapped and that freedom not to associate should be protected by the South African Constitution.

6.4.2 Minority trade unions should be given a voice

Section 1 of the South African Constitution endorses pluralism by promoting a democratic system founded on basic values such as equality, freedom, and a multi-party system of government. This system generates a multi-party democracy paradigm, which is particularly visible in the political realm, in which all people are free to associate and are treated equally on the basis of their preferences. The same paradigm should prevail in workplace democracy, and minority unions should be given a voice. In order to realise worker interests effectively, the legislature should allow for multi-unionism that really symbolises a pluralistic democracy, in keeping with the South African model of democracy.

6.4.2.1 Approaching the International Labour Organisation

The ILO recognises and upholds the protection of the rights of minority unions. Kruger and Tshoose suggest that minority unions may approach the ILO on the premise that the LRA endorses a 'majority trade union monopoly' which is contrary to international standards of freedom of association.[44]

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[44] Kruger and Tshoose, 'The Impact of the *Labour Relations Act* on Minority Trade Unions' 316.

6.4.3 Misalignment between the Labour Relations Act and the International Labour Organization's Collective Agreements Recommendation, 1951 (No 91)

In terms of section 39(1) of the South African Constitution, the courts are required when interpreting the Bill of Rights to promote values that underlie an open and democratic society based on human dignity, equality, and freedom.[45] The courts are also required to consider international law and may consider foreign law.[46] The ILO's Collective Agreements Recommendation, 1951 (No 91) emphasises the fact that 'prior to the extension of the agreement, the employers and workers to whom the agreement would be made applicable by its extension should be given an opportunity to submit their observations'.[47]

45 Section 39(1)(*a*) of the Constitution.
46 Section 39(1)(*b*) and (*c*) of the Constitution.
47 Paragraph 5(2)(c) of the ILO's Collective Agreements Recommendation 1951 (No 91).

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CONFIRMATION BY EDITOR

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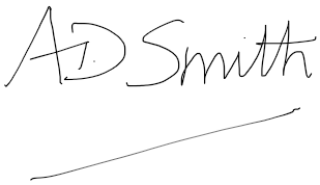
12 July 2024

To whom it may concern

I confirm that the candidate, Ms Nomfusi Gladys Gcakini, asked me to edit her LLD thesis, 'The impact of Labour Relations Act 66 of 1995 (as amended) on the right to freedom of association'.

I have edited it to the standard the University of South Africa requires and returned the thesis to her to finalise.



AD Smith