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THE IMPACT OF THE *LABOUR RELATIONS ACT* ON MINORITY TRADE UNIONS: A SOUTH AFRICAN PERSPECTIVE

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1 Introduction

The main objective of this article is to analyse the impact of section 18 of the *Labour Relations Act* 66 of 1995 (hereinafter the *LRA*) on the constitutionally entrenched right of every person to freedom of association, the right of every trade union to engage in collective bargaining,¹ and the right of every trade union to organise. Furthermore, this article examines the justifiability of the impact of section 18 on minority trade unions in terms of international labour standards and the *Constitution*. In the first part of this article we commence with a brief overview of the concept of majoritarianism, pluralism and industrial unionism in the context of the South African labour market. Part Two deals with the impact of section 18 of the *LRA* on minority trade unions, whilst Part Three explores the concept of workplace democracy. Part Four investigates the applicability of international labour standards in the context of the right to freedom of association, and the last part of this article deals with conclusions and recommendations on the impact of section 18 of the *LRA*.

The advent of the new political dispensation in 1994 heralded the coming of a new labour dispensation. Labour relations and labour policies changed significantly from those which prevailed under the previous government. The African National Congress came into power with the backing and support of the Congress of South African Trade Unions and the South African Communist Party. After the ANC became

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¹ Section 23(4)(b) of the *Constitution of the Republic of South Africa*, 1996 (hereinafter the *Constitution*).

the ruling party, those sections of society that had brought the organisation into power harboured great expectations from the ANC government. Workers expected government to serve their interests and this expectation was fervently advocated and promoted by former trade unionists who found themselves in the ANC government at the time or who formed part of the structures of the alliance partners of the ANC.² Godfrey *et al*³ note that the review of the labour legislation framework was at that stage a priority for the new government, with specific focus on the review of the collective bargaining dispensation.

The abuse of trade unions under the previous government gave rise to a unique entrenchment of labour rights in the *Constitution*.⁴ The drafters thereof were determined to avoid a repetition after 1994 of this abuse.⁵ Section 23 of the *Constitution* goes to great lengths to protect, amongst other matters, the right to form and join a trade union,⁶ the right of every trade union to organise⁷ and the right of every trade union to engage in collective bargaining.⁸ The *LRA* was promulgated in furtherance of section 23(5) of the *Constitution*. An important purpose thereof is to provide a regulatory framework for collective bargaining in South Africa.⁹ The *LRA* remedied an important deficiency of its predecessor, the 1956 *LRA*, namely the uncertainty regarding the rules and principles governing collective bargaining.¹⁰ One of the most significant changes in the new *LRA* was that it now provided for legislated organisational rights.¹¹

Macun¹² argues that commentators have often viewed the *LRA* as favouring larger unions and as conferring clear advantages on unions with majority support at the establishment or industry level. Chapter III of the *LRA* regulates collective

² Bendix *Industrial Relations* 81.

³ Godfrey, Theron and Visser 2007 www.dpru.uct.ac.za 23.

⁴ Section 23 of the *Constitution*.

⁵ Grogan *Collective Labour Law* 11.

⁶ Section 23(2)(a) of the *Constitution*.

⁷ Section 23(4)(b) of the *Constitution*.

⁸ Section 23(5) of the *Constitution*.

⁹ Section 1(c)(i) of the *Labour Relations Act* 66 of 1995 (*LRA*).

¹⁰ Grogan *Collective Labour Law* 11.

¹¹ Bendix *Industrial Relations* 81.

¹² Macun 1997 *LDD* 69-81.

bargaining.¹³ While this chapter seemingly promotes a pluralistic¹⁴ approach to organisational rights it is decidedly biased towards majoritarianism.¹⁵ This is the case despite minority trade unions fulfilling an important role in the current labour system, especially when it comes to the balance of power in the employment arena.

Besides the right of a majority trade union¹⁶ to appoint representatives¹⁷ and the right to disclosure of information by the employer to enable the trade union representative to effectively perform his/her duties as such,¹⁸ the incentives for majoritarianism in the *LRA* include the right to enter into a collective agreement setting thresholds of representivity for the granting of access, stop-order and trade union leave rights to minority unions (section 18), the right to conclude agency shop and closed shop agreements (sections 25 and 26), the right to apply for the establishment of a workplace forum (section 80 and 81) and the right to conclude collective agreements which will bind employees who are not members of the union or unions party to the agreement.¹⁹

It is argued in this article that despite the *LRA's* purpose of advancing economic development, social justice, labour peace and democratisation of the workplace by fulfilling its primary objects, which include the promotion of employee participation in decision making in the workplace,²⁰ the *LRA* prohibits this from happening through the nature of a number of its provisions. Under the guise of striving to promote orderly collective bargaining,²¹ a number of sections of the *LRA* benefit majority

¹³ Sections 11-63 of the *LRA*.

¹⁴ Du Toit *et al Labour Relations Law* 246. Du Toit defines the term pluralism as "the term that was used under the previous Act to describe a model of collective bargaining that in contrast to the majoritarian model, grants recognition to more than one trade union provided they are sufficiently representative of a defined bargaining unit".

¹⁵ Du Toit *et al Labour Relations Law* 246.

¹⁶ Van Niekerk *et al Law @ Work* 332. The author defines majority unions as "... those registered unions that on their own, or in combination with any one or more unions, have as their members the majority of the employees employed by the employer in a workplace. This requires that at least 50 per cent plus 1 of the employees employed in the workplace must be members of the union(s)".

¹⁷ Section 14 of the *LRA*.

¹⁸ Section 16 of the *LRA*.

¹⁹ Section 23(1)(d)(iii) of the *LRA*; Du Toit *et al Labour Relations Law* 246.

²⁰ Section 1(d)(iii) of the *LRA*.

²¹ Section 1(d)(i) of the *LRA*.

unions inordinately, while minority trade unions often find themselves faced with insurmountable obstacles that prevent them from being able to engage in collective bargaining.

Section 18 of the *LRA* is the central topic of discussion in this article. It promotes a system of collective bargaining in which the position of majority unions is enhanced while minority unions are marginalised. Pluralism and diversity, which should be respected in a democracy, are being stifled through the application of section 18 of the *LRA*.

The *LRA* contains a number of provisions aimed at promoting majoritarianism. Amongst these, section 18 has a particularly detrimental effect on minority trade unions. It empowers a majority trade union and an employer to 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. This article aims to evaluate the impact of section 18 on minority trade unions and to examine the constitutionality of this section in the context of international labour standards.

2 Brief overview of the concept of pluralism and majoritarianism

In order to have a better understanding of section 18 of the *LRA*, a brief discussion of majoritarianism and pluralism is warranted. Baskin and Satgar note that:²²

...the *LRA* is profoundly majoritarian. Unions with majority support get distinct advantages. Small, minority and craft-based unions are disadvantaged. The message for unions is clear...grow or stagnate.

Pluralism is defined as "... a term used by the predecessor of the *LRA* to describe a model of collective bargaining that, in contrast to the majoritarian model grants recognition to more than one trade union, provided they are sufficiently representative, of a defined bargaining unit."²³ Being regarded as sufficiently

²² Baskin and Satgar *New Labour Relations* 12.

²³ Du Toit *et al Labour Relations Law* 246.

representative clears the way for unions that are regarded as such to be viewed as representative.²⁴ Being regarded as representative allows trade unions to claim organisational rights in terms of sections 12²⁵ and 13²⁶ of the *LRA*.

Bendix²⁷ refers to the pluralist approach as central to the conduct of the labour relationship. The pluralist approach presupposes that with different trade unions representing different interests, power will be distributed in a manner that is fair. It will contribute thereto that the unbridled exercise of power by one trade union is avoided because of the countervailing power of another trade union.

The model of majoritarianism, on the other hand, bestows a degree of primacy on unions with majority membership (at least 50%+1) in a workplace.²⁸ Besides the rights contained in sections 12 and 13 of the *LRA*, a number of empowering provisions in Chapter III of the *LRA* exist. These incentives, designed to promote a majoritarian system of collective bargaining in which a number of strong unions prevail as bargaining agents, are at the heart of the problems facing minority trade unions.

3 The impact of section 18 of the *LRA* on minority trade unions

3.1 Introduction

South Africa's constitutional democracy is built on a number of cornerstones. One important cornerstone is that of human dignity, the achievement of equality and the advancement of human rights and freedoms.²⁹ Equality before the law is a fundamental right which is enshrined in section 9 of the Constitution.³⁰ Everyone is equal before the law and has the right to equal protection and benefit of the law.

²⁴ Section 11 of the *LRA*.

²⁵ The right to trade union access to an employer's workplace.

²⁶ The right to trade union subscriptions and levies.

²⁷ Bendix *Industrial Relations* 253.

²⁸ Van Niekerk *et al Law @ Work* 361.

²⁹ Section 1 of the *Constitution*.

³⁰ Section 9 of the *Constitution* provides that "everyone is equal before the law and has the right to equal protection and benefit of the law".

Despite this constitutional right, it appears that equality before the law for all trade unions is often not seen in practice.

The purpose of this part is to evaluate the impact and effect of the provisions of section 18 when it is abused by majority trade unions and employers. Case law dealing with this question is severely limited and therefore interviews had to be conducted to cast light on the subject.

3.2 The right to establish thresholds of representativeness

Section 18(1) of the *LRA* states as follows:

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.

3.3 The application of section 18: Solidarity's experience in the mining industry

Interviews conducted with Solidarity Trade Union on the impact of section 18 in the mining industry indicated that the provisions of section 18 are used by majority trade unions to set inordinately high thresholds for representivity, thereby effectively ensuring that Solidarity and other minority unions, which have been consistently reaching thresholds for representivity within specific bargaining units, lose recognition where the higher threshold cannot be reached.³¹

³¹ Interview 1: Gideon du Plessis: Deputy-General Secretary (Solidarity Trade Union) 2012; Interview 2: André van der Merwe: Head Mining Industry (Solidarity Trade Union) 2012; Interview 3: Louis Pretorius: Senior National Organiser: Mining (Solidarity Trade Union) 2012. See also *South African Post Office Ltd v Commissioner Nowosenetz* 2013 2 BLLR 216 (LC). This case illustrates the position faced by minority unions in cases dealing with the determination of the threshold for organisational rights. In this case the union was denied organisational rights to which it was entitled in terms of the settlement agreement, but the employer and majority union had subsequently raised the threshold in a fresh agreement. This resulted in the fresh agreement novating earlier agreements and precluding the minority union from claiming rights acquired under the earlier agreements.

A further tactic by majority unions seems to entail the re-negotiation of the bargaining unit structure. The aim of this tactic is to diminish the number of bargaining units by incorporating the bargaining units where minority trade unions, such as Solidarity, are organised, into one big bargaining unit. The effect is that minority unions find it difficult to reach the required threshold in the new bargaining structure in circumstances where it has consistently done so in terms of the previous bargaining unit structure.

A number of examples of the manner in which section 18 finds application in the South African mining industry are distinguishable. This part is confined to the examples discussed below.

3.3.1 Anglo Platinum Mines Rustenburg Base Metal Refineries

During 2008 and early 2009, Solidarity was organised in Anglo's Rustenburg Base Metal Refineries ("RBMR"), which at that stage had two categories of bargaining units, namely the junior unit, which ranged from levels A1-B6, and the senior unit, which ranged from levels B7-C5. Solidarity had an approximate 2% membership within the junior unit, but enjoyed recognition in the senior unit with a percentage of 28, 5%.

In terms of the recognition agreement which lapsed on 31 January 2009, the requisite level for recognition was 30% representation in the operators and/or supervisory units. By virtue of Solidarity having reached the 30% representation threshold, it has enjoyed organisational rights as contained in the *LRA* as well as recognition to be party to certain participative forums. Towards the end of January 2009, after the recognition agreement setting the recognition threshold at 30% had lapsed, a new agreement was entered into between the majority unions NUMSA, NUM and Anglo Platinum, which aimed at increasing the threshold for recognition to 40%.

Solidarity launched a major recruitment drive which was aimed at recruiting at least 30 new members in the senior bargaining unit, which would have ensured that it reached the required 40% representation threshold as set out in the agreement. Solidarity failed to recruit these members and as a result could not reach the 40% representation within the senior bargaining unit. It was given 90 days' notice of the withdrawal of its recognition status and was thereafter not able to meet the required threshold after three verification exercises. The recognition agreement between Anglo and Solidarity was terminated at the end of the third month of the notice period. The effect of this was that Solidarity lost all its members in RBMR.

3.3.2 Kumba Resources: Sishen Iron Ore (SIO)

During the course of 2003, Solidarity and SIO entered into a recognition agreement. Solidarity has consistently reached the threshold for "significant representativeness," as contemplated in the recognition agreement. The said agreement is currently still in operation and Solidarity enjoys the organisational rights contemplated in clause 5 of the agreement.

The National Union of Mineworkers (NUM) is the majority trade union in SIO. NUM has consistently been placing pressure on SIO management to conclude a threshold agreement (in terms of section 18 of the *LRA*) that would effectively render the existence of other trade unions in SIO impossible.

During the course of November 2010, NUM sent a letter to SIO formally requesting the conclusion of a threshold agreement in terms of section 18(1) and (2) of the *LRA*. The said letter states NUM's intention to have the threshold set at 50% + 1 membership of the total workforce within the bargaining unit within a workplace for any union seeking organisational rights.

NUM's pressure on SIO management is steadily mounting. To date Solidarity has continued to indicate that it has a separate recognition agreement with SIO which remains in full force. To date SIO has not indicated that it intends to terminate the

recognition agreement with Solidarity. NUM has indicated that it will seriously consider strike action in order to place pressure on SIO to conclude a collective agreement in terms of section 18.

3.3.3 Lonmin Plc

Solidarity has approximately 1000 members in Lonmin Plc. The current bargaining unit structure provides for 3 bargaining categories, namely Category 3 to 8 workers, Miners and Artisans and Officials. NUM organises mainly in the Category 3 to 8 workers bargaining unit, Solidarity organises mainly in the Miners and Artisans bargaining unit, while Solidarity and the United Association of South Africa (UASA) mainly organise in the officials bargaining unit. Solidarity has 46% representation in the Miners and Artisans bargaining unit, which is where their main strength lies.

NUM has begun pushing for a new collective agreement in terms of section 18, which provides for only two bargaining units. NUM proposes that category 3 to 9 workers should become the one bargaining unit, while Miners and Artisans and Officials become the second bargaining unit. NUM furthermore demands that recognition should no longer be measured at the 30% threshold inside workplaces within mines in the Lonmin Plc Group, but rather should be measured at 20% in the two proposed bargaining units groupwide.

The inclusion of category 9 (C lower band) workers in the proposed bargaining unit to encompass category 3 to 9 workers, results in a significant number of the workers currently in the Miners and Artisans bargaining unit where Solidarity is the strongest union falling inside a bargaining unit where Solidarity has virtually no members. Even if the groupwide 20% threshold is not agreed upon, the new bargaining unit structure will result in Solidarity's level of 46% representation in the Miners and Artisans bargaining unit significantly diminishing.

The new bargaining unit structure, when implemented, will result in Solidarity and UASA being unable to reach the 20% groupwide representation threshold. This will inevitably result in the loss of recognition for these trade unions.

4 The impact of the *LRA* on minority unions and their members

The examples set out in the preceding paragraphs, indicate that minority unions are often faced with a situation where majority trade unions and employers agree to establish a threshold for representativeness in terms of section 18(1) of the *LRA* that is unreachable for minority unions.³² Quite clearly this creates a situation where a minority union cannot obtain organisational rights in terms of sections 12 and 13 of the *LRA*.³³

This results in a minority union not being able to recruit members in the workplace and not being able to have their subscriptions deducted from their members' salaries on a monthly basis, despite the support that a minority union may enjoy in a certain bargaining unit of the employer. It is extremely difficult for a union in this position to increase its membership, which again ensures that it will never reach the set threshold.

The implications of the *National Union of Metalworkers of South Africa v Bader Bop (Pty) Ltd & another* judgment,³⁴ namely that a trade union is entitled to embark on strike action in order to obtain organisational rights in circumstances where it is not regarded as sufficiently representative, provides some form of relief for minority unions. Even in circumstances where wages are concerned, it is often difficult to muster enough support for a strike. This is even more so when it comes to convincing members to embark on a strike in order to assist their trade union to obtain organisational rights.

³² *South African Post Office Ltd v Commissioner Nowosenetz* 2013 2 BLLR 216 (LC).

³³ Access to the workplace and deduction of trade union subscriptions or levies.

³⁴ *National Union of Metalworkers v Bader Bop (Pty) Ltd* 2003 24 ILJ (CC).

There also seems to be a high prevalence of cases where the threshold is raised in a new collective agreement after the previous collective agreement (with a lower threshold) expires, in order to strengthen the position of the majority union and diminish the impact that a minority union had while it enjoyed recognition.³⁵ The loss of recognition as a result of the raising of the threshold impacts heavily on minority unions. This has the effect that a trade union, which in certain circumstances has enjoyed certain organisational rights for a period of time, loses recognition (and as a result loses the organisational rights) that it had enjoyed up to that point. In these circumstances minority unions as a rule almost certainly lose their members in that specific workplace, because these members fail to see the advantages of belonging to a trade union when it has no organisational or bargaining rights.

A further situation which quite often occurs is that an agency shop or a closed shop agreement in terms of sections 25(1) of the *LRA* exists in the workplace.³⁶ Members of a minority union might be moved to be a member of a majority trade union and pay the required monthly subscription and the compulsory agency fee, if the majority union can benefit them in the workplace. However, remaining a member of a minority union, and paying the monthly dues in terms of the agency shop agreement, in circumstances where a minority union has lost recognition as a result of a section 18 collective agreement, is in practice not often seen.

The ultimate result is that quite often the position of minority unions worsens as a result of agreements in terms of section 18 and the consequent loss of recognition, as this as a rule translates into the loss of members. Members of minority unions are thus left without a union of choice to bargain on their behalf

³⁵ *South African Post Office Ltd v Commissioner Nowosenetz* 2013 2 BLLR 216 (LC).

³⁶ In terms of s 25(1) of the *LRA* 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.

5 Bargaining units and the term "workplace"

One of the major functions of trade unions is that of procuring better working conditions and wages for its members.³⁷ Vettori³⁸ asserts that the most important instrument of serving the interest of the members of trade union is collective bargaining. She argues that the primary role played by collective bargaining in South African labour law in terms of the *LRA* is extended to non-distributive or non-production-related issues. This is apparent in the provisions regarding workplace forums and bargaining units. Therefore it is important to define the concept bargaining units and workplace for the purposes of the discussion to follow.

The term "workplace" is defined by the *LRA* as:³⁹

The place or places where the employees of an employer work. If an employer carries on 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 a workplace.

In addition, section 213 of the *LRA* defines "workplace" in relation to the public service as follows:

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; or for any other purpose, a national department, provincial administration, provincial department or organisational component contemplated in section 7(2) of the Public Service Act, 1994 (promulgated by Proclamation 103 of 1994), or any other part of the public service that the Minister for Public Service and Administration, after consultation with the Public Service Co-ordinating Bargaining Council, demarcates as a workplace; In all other instances means the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place where employees work in connection with each independent operation constitutes the workplace for that operation.

³⁷ ILO 2005 www.ilo.org 17-21; Muhammad 2010 *Far East Journal of Psychology and Business* 79-82.

³⁸ Vettori *Alternative Means* 88-105.

³⁹ Section 213 of the *LRA*.

This definition, specifically subsection (c) thereof, envisages the existence of more than one workplace where employees work in connection with each independent operation, and is applicable in this case. This definition has been criticised as being too wide and vague with Cheadle stating that it is evident from this definition that a workplace can be made up of one or more places of work and that each case will depend on its own facts.⁴⁰

In dealing with this issue, Grogan⁴¹ refers to the matter of *OCGAWU v Volkswagen of South Africa (Pty) Ltd.*⁴² Grogan asserts that the commissioner in this case noted that the legislature recognised that the term workplace could have a different meaning than that of the statutory definition as quoted above, where the context indicated to the contrary. The commissioner further held that if the term, when used in chapter III of the *LRA*, is to be given the statutory meaning, this would lead to absurdities.

The commissioner held that for at least the implementation of section 18 of the *LRA*, the measure should be the level of representivity of a trade union within a bargaining unit. The commissioner further held that the legislature's intention could not have been to promote majoritarianism so far as to diminish the rights of unions which have established majority status in a particular bargaining unit. He further contends that a threshold of a majority in the workplace as a whole would constitute a radical departure from the rights won by unions in their historical bargaining constituencies. It is plausible that the bargaining units formed along the defined categories of officials, union men, and category 2 to 8 employees each satisfy the requirements of a "workplace" in terms of the interpretation accorded thereto in terms of the *OCGAWU* case. If this line of argumentation is applied, it would negate the cynical workings of section 18.

⁴⁰ Cheadle 1994 *Current Labour Law*.

⁴¹ Grogan *Collective Labour Law* 333.

⁴² *OCGAWU v Volkswagen of South Africa (Pty) Ltd* 2002 23 ILJ 220 (CCMA).

6 Analysis of section 18 of the *LRA* in view of the provisions of section 21(8)(b) of the *LRA*

Section 21 sets out how organisational and collective bargaining rights in the *LRA* may be exercised. When a registered trade union wishes to exercise its collective bargaining rights, section 21(1) provides that such a trade union may notify its employer of its intention to do so in a workplace. Disputes arising from the exercise of section 21 rights must be referred to arbitration before the CCMA.

Subsection (8)(b) sets out criteria for consideration by the Commissioner in the event that such a referral is made, which the Commissioner is obliged to consider if the employer seeks to withdraw any of the organisational rights conferred on trade unions in terms of the *LRA*. This provision reads:

If the unresolved dispute is about whether or not the registered trade union is a representative trade union, the commissioner must seek to minimise the proliferation of trade union representation in a single workplace and, where possible, to encourage a system of a representative trade union in a workplace; and to minimise the financial and administrative burden of requiring an employer to grant organisational rights to more than one registered trade union, the commissioner must consider; the nature of the workplace; the nature of the one or more organisational rights that the registered trade union seeks to exercise; the nature of the sector in which the workplace is situated; and the organisational history at the workplace or any other workplace of the employer; and may withdraw any of the organisational rights conferred by this Part and which are exercised by any other registered trade union in respect of that workplace, if that other trade union has ceased to be a representative trade union.

It is clear from this section that mere numbers are not the only consideration and that the history of the workplace and the membership therein are, amongst others, significant factors to be considered before a trade union's representative status is revoked.

7 International labour standards, constitutional principles and recommendations by the Committee for Freedom of Association (CFA)

7.1 Introduction

At this stage it becomes important to assess the tenability of section 18 of the *LRA*. As a point of departure for this assessment, this part aims to assess international labour standards, recommendations by the CFA⁴³ and relevant international case law. Due to the importance of international and foreign law in the South African context, this may provide important principles when conducting this assessment.

In terms of section 39(1) of the *Constitution* the courts are required when interpreting the Bill of Rights to promote values that underline an open and democratic society based on human dignity, equality and freedom. Similarly, the courts are also required to consider international law, and may consider foreign law.

Furthermore, section 232 of the *Constitution* states: "Customary international law is law in the Republic unless it is inconsistent with the Constitution or the parliament, " while section 233 states: "When interpreting any legislation, every court must refer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. "

According to Van Niekerk *et al*, section 39(1) creates the expectation that public international law, both that which is binding due to ratification as well as that which is not binding due to South Africa not being a party thereto, should be used for

⁴³ The Committee on Freedom of Association (CFA) is a Governing Body Committee of the ILO. It was established by the ILO in 1951 for the purpose of examining complaints against member states for violations of freedom of association, whether or not the member state concerned had ratified the relevant Conventions. If the CFA finds that there has been a violation of freedom of association standards, it issues a report and makes recommendations on how the situation could be remedied. Governments are requested to report on the implementation of its recommendations.

interpreting legislation. In the case of *S v Makwanyane* the Court remarked as follows:⁴⁴

International agreements and customary international law provide a framework within which...(the Bill of Rights) can be evaluated and understood and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Interim American Commission on Human Rights and the European Court of Human Rights, had in appropriate cases, report of specialised agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions.⁴⁵

Dugard notes that international law is not foreign law and as such South African courts may take judicial notice thereof as if it forms part of the common law.⁴⁶ In practice, he contends, the courts may turn to findings of international tribunals as well as international treaties in dealing with certain questions.⁴⁷ In the matter of *Avril Elizabeth Home*,⁴⁸ Van Niekerk AJ adopted the following line of reasoning in order to legitimately draw upon the contents of an unratified convention of the ILO in dealing with the matter before him:⁴⁹

Although South Africa has not ratified Convention 158, and is therefore not obliged to implement its terms in domestic legislation, the Convention is an important and influential point of reference in the interpretation and application of the *LRA*.

The observations and surveys by the ILO's Committee of Experts on Convention 158 are equally important as a point of reference in the interpretation of Chapter VIII of the *LRA* and the Code since they give content to the standards that the Convention establishes. This is particularly so in the present instance because both Chapter VIII and the Code draw heavily on the wording of Convention 158.

⁴⁴ 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC).

⁴⁵ See also *South African National Defence Union v Minister of Defence* 1999 20 ILJ 2265 (CC). In this case the CC relied amongst others on international instruments for determining the meaning of "worker".

⁴⁶ Section 39(1)(c) of the *Constitution*.

⁴⁷ Dugard *Essays* 119.

⁴⁸ *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation Mediation and Arbitration* 2006 ZALC 122.

⁴⁹ *National Union of Metalworkers v Bader Bop (Pty) Ltd* 2003 24 ILJ (CC).

The approach adopted by van Niekerk AJ in the above matter was that it was manifest that the legislature had drawn on Convention 158 in Chapter VIII and the Code and therefore it was appropriate to use the the contents thereof in adjudicating the matter. When one proceeds to the interpretation of the *LRA*, section 3 thereof states the following:

Any person applying this Act must interpret its provisions - to give effect to its primary objects; in compliance with the constitution; in compliance with the public international law obligations of the Republic.

It is therefore clear that when one interprets the provisions of the *LRA*, these provisions are subject to the fundamental principles contained in the Constitution. In interpreting these provisions there must be compliance with the standards contained in international law, due to South Africa's membership of the ILO.

7.2 International standards on majoritarianism and pluralism

The Digest of Decisions of the CFA contains its recommendations on majoritarianism and pluralism. Its recommendations clearly states that, while it may be to the advantage of workers to avoid a multiplicity of trade union movements, unification through state intervention, be it a direct or indirect result of legislative provisions applicable to trade unions, is contrary to the principle embodied in articles 2 and 11 of the *Convention concerning Freedom of Association and Protection of the Right to Organise*.⁵⁰ It clearly states that it is preferable for governments to seek to encourage trade unions to join together voluntarily to form strong and united organisations than to legislate compulsory unification upon trade unions, a course of action which runs contrary to the principles of freedom of association embodied in the *International Labour Conventions*.

⁵⁰ *Freedom of Association and Protection of the Right to Organise Convention (1948) (Convention No. 87)*. In terms of this Convention each member of the International Labour Organisation for which this is in force undertakes to undertake all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise.

7.3 *International standards on the right to freedom of association*

The right to freedom of association is described by Emerson as the judicial and moral entitlement of workers to form trade unions, to join a trade union of their own choosing, and to see that such a trade union functions independently.⁵¹ The right to freedom of association is a fundamental right which is protected in a number of international instruments.⁵² The ILO's *Declaration of Philadelphia* (adopted on 10 May 1944) holds that freedom of expression and association are essential to sustained progress.⁵³ Article 1 of Convention 87 states as follows:⁵⁴

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

This right is similarly protected in the *International Covenant on Civil and Political Rights*.⁵⁵ Article 22 thereof states:

Everyone has a right to freedom of association with others, including the right to form and join trade unions for the protection of their interests.

The ILO requires respect for and adherence to the principle of freedom of association, as is clear from the following quotation:⁵⁶

Respect for freedom of association around the world is a fundamental and unavoidable requirement for the International Labour Organisation, because of its most essential structural characteristic, namely tripartism. Without freedom of association or, in other words, without employers' and workers' organisations that are autonomous, independent, representative and endowed with the necessary rights and guarantees for the furtherance and defence of the rights of their members and the advancement of the common welfare, the principle of tripartism would be impaired, if not ignored, and chances for greater social justice would be seriously prejudiced.

⁵¹ Emerson 1964 *Yale L Rev* 1-35; Budeli 2009 *Fundamina* 57-74.

⁵² See, for example, the *African Charter on Human and Peoples' Rights* (1981) (*Banjul Charter*); the *European Convention on Human Rights and Fundamental Freedoms* (1950); the *Universal Declaration of Human Rights* (1948).

⁵³ *ILO Declaration of Philadelphia* (1944) Chapter I(b).

⁵⁴ *Convention No. 87* (ratified by South Africa).

⁵⁵ *International Covenant on Civil and Political Rights* (1966).

⁵⁶ *ILO Law on Freedom of Association*.

7.4 International precedents/comparative law

Olivier⁵⁷ refers to a case which is important for the purpose of evaluating the tenability of section 18 of the *LRA*. In the matter of *Wilson v UK*,⁵⁸ the members of a trade union stated that the employer's retraction of the recognition of their trade union violated their right of expression (section 10 of the *European Convention on Human Rights*, 1953, hereafter ECHR) as well as their right to association (article 11 of the ECHR). The applicants' case was that the allowance of discrimination towards members of the trade union in terms of English law was contrary to the prohibition of discrimination as contained in article 14 of the ECHR. The European Commission of Human Rights unanimously found that the right of freedom of association, as entrenched in article 11 of the ECHR, was violated by this conduct. Olivier noted that the European Commission of Human Rights found that the article 11 right allowed for trade union freedom as a special form of the principle of freedom of association.

In the matter of *Demir and Baykara v Turkey*⁵⁹ the European Commission of Human Rights found that collective bargaining has in principle become an essential element of article 11 (the right to associate). The court stated that only interference which is strictly necessary in a democratic society can be justified, but also stated that it is still allowed to grant special status to representative trade unions.

7.5 International standards on the right to collective bargaining

The right to collective bargaining is a fundamental right that is confirmed by member states of the ILO by virtue of their membership. This right is protected in a number of international instruments. Part of the 10-point plan adopted by the ILO in the *Declaration of Philadelphia* is the effective recognition of the right of collective bargaining, and the co-operation of management and labour in the continued improvement of productive efficiency and the collaboration of workers and

⁵⁷ Olivier *Dissipline, Ontslag en Menseregte Handleiding* 91.

⁵⁸ *Wilson v UK* 2002 35 EHRR 523.

⁵⁹ *Demir and Baykara v Turkey* 2008 ECHR 1345.

employers in the preparation and application of social and economic measures.⁶⁰ Some of the other instruments which protect and regulate this right are, the *Right to Organise and Collective Bargaining Convention* of 1949, (ratified by South Africa), the *Declaration of Fundamental Principles and Rights at Work*, 1998, the *Collective Bargaining Convention* of 1981, and the *Collective Bargaining Recommendation*, 1981.

The standards and principles emerging from the ILO's Conventions, Recommendations and other instruments set forth by the committee of experts and the CFA include a trade union which represents the majority or a high percentage of the workers in a bargaining unit, enjoying preferential or exclusive bargaining rights. However, in cases where no trade union fulfils these conditions or such exclusive rights are not recognised, workers' organisations should nevertheless be able to conclude a collective agreement on behalf of their own members.

Where under a system of nominating an exclusive bargaining agent there is no union representing the required percentage to be so designated, collective bargaining rights should be granted to all unions in this unit, at least on behalf of their own members. According to Adams *et al* this means that employees who want to be represented by minority unions have an international human right to bargain collectively.⁶¹ If there is no union covering more than 50% of the workers in a unit, collective bargaining rights should nevertheless be granted to unions in the unit at least on behalf of their members.⁶²

The right to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade unions represent. The public authorities should refrain from any interference which would

⁶⁰ *ILO Declaration of Philadelphia* (1944) Chapter III(e).

⁶¹ Adams 2009 *CLELJ* 382.

⁶² This principle was also approvingly referred to by the CFA in *The Glass, Cement and Soil Industries Workers' Union* Case No 2303 (Turkey) (2003) para 1373.

restrict this right or impede the lawful exercise thereof. Any such interference would appear to infringe the principle that workers' and employers' organisations should have the right to organise their activities and to formulate their programmes.⁶³

7.6 *International standards on the right to organise*

The *Freedom of Association and Protection of the Right to Organise Convention* has been ratified by South Africa. In terms of article 11 of this Convention each member of the ILO for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise.

The Digest of Decisions of the CFA⁶⁴ (the CFA had by 1997 adjudicated upon at least 1800 cases which are mostly found in the Digest⁶⁵) sets out the general principles relating to the right of organisations to freely organise their activities and to formulate their programmes. These include the preclusion of any provision which gives the authorities the right to restrict trade union activities in relation to the activities and objects conventionally pursued by trade unions, for example.⁶⁶

The necessary measures should be taken to ensure that access is granted freely to farmworkers, domestic workers and workers in the mining industry by trade unions and their officials for the purpose of carrying out normal union activities on the premises of employers.

7.7 *Recommendations on the recognition of most representative trade unions*

The CFA has stated that the mere fact that the law of a country distinguishes between the most representative trade unions and other trade unions is not in itself

⁶³ Currie and De Waal *Bill of Rights Handbook* 515.

⁶⁴ ILO *Law on Freedom of Association* 2.

⁶⁵ Olivier *Dissipline, Ontslag en Menseregte Handleiding* 90.

⁶⁶ ILO *Law on Freedom of Association* 95.

a matter for criticism. Such a distinction should not result in the most representative organisations being granted privileges extending beyond that of priority in representation, on the ground of their having the largest membership, for such purposes as collective bargaining or consultation by governments, or for the purpose of nominating delegates to international bodies. In other words, this distinction should not have the effect of depriving trade union organisations that are not recognized as being among the most representative of the essential means for defending the occupational interests of their members, for organising their administration and activities and formulating their programmes, as provided for in Convention 87.⁶⁷ It further provides that workers' freedom of choice would be jeopardised if the distinction between most representative and minority unions results, in law or in practice, in the prohibition of other trade unions which workers would like to join, or in the granting of privileges such as to influence unduly the choice of organisation of workers.

In addition, the CFA has stated that the granting of exclusive rights to the most representative organisation should not mean that the existence of other unions to which certain workers might wish to belong is prohibited. Minority organisations should be permitted to carry out their activities and at least to have the right to speak on behalf of their members and to represent them.⁶⁸

According to Adams, majoritarian exclusivity is consistent with the principles of international human rights,⁶⁹ but exclusive majoritarian exclusivity is not. Adams further notes that any legislative regime designed to eradicate the possibility of minority unionism offends workers' rights.

⁶⁷ *ILO Freedom of Association Digest* para 143.

⁶⁸ *Ibid* para 974.

⁶⁹ Van der Walt *Democratisation of the Workplace* 391.

8 Democracy, constitutionally entrenched labour rights and workplace democracy

8.1 Introduction

This part deals with the constitutionally entrenched rights to engage in collective bargaining, to organise, and the right to freedom of association. It dwells on the relation between the right to freedom of association and other fundamental rights. The core meaning of democracy and the term industrial democracy are also assessed. The purpose here is to evaluate what the aforementioned rights entail and the constitutionality of section 18.

8.2 Relevant provisions of the Constitution

The founding principles of the *Constitution* set positive standards with which all law in South Africa must comply in order to be valid. These founding principles are the prism through which the *Constitution* should be viewed.

Such provisions include the founding principles of human dignity, the achievement of equality⁷⁰ and the advancement of human rights and freedoms.⁷¹ The supremacy of the *Constitution* and the rule of law⁷² are further important provisions for the purposes of this assessment. These provisions provide the key to the understanding of the core meaning of democracy. Section 7(1) of the *Constitution* further affirms the democratic principles and lays the foundation for the interpretation of the fundamental rights in Chapter 2 of the *Constitution* by stating: "The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

The right to fair labour practice is protected by section 23 of the *Constitution*. The *LRA* was enacted to give effect to this right, and is the national legislation envisaged

⁷⁰ Section 9(1) of the *Constitution* provides that "Everyone is equal before the law and has the right to equal protection and benefit of the law".

⁷¹ Section 1(a) of the *Constitution*.

⁷² Section 1(c) of the *Constitution*.

by this section to regulate collective bargaining. If any labour practice infringes this right it is unlawful and unconstitutional, subject to the application of section 36(1). Section 36 of the *Constitution*, read in conjunction with sections 7(3), 37 and 39 thereof, is the main provision that determines the degree to which a right entrenched in the Bill of Rights can be limited. In terms of section 36(2) of the *Constitution* any limitation of an entrenched right in the Bill of Rights should occur in terms of section 36(1).⁷³ The provisions of section 39(2) of the *Constitution* are important when it comes to the assessment of the tenability of section 18 of the LRA. This section states: "When interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purpose and objects of the Bill of Rights."

8.3 The right to engage in collective bargaining

The right to collective bargaining is a human right that enjoyed protection under the interim *Constitution* and which enjoys protection under the final *Constitution*. Notably the interim *Constitution's* wording in this regard was "workers and employers shall have the right to organise and to bargain collectively."⁷⁴ The wording of the final *Constitution* has been changed, however, by the introduction of the word "engage." Section 23(5) states:

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

The *LRA* has removed the duty to bargain, which was previously imposed by the Industrial Court. Because collective bargaining is no longer compelled by law, it has adopted a set of organisational rights for trade unions.

⁷³ Olivier *Managing Employment Relations*.

⁷⁴ Currie and De Waal *Bill of Rights Handbook* 515.

8.4 The constitutional right to organise

Section 23(4)(b) of the *Constitution* states that "Every trade union and every employers' organisation has the right to organise." According to Currie and De Waal the rights conferred in section 23(2)(a) and (b) of the *Constitution* go beyond the "limited" right to freedom of association and are more fundamental in nature. Currie further asserts that the *LRA* gives effect to these rights by granting a number of organisational rights including the right of access to the employer's premises for union-related purposes; the right to hold meetings; the right to conduct ballots; the right to stop-order facilities; the right of union office bearers to be given time off for union activities; the right to elect trade union representatives; and the right to disclosure of information for the purposes of collective bargaining.⁷⁵

8.5 The relation between the right to freedom of association and other fundamental rights

Olivier notes that the right to freedom of association encompasses the right to organise and the right to further the interests of members of a trade union.⁷⁶ He further asserts that freedom of association is related to the right to organise, the right to collective bargaining and the right to strike.⁷⁷ According to Olivier the effect of the denial of freedom of association is that the right to collective bargaining is undermined. He states that a legal scheme aimed at protecting the right of workers and trade unions to collective bargaining and to strike will be meaningless if the underlying right to join and belong to a trade union is not protected. Conversely, he argues, the right to freedom of association will remain an ineffective right if the right to collective bargaining and the right to strike are not recognised as well. The right to freedom of association is therefore referred to as a "shorthand expression for a bundle of rights and freedoms relating to membership of associations of workers and employers."⁷⁸

⁷⁵ Section 12 of the *LRA*.

⁷⁶ Olivier *Dissipline, Ontslag en Menseregte Handleiding* 89.

⁷⁷ Olivier *Dissipline, Ontslag en Menseregte Handleiding* 4.

⁷⁸ Budeli 2009 *Fundamina* 57-74.

9 The core meaning of democracy

Political equality manifesting in the equal franchise for all adult citizens is central to democracy.⁷⁹ The right to vote is a basic criterion with which to measure the authenticity of a system claiming to be democratic. The more democratic a system claims to be, the closer it should come to universal franchise. This principle is implemented through a system of representation of voters, in the case of South Africa specifically by proportional representation.⁸⁰

Malan⁸¹ asserts that a multi-communal society needs a specific form of democracy, namely a pluralist instead of a utilitarian or majoritarian democracy. He states that majoritarian democracy gives full effect to the will of the majority regardless of the effect on minorities. The will of the strongest prevails, while minorities are left powerless to deal with core questions that may be paramount to their wellbeing.

Malan further notes that majoritarian democracy based on utilitarian principle is democratic only in part, namely to the extent that the majority is the only part of the *demos* that can govern in its own interest, but that such a system is undemocratic in that it leaves the minorities devoid of any *kratos*, and thus vulnerable to domination by the majority. Malan states that those belonging to a minority are treated on the same footing as minors who are subject to the authority of adults. He notes that their right to be treated as equals is in this way blatantly violated.⁸²

Malan notes that the Constitutional Court has on various occasions strongly endorsed the notion of pluralism, of a pluralist democracy, of tolerance for diversity and difference, and expressed itself strongly against homogenisation and assimilation.⁸³ In the matter of *Minister of Home Affairs v Fourie*⁸⁴ the court held that there are a number of constitutional provisions that underlie the constitutional

⁷⁹ Dworkin 1987 *USFL Rev* 1-30; Wall 2006 *Journal of Political Philosophy* 85-100.

⁸⁰ Lister 2012 *Stan J Int'l L* 257-276; Bellamy 2012 *CRISPP* 1-23.

⁸¹ Malan 2010 *TSAR* 427-440.

⁸² Malan 2010 *TSAR* 427-440.

⁸³ Malan 2010 *TSAR* 427-440.

⁸⁴ *Minister of Home Affairs v Fourie* 2006 3 BCLR 355 (CC) para 61 380C-E.

value of acknowledging the value of diversity and pluralism in our society, and that give a particular texture to the broadly phrased right to freedom of association.⁸⁵

Malan contends that citizens in a pluralist democracy affirm the right to self-expression without being forced to subordinate themselves to the cultural and religious norms of others. A pluralist democracy strikes a balance between majority rule and minority protection. Malan states that this balance is achieved by acknowledging the general right of the majority to govern on account of the majority obtained at the ballot box, but at the same time by recognising the right of cultural and other minorities to survive and to flourish as communities. According to Malan, a constitutional democracy has a constitution that protects certain basic rights which act as a counter to unbridled majoritarianism, as the constitution places these rights outside the reach of the political power of the majority.⁸⁶

10 Industrial democracy

According to Van der Walt⁸⁷ the notion of an industrial democracy has been translated into legislation through the *LRA*, which states in section 1: "The purpose of the Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objectives of this Act..."⁸⁸ He further notes that the drafters of the Act wished to extend the government's intention of democratising the country to the workplace in a similar way as found in a number of countries, most notably Germany and the Netherlands whose systems were used as models for the *LRA*. Importantly, section 1 of the *LRA* refers to one of the primary objects that it aims to fulfill as the aim to give effect to the rights conferred by section 27 of the *Constitution*.⁸⁹

⁸⁵ Section 18 of the *Constitution*.

⁸⁶ Malan 2010 *TSAR* 427-440.

⁸⁷ Van der Walt *Democratisation of the Workplace*.

⁸⁸ Section 1 of the *LRA*.

⁸⁹ Section 27 refers to the interim *Constitution of the Republic of South Africa Act* 200 of 1993, which was replaced by s 23 of the present *Constitution*.

Van der Walt continues by stating that industrial democracy is the application of democratic principles in the workplace and entails that workers as members of a particular unit participate in decision making. The desire for democracy in the workplace continues to increase, and it seems natural that the same principles found in the larger society should also apply to the workplace. Brassey⁹⁰ asserts:

Democratisation is the process by which those to whom decisions relate are given a greater say in the process of decision making; the right to vote, which (for example) enjoys protection under section 19(3)a of the Constitution, is but one manifestation of the democratic process; others include the right to be consulted or heard before a decision is taken.

The principle of proportional representation also applies to collective bargaining in the workplace and is not only limited to parliamentary participation. Malan further notes that,⁹¹ insofar as any of the entrenched rights in section 23 of the *Constitution* are not given effect to, the democratic integrity of the *Constitution*, as entrenched in section 1 thereof, is compromised.

The rights in section 23 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. The correct view of the entrenched rights of section 23 would be to say that these rights are entrenched with the purpose of ensuring that the democratic principle prevails in the labour context.

Therefore, any measures taken by the *LRA* to limit access to organisational rights (being a core ingredient of collective bargaining) would fall foul of the provisions of equality and the core meaning of democracy. As such, this would constitute an unfair limitation of the rights entrenched in section 23 of the *Constitution*. The impact of the sections of the *LRA* under discussion on minority unions and their members is in effect tantamount to disenfranchising workers from democracy in the

⁹⁰ Brassey *Employment and Labour Law* 1-5.

⁹¹ Malan 2010 *TSAR* 427-440.

labour context. Only workers belonging to trade unions who have organisational rights are given the opportunity to engage in collective bargaining.

11 Workplace forums: The democratisation of work or an exercise in futility?

It is important to view the effects of section 18 against the background of section 80 of the *LRA*. This section contains, amongst others, the following provisions:⁹²

A workplace forum may be established in any workplace in which an employer employs more than 100 employees. Any representative trade union may apply to the Commission in the prescribed form for the establishment of a workplace forum.

The aim of the legislature with the inclusion of workplace forums in the *LRA*, namely to address the need of employees and employers to have more interaction that is aimed at working together in a positive fashion in ways other than formal collective bargaining structures and processes,⁹³ is one that is worthy of applause. However the notion of workplace forums has failed dismally in the South African context.⁹⁴ In practice very few workplace forums were established.⁹⁵ Olivier not only criticises the legislature for crafting the provisions of the *LRA* in such a manner that it openly protects the monopoly of majority trade unions, but also suggests that the fact that a workplace forum and trade union-based forum can be established only through an application for the establishment thereof by a majority union⁹⁶ is one of the major reasons for the failure of workplace and trade union-based forums in South Africa.⁹⁷

⁹² In this section a representative trade union means a registered union, or two registered unions acting jointly, that have as members the majority of the employees employed by an employer in a workplace (s 78(b) of the *LRA*).

⁹³ Satgar 1998 *LDD* 48-55.

⁹⁴ Wood and Mahabir 2001 *Industrial Relations Journal* 230-241.

⁹⁵ Satgar 1998 *LDD* 43-60; DPRU 2008 blogs.uct.ac.za 10.

⁹⁶ Olivier 1996 *ILJ* 810-812.

⁹⁷ Steadman 2004 *ILJ* 1190. Steadman notes that majority trade unions are loathe to apply for the establishment of workplace forums because of their fear of the erosion of their power, their fear of the erosion of collective bargaining structures, and their fear of the strengthening of the position of non-trade union and minority trade union interests.

The concept of the workplace forum is one that holds great potential to ensure that the constitutional right to engage in collective bargaining is effectively recognised. For minority trade unions and their members this would have been a welcome and excellent instrument to ensure that their voice is heard in the workplaces where majority trade unions for all practical purposes are calling the shots.⁹⁸ The fact that the legislature saw fit to leave the key for the establishment of a workplace forum in the hands of majority unions has undone the potential that this concept has in our labour dispensation. For minority trade unions this means that their voice (and that of their members) is again stifled by legislation that on the face of it seems neutral and aimed at promoting collective bargaining, but in practice ensures that majority trade union monopoly is maintained.

12 The effective recognition of the right to engage in collective bargaining as an equality challenge

Blackett and Sheppard⁹⁹ were commissioned by the ILO to write a Working Paper, as an input for preparing the ILO Director-General's Global Report to the 2003 session of the International Labour Conference. Their paper explores a complex and wide-ranging subject, being the interface between collective bargaining and equality under current conditions of work. It argues that these two fundamental principles and rights are mutually reinforcing and can together promote workplace governance which reconciles economic with social goals.

The authors conclude that the ILO's *Declaration on Fundamental Principles and Rights at Work* could hardly be clearer. Both the "effective recognition of collective bargaining" and the "elimination of discrimination in respect of employment and occupation" are so central to the ILO's social justice mandate and decent work agenda that Members have a good faith obligation to respect, to promote and to realise them. Both "immutable" principles have their distinct, robust normative

⁹⁸ Buhlungu 1999 *African Sociology Review* 111-129; See also Wood and Mahabir 2001 *Industrial Relations Journal* 230-241.

⁹⁹ Blackett and Sheppard 2002 www.ilo.org 1-52.

justification, with a deeply egalitarian and democratic thread underpinning them that stresses the centrality of enfranchisement within the world of work.

They argue that unequal access to collective bargaining is an equality challenge. This decidedly broad approach to equality draws upon the deep egalitarianism that characterises the quest for social justice within the world of work. It also focuses on the purpose of protection against discrimination, to affirm the equal worth and dignity of all human beings and more specifically to ensure that the fundamental character of equality, recognised within the ILO's normative universe and beyond, is a reality in working peoples' lives. The approach is moreover compelled by the constitutional mandate of the ILO and its normative system to include "all workers." There is a profound equality challenge surrounding access to collective bargaining, one that the Declaration calls on the ILO and its constituency to address.

To affirm that collective bargaining mechanisms can both hamper and enhance equality is not necessarily to affirm that collective bargaining mechanisms are explicitly exclusionary. Although in some cases collective bargaining has been used as a majoritarian device to engage in direct discrimination against minority groups, the thrust of the unequal access claim is about systemic discrimination – that is, discrimination that is embedded in social and institutional practices, policies or rules. Simply put, in the design and application of machinery to give effect to the fundamental principle and right to collective bargaining, there were forgotten, overlooked or quite simply excluded categories rendered invisible to collective labour relations because they did not fall within the range of the dominant paradigm. As that dominant paradigm continued to shift, moreover, the asymmetries deepened as the vehicles to render collective bargaining effective failed even to capture the increasingly plural workplace realities.

Accordingly there is also an element of pragmatism in the link between freedom of association and collective bargaining. In other words, for the freedom of association to be fully meaningful, its exercise must be enhanced to ensure real participation in matters that affect workers' lives. The participation entails ensuring that there are mechanisms for giving people a voice within the workplace and the broader world of

work. The effective recognition of the right to bargain collectively encompasses the recognition of a complex and varying combination of factors. State enabling action is needed to ensure that appropriate facilitative regulatory frameworks are in place, and, seemingly paradoxically, that there is also freedom from state intervention, to ensure that workers and employers can negotiate the conditions that govern them.

The impact of section 18 on minority unions has been comprehensively discussed above, and the discussion brings the constitutionality of the legislation into question. Constitutional rights that come into play are the right to engage in collective bargaining, the right to freedom of association and the right to organise. All these rights are constitutionally entrenched and safeguarded.

A strong argument can be made that if any of the entrenched rights in section 23 of the *Constitution* are not affected the integrity of the *Constitution* is compromised.

13 Options for minority unions

A minority union, or an alliance of minority trade unions acting together, could lay a complaint with the ILO in terms of the Constitution of the ILO, raising the following issues:

- The majority trade union monopoly instituted and maintained by the *LRA* through the provisions of sections 18 is contrary to the principles which are embodied in the international labour conventions relating to freedom of association. A minority union, or an alliance of minority trade unions acting together, can approach the Constitutional Court for a declaratory order seeking to have section 18 declared unconstitutional.

The basis for this application would be the following:

- The limitation of the right to freedom of association, the right to organise and the right to engage in collective bargaining in the aforesaid sections of the *LRA* are

unjustifiable when the factors to be taken into account in terms of section 36(1) of the *Constitution*, are assessed. As a basis for interpreting the content of these rights contained in the Bill of Rights the content of international labour standards should be utilised.

The effect of these sections is that employees associating with minority trade unions are treated in a different manner than persons associating with majority trade unions, with regard to access to their constitutional right to engage in collective bargaining and the right to organise. This differentiation is unjustifiable in terms of section 9 of the *Constitution* when interpreted by means of international labour standards.

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 the employer raised the threshold for a trade union to be regarded as sufficiently representative in a new collective agreement, such a 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 about 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 the stages of appeal, through the Labour Appeal Court, the Supreme Court of Appeal, and to the Constitutional Court, if necessary.

When a minority union is faced with an award by a commissioner on the question as to whether such a union is sufficiently representative in a workplace or not, and where the Commissioner acts in accordance with the prescriptive provisions of section 21(8)(a)(i) of the *LRA*, this award should be taken on review to the Labour Court. When this application is refused the matter should be taken through the stages of appeal through the LAC and the SCA to the CC, if necessary.

It is furthermore recommended that government engages in dialogue with minority unions in order to come to a better understanding of the problem. Minority unions, which as a rule are not represented at the National Economic Development and Labour Council (NEDLAC), find it difficult to attempt to change government's policy on majoritarianism. The matter should be placed before NEDLAC for discussion and the necessary action. It is furthermore recommended that government appoint a task team for making recommendations on the amendment of section 18 of the *LRA* and the writing of a code of good practice to minimise the negative effect of section 18 on minority trade unions. This task team should in its investigation also assess the constitutionality of section 18 in the context of international labour standards.

14 Conclusions

This article has highlighted some of the intricate challenges associated with the interpretation and application of section 18 of the *LRA* on minority trade unions. It is argued that a number of sections in the *LRA* have the purpose of promoting majoritarianism, while at the same time placing almost insurmountable obstacles in the way of unions whose members are not in the majority in a workplace. The clear winners emerging from the collective bargaining framework of the *LRA* are majority trade unions.

A particularly powerful provision included in the *LRA* is section 18, in terms of which a majority trade union and an employer have the right to conclude a collective agreement setting a threshold for representivity for other unions in a workplace to meet, failing which they will not be recognised as trade unions or have the accompanying organisational rights in terms of sections 12, 13 and 15 of the *LRA*.

Furthermore, section 18 of the *LRA* permits workplace-specific bargaining by allowing a majority union in a workplace, as defined, to negotiate on behalf of all the employees in that workplace. What this section does not explicitly state is whether when such negotiation takes place the majority union and the employer may negotiate away the rights of currently recognised representative unions. Section 18

merely permits a majority union and an employer to enter into a collective bargaining agreement to regulate the organisational rights of workers within a bargaining unit. This section is accordingly permissive.

The section itself contains no express internal limitations. In particular, it makes no reference to whether the negotiations permitted by the section may occur when other recognised unions are exercising organisational and bargaining rights or to the impact of such conduct on the rights of existing minority unions in the bargaining unit. Section 18 was not intended to promote collusion between employers and majority unions to deprive long-established unions and their members of their rights.

On a proper interpretation, section 18 of the *LRA* cannot be read to condone the effective manipulation of the collective bargaining units so as to exclude minority trade unions from participating in collective bargaining on behalf of their members employed by a specific employer. Properly construed, section 18 should not be interpreted as a blanket licence for a "majority" union to eliminate the bargaining rights of unions which satisfy the criteria contemplated in section 21(b). It can therefore be concluded 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 section 18.

In conclusion it can be argued that section 18(1) of the *LRA* does not support the interpretations of the ILO on Freedom of Association discussed above, that this provision is unconstitutional and in violation of 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 and long-standing practice.

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List of abbreviations

ANC	African National Congress
CCMA	Commission for Conciliation Mediation and Arbitration
CFA	Committee for Freedom of Association of the ILO
CLL	Current Labour Law
CLELJ	Canadian Labour and Employment Law Journal
COSATU	Congress of South African Trade Unions
CRISPP	Critical Review of Social and Political Philosophy
DPRU	Development of Policy Research Unit
ECHR	European Convention for the Protection of Human Rights and Freedoms
EHRR	European Human Rights Reports
FEDUSA	Federation of Unions of South Africa
ILO	International Labour Organisation
ILJ	Industrial Law Journal
ILR	International Labour Review
LDD	Law, Democracy and Development
LRA	The Labour Relations Act
NACTU	National Council of Trade Unions
NEDLAC	National Economic Development and Labour Council
NUM	National Union of Mine Workers
Stan J Int'l L	Stanford Journal of International Law
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
UASA	United Association of South Africa
USFL Rev	University of San Francisco Law Review
Yale L Rev	Yale Law Review