

Unrepresentative Trade Unions' Representation in Individual Oriented Proceedings

by Mr Temogo Esitang

1. Introduction

The Republic of South Africa on 27 March 2018 will be celebrating its 24 years of democracy. The late former President Nelson Mandela in his much-acclaimed speech delivered before his sentencing in the famous Rivonia trial set the tone for South Africa's constitutional model of democracy. He passionately stated that:

"I have fought against white domination, and I have fought against black domination. I have cherished the ideal of a democratic and free society in which all persons live together in harmony and with equal opportunities. It is an ideal which I hope to live for and to achieve. But if needs be, it is an ideal for which I am prepared to die."¹

In my view this is the spirit within which the Constitution, 1996 was adopted. Prior to the adoption of this Constitution, political leaders like himself were in jail and the government of the day then was the Nationalist Party (NP). This same NP were the architects of the apartheid laws that he vehemently fought against and yet he and the organization that he led, the African National Congress (ANC), found it expedient to forge the future of all in South Africa through co-operation with the then minority government led by the NP. The NP and other small political parties were by far in comparison to the ANC's majority support a minority and thus represented minority interests, yet they fully participated in the establishment of a new South Africa and had a voice in the process.² The popular ANC therefore chose to be inclusive as far as possible of these relatively small political parties. The constitutional labour rights such as the rights to freedom of association, to

¹ ANC website available at www.anc.org.za (accessed 1 February 2018).

² Woolman and Swanepoel in Woolman and Bishop Constitutional Law of South Africa Revision 6 Juta (2014) 2:41. See also Murray C "Negotiating Beyond Deadlock: From the Constituent Assembly to Court" 32 *IJLI* (2004) 344-345.

organize and to engage in collective bargaining were the goals aspired for and were subsequently entrenched in the Constitution, 1996.

The Labour Relations Act³ (LRA of 1995) as a labour relations dispensation in the country purports to give effect to the principles contained in the Constitution.⁴ The system is voluntarist and bolstered by the qualified right of trade unions to acquire organisational rights⁵ and to strike.⁶ The majority trade unions through the model of collective bargaining that is strongly inclined towards majoritarianism are able to bolster their dominance of the collective bargaining space and sometimes effectively preventing those trade unions that are unable to meet the threshold of representivity from being active in the workplace.⁷

The central question posed in this paper is whether the right to establish thresholds of representivity in relation to organisational rights and its consequent effect of limiting the right to freedom of association of unrepresentative trade unions insofar as representation in individual matters is concerned is

- in line with the Constitution
- and the principles of the International Labour Organisation (ILO).

The appraisal is made up of four parts. The first part constitutes an exposition of the current organisational rights dispensation and the reflects on deficiencies in the current collective bargaining system insofar as freedom of association is concerned and to provide suggestions on what requires to be done in the quest for the protection and promotion of the right to freedom of association. The second constitutes an exposition of the Constitution's promotion of minority interests, be it through political associations or otherwise. The third part covers the principles of the ILO and what member states may

³ Act 66 of 1995.

⁴ See s1 of the LRA of 1995.

⁵ Chapter III Part A.

⁶ See ss 64-70 of the LRA of 1995 and s 23(2)(c) of the Constitution, 1996.

⁷ See Esitang TG and Van Eck S "Big Kids on the Block Dominating Minority Trade Unions: Reflections on Thresholds, Democracy and ILO Conventions" in ISSSL *World Congress XXI*: (15-18 September 2015 Cape Town) 1-25 and Esitang and Van Eck (2016) *ILJ* 763. See also Esitang TG and Van Eck S "Minority trade unions and the amendments to the LRA: Reflections on thresholds, democracy and ILO conventions" 2016 *ILJ* 763- 778.

and may not do within the context of their policy choices insofar as models of collective bargaining are concerned. The final part poses the major considerations in the regulation of statutory organisational rights and the how collective bargaining is to unfold in regulating same.

2. The Organisational Rights Dispensation of the LRA of 1995

Organisational rights whether acquired, *inter alia*, as a result of statutory provisions or otherwise are the oxygen of trade unions. As succinctly mentioned by Mischke:

“organisational rights provide trade unions with the essential instruments for not only securing an organisation a foothold in the employer’s business, but also laying the foundations for a future collective bargaining relationship with the employer.”⁸

These rights are also enjoyed by trade unions by virtue of membership to the bargaining council. Where a trade union is a majority trade union in the workplace, it will enjoy all these organisational rights.⁹ Where a trade union is sufficiently representative¹⁰ it will enjoy some organisational rights with the exception of the right to elect trade union representatives and the right to disclosure of information which are enjoyed exclusively by majority trade unions.¹¹ The LRA of 1995 does not expressly make provision for minority trade unions to acquire statutory organisational rights.

The statutory organisational rights referred to in the LRA of 1995 are the following:

- the right to access to the workplace (s 12 of the LRA);
- the right to the deduction of trade union subscriptions (s 13 of the LRA);
- the right to elect trade union representatives (s 14 of the LRA);
- the right of trade union officials to take leave for union activities (s 15 of the LRA);

⁸ Mischke C “Getting the Foot at the Door: Organisational Rights and Collective Bargaining in terms of the LRA” *CLL* (2004) 60.

⁹ Ss 12, 13, 14, 15 and 16 of the LRA of 1995.

¹⁰ s 11 refers to “a registered trade union, or two or more registered trade unions acting jointly that are sufficiently representative.” There is no definition of sufficient representivity in the LRA.

¹¹ See s 14 of the LRA of 1995.

- and the right to disclosure of information for the purpose of collective bargaining (s 16 of the LRA).

All except the right to elect trade union representatives and the right to disclosure of information, these are enjoyed by sufficiently representative trade unions. There is no indication in the LRA of 1995 on what the definite or actual percentage is for a trade union to be “sufficiently representative.” However, the LRA of 1995 does provide that when a trade union wishes to exercise organisational rights, the arbitrator must seek to do the following:

- limit the proliferation of trade unions;
- limit the financial burden which comes with if for employers pertaining to the recognition of multiple trade unions; and
- take a basket of rather vague factors, such as the nature of rights sought, the nature of the workplace and the sector, and the organisational history of the workplace into account before granting the rights.¹²

The LRA of 1995 provides that there are three methods for the acquisition of organisational rights. Firstly, through lodging a dispute when the trade union is of the view they have a particular level of representivity.¹³ The second is by virtue of membership to a bargaining council.¹⁴ The third is through a collective agreement.¹⁵

The majority trade union and employer or the bargaining council have the option of entering a threshold agreement in terms of section 18 or 20 of the LRA. Sections 18 and 20 collective agreements regulate what percentages are required from time to time to

¹² S 21(8) of the LRA. In *SACTWU v Marley (SA) (Pty) Ltd t/a Marley Flooring (Mobeni)* (2000) 21 ILJ 425 (CCMA) 429 paras G – H the arbitrator denied the rights to stop order facilities and union representatives to a trade union with 42.3% membership in the workplace. The rationale for this was provided at 428C-D the CCMA cited that the refusal of organisational rights as avoiding fragmentation of the workplace and to have workers speaking in one voice. “.

¹³ S 21 of the LRA of 1995.

¹⁴ See ss 18 and 20 of the LRA. See also s 19 of the LRA of 1995.

¹⁵ Ss 18 of the LRA of 1995 provides for the setting of thresholds by majority trade unions and employers. In *POPCRU v Ledwaba NO and others* 2013 [BLLR] 1137 (LC) 1149 para 31 the employer and the majority trade union POPCRU agreed to a new threshold collective agreement which replaced the previous threshold collective agreement.

acquire organisational rights. In this regard, section 18 of the LRA provides on the one hand that:

“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.”

On the other hand, section 20 provides that there is no preclusion to a collective agreement regulating all or some organisational rights through an instrument other than section 18. This also means that the section 18 threshold agreement inasmuch as it may be entered by a majority trade union may also be entered by an unrepresentative trade union.¹⁶ In *SA African Correctional Services Workers Union v Police and Prisons Civil Rights Union* Labour Appeal Court (LAC),¹⁷ the LAC held that an unrepresentative trade union that does not have organisational rights may negotiate for some of these with the employer. This of course does not mean that the employer will grant them.

South African labour law commentators have confirmed that a dominant majority trade union and an employer may want to use threshold agreements to exclude rival trade unions, and thus effectively disable these unrepresentative trade unions from getting their foot in the door.¹⁸ Brassey *et al*¹⁹ in this regard attributes the exclusion as a manifestation of the principle of majoritarianism, which in terms of the LRA of 1995 allows for what he terms connivance between the majority trade unions and employers to exclude rival trade unions. Du Toit *et al*²⁰ do state that section 18 of the LRA is being used to prevent

¹⁶ Section 20 of the LRA of 1995 does not specify that a majority trade union may enter into this agreement exclusively.

¹⁷ (2017) 38 *ILJ* (LAC) at para 36 the LAC held that whilst s 23(1) of the LRA provides a collective agreement that sets thresholds of representivity for the acquisition of organisational rights that will be binding on minority trade unions, it does not deny an employer from entering such agreement with a minority trade union that seeks organisational rights.

¹⁸ Du Toit *et al Labour Relations Law-A Comprehensive Guide* (2015) 261. See also Grogan “Majority Rules of Thresholds and Extended Agreements” *EL* (2014) 14 and Le Roux “Organisational Rights for Minority Unions: Democratic Rights and Orderly Collective Bargaining” *CLL* (2014) 69.

¹⁹ Brassey *et al* “Commentary on the Labour Relations Act” (2006) A3-23.

²⁰ Du Toit *et al Labour Relations Law-A Comprehensive Guide* (2015) 261. Although dismissed by the Labour Appeal Court, in *POPCRU v Ledwaba NO and others* 2013 [BLLR] 1137 (LC) 1150 para 31 it was also confirmed that organisational rights which had previously been enjoyed by a minority trade union

unrepresentative trade unions from “getting a foothold in a workplace” may potentially violate the basic rights of employees and their trade unions.²¹

It is submitted that the effect of setting thresholds of organisational rights in collective agreements is sometimes meant to effectively prevent trade unions from their registered activity.²² This includes preventing them from the exercise of the right to elect trade union representatives in terms of section 14 of the LRA of 1995 and related rights. It is submitted that the activity of the trade union may be either in the individual representation space or in the collective representation space. The former, namely, the individual representation space, is the focal point of this paper. It is argued that the individual representation space has to be appreciated within the context of the right to freedom of association and not just given content with reference to the entering into a collective agreement on service conditions.

The unrepresentative trade union by virtue of not meeting a set threshold may not exercise the right to elect trade union representatives in terms of section 14(2)(a) of the LRA of 1995. It is argued that this state of affairs also compounds the right of the member to be represented by such an unrepresentative trade union in disciplinary or grievance proceedings and thus the right to freedom of association in terms of international norms is equally not protected.²³

That an unrepresentative trade union may be unable to elect trade union representatives may have been the subject of a collective agreement determinable in terms of section 23(1)(d) of the LRA of 1995 which provides as follows:

“A collective agreement binds employees who are not members of the registered trade union or trade unions party to the agreement...”

through an organisational rights agreement could be taken away by a subsequent agreement between the employer and a majority trade union. This, it was held, was consistent with the novation principle.

²¹ As above. See also s 23(2) of Constitution of South Africa, 1996, ss 4 and 8 of the LRA of 1995.

²² S 14(4) of the LRA of 1995.

²³ See para 6 below on the exposition of the International Labour Organisation and the determination by the supervisory bodies.

The effect of this provision on unrepresentative trade unions is that an agreement entered in terms of this provision will bind all employees irrespective of whether they belong to the majority trade union or not. This translates arguably in the possibility of the unrepresentative trade union being disabled from electing a trade union representative that would enable it to represent members in disciplinary or grievance proceedings. This also arguably negatively impacts on the right to freedom of association, from the perspective of the Constitution, 1996 and ILO norms as will be discussed below.

It is argued that the right to freedom of association provision in the LRA of 1995 does not expressly require a minimum threshold and therefore should apply to every member of a trade union.²⁴ The amendments to the LRA introduced a mechanism that discourages employers and dominant trade unions from fixing thresholds that effectively exclude rival trade unions from acquiring organisational rights.²⁵ This may have the effect of intensifying the rivalry between competing trade unions in the workplace. Du Toit *et al* regard an “increase in trade union rivalry” as a consideration or justification for granting a trade union organisational rights despite their minority status.²⁶ The question that comes to the fore is whether a majority trade union and an employer or a bargaining council can deny a member of a trade union from being represented by his/her trade union despite its unrepresentative status? It is submitted that this is the question that can bring answers to the rivalry between trade unions in South Africa which have the workplace and society with scenes of violence and intolerance which defeats the very purpose of the LRA of fostering labour peace in the workplace and in society.²⁷

To a certain extent the 2014 amendments to the LRA of 1995 have yielded hope for unrepresentative trade unions. Section 21(8C) of the LRA of 1995 provides that:

²⁴ See Tregaskis “Freedom of Association and the Closed: A Balancing of Rights?” *HLR* 84 (1985) 84.

²⁵ Van Niekerk *et al* “Law @ work” (2015) 376.

²⁶ Du Toit *et al* “Labour Relations Law-A Comprehensive Guide” (2015) 259.

²⁷ S 1 of the LRA. See also Rycroft A “Violence and Dismissals in the Strike Context” paper presented at the Annual Labour Law Conference in Sandton Johannesburg (2013).

“[s]ubject to the provisions of subsection (8), 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 thresholds of representativeness established by a collective agreement in terms of section 18, if (a) all parties to the collective agreement have been given an opportunity to participate in the arbitration proceedings; and (b) the trade union, or trade unions acting jointly, represent a significant interest, or a substantial number of employees, in the workplace.”

These are positive developments in so far as the promotion of the right to freedom of association is concerned as the CCMA now may permit a right to elect trade union representative to a trade union even though this right may be excluded in terms of section 18 or 20 of the LRA of 1995.

The amendments do pose some challenges insofar as firstly, the interpretation of “a significant interest.” Secondly when would a trade union be said to represent a “substantial number of employees.”²⁸ Thirdly, what would the effect of section 23(1)(d) which provides for a binding collective agreement? The fourth challenge is that the fact that there is nothing that limits a trade union’s constitutional right to strike in order to acquire organisational rights. This clearly places the power of CCMA arbitrators at loggerheads with majority trade unions who wish to enter into threshold agreement that have the effect of excluding the very trade unions that the amendments seek to include. These may pose an opportunity for the Legislature to go back to the drawing board to address these interpretational challenges.

4. The Impact of Thresholds in Bargaining Councils

There are various bargaining councils in both the private and public sector. The public sector bargaining councils serve to provide examples of the challenges identified within the exercise of the right to freedom of association and specifically the right of unrepresentative trade unions to represent members in individual matters such as disciplinary hearings and grievance proceedings. The constitution of the Public Service

²⁸ S 21(8C) (a) and (b) of the LRA.

Co-ordinating Bargaining Council²⁹ (“PSCBC”) provides for two requirements before a trade union can become member of the PSCBC:

“7.1 Any single trade union party may apply for admission to the Council if it –
(a) meets the threshold requirement of 50 000 members; and
(b) is admitted to a Sectoral Council.”

One or more trade unions working together which are unable to meet the 50 000 threshold will not be able to participate in the activities of the bargaining council. Any trade union wishing to be a party to the PSCBC also needs to be admitted to the relevant sectoral council before being admitted to the PSCBC. The General Public Service Sectoral Bargaining Council (“GPSSBC”) is an example of such a sectoral council. The constitution of the GPSSBC provides that only one or more trade unions acting together that meet the threshold of 30 000 members may apply for admission to the GPSSBC.³⁰ The bargaining council system therefore precludes unrepresentative trade unions from engaging in collective bargaining in so far as they are excluded from becoming party to the statutory institutions which are established for amongst others collective bargaining activities. There is no sustainable challenge to this state of affairs from the point of view of collective bargaining and the power dynamics that go with it, as this phenomenon is informed by numbers, especially within the context of a majoritarian model of collective bargaining.

The challenge though, lies with the collectively bargained agreement on the disciplinary code and procedures for the general public service,³¹ which is embodied in PSCBC Resolution 1 of 2003.³² This agreement provides that an employee who is subjected to a

²⁹ The PSCBC is established in terms of s 36 read with s 213 of the LRA of 1995. See Constitution of the PSCBC paras 4(a)-(o). The powers and duties of the PSCBC are, *inter alia*, to negotiate transverse matters and conclude collective agreements and to resolve disputes through dispute resolution mechanisms.

³⁰ GPSSBC Resolution 2 of 2003 “Constitution of the GPSSBC” paras 6.2(a) and (b) provide that “A registered trade union which meets the threshold requirement of 30 000 members; or two or more registered trade unions acting together as a single party, provided their combined membership meets the threshold requirement of 30 000 members” may apply to become parties.

³¹ The general public service sector excludes the educators, correctional services and the police services. There are sectoral bargaining council for these sectors.

³² The part on “definitions” of PSCBC Resolution 1 of 2003 relating to disciplinary processes defines “recognised trade union” as “all unions admitted to the PSBC as well as any trade union that enjoys organisational rights from a particular department (the latter union is recognised for the particular department only).” The right of appearance in disputes under the auspices of the PSCBC would therefore

disciplinary hearing may be represented by a “fellow employee” or “the representative of a recognised trade union.” The part on “definitions” of PSCBC Resolution 1 of 2003 relating to disciplinary processes defines “recognised trade union” as “all unions admitted to the PSCBC as well as any trade union that enjoys organisational rights from a particular department (the latter union being recognised for the particular department only).”

It is submitted that the numbers for admission to the bargaining councils referred to should bear no relevance to representation of members in grievance and disciplinary proceedings. The consideration of numbers as a determination for representative capacity needs only be relevant for purposes of collective bargaining.³³ The content and essence of this argument is captured in the discussion of the constitutional principles and international norms below.

5. Constitutional Labour Rights and Constitutional Democracy

5.1 Introduction

The question explored in this part is whether South Africa’s majoritarian model of collective bargaining conforms with the spirit and purport of the Constitution, 1996. This part will firstly, consider the model of constitutional democracy and the role that minority interests play within this model. Secondly, an exposition of the right to freedom of association from the context of the constitutional perspective and from the perspective of international law. Finally, the permissible limitations of constitutional rights will be looked at to determine the extent to which the right to freedom of association may be limited.

be afforded to trade unions admitted to the PSCBC as well as those that already enjoy organisational rights in any particular department.

³³ See the discussion of the international norms at 6 below.

5.2 Reflections on the Constitutional Model of Democracy

The Constitution of South Africa³⁴ (Constitution, 1996) and its Bill of Rights were negotiated by the African National Congress (ANC) in the main and the Nationalist Party (NP) government. There was no obligation on the ANC or the NP to involve any other political formations in the country. However, the relatively small political formations such as the Inkatha Freedom Party (IFP), the Pan Africanist Congress (PAC), the Herstigte Nasionale Party (HNP) were not ignored as their participation in the negotiations for a new political order for South Africa required some form of consensus. According to Hopper³⁵ this facilitated “the exchange of power from apartheid regime” with majority rule being disbanded to make way of government of national unity and introducing proportional representation.

The constitutional democratic model provides that the majority political party that wins the majority number of votes will become the government of the day and thus establish policy. However, the small political parties that possess a low threshold of representivity, will not necessarily be excluded from political existence and/or participation. In this regard sections 57(b), 70(b), 116(b) of the Constitution, 1996 all provide for the participation of minority political parties within institutions of democracy.

It is accepted that the first thing that comes to mind when mention is made of industrial democracy in the South African context is the workplace forum. Workplace forums are provided by the LRA of 1995 as an instrument to bolster the democratization of the workplace through employee participation some aspects of the business of the employer.³⁶ Whether the reasons are justified or not the trade unions have not accepted these as a vehicle of democracy and other methods of ensuring there is a semblance of democracy in the workplace have been pursued, and major in these is the collective

³⁴ Constitution of South Africa of 1996.

³⁵ “Evaluating South Africa Design” (2008) 1 available at http://www.ucl.ac.uk/opticon1826/archive/Issue5/Article_S_HS_Hopper.pdf (accessed January 2018).

³⁶ See s 1 and ss 78-94 of the LRA of 1995.

bargaining process. The focus of this paper is not the exploration of the workplace forum but rather the impact of thresholds of representivity on organisational rights.

5.3 The Rights to Freedom of Association, to Organise and to Engage in Collective Bargaining

The Constitution, 1996 does not expressly provide for the rights to freedom of association³⁷, to organise³⁸ and to engage in collective bargaining³⁹ to be subject to a threshold when exercised. However, section 23 of the Constitution, 1996, envisages labour legislation that will regulate collective bargaining⁴⁰ subject to limitations to such legislation being compliant with section 36(1) of the Constitution, 1996.

The Constitution, 1996 does not make provision that these rights are to be limited by means of thresholds of representivity.⁴¹ It is submitted that should the LRA make provision for a model of democracy which limit unjustifiably the right “every worker” to participate in the “activities and programmes” of its trade union as provided for in section 23(2)(a) and ((b) of the Constitution, 1996, such limitation could possibly fail constitutional muster. Further, any trade union member’s right to elect or be elected as a trade union representative, or specifically to be represented in a disciplinary hearing does constitute the activities of trade unions envisaged in the LRA of 1995 and should be protected by the Constitution, 1996.

³⁷ S 18 and 23(2) of the Constitution, 1996. These sections respectively provide for the right to freedom of association for citizens and the right of “every worker (a) to form and join a trade union (b) to participate in the activities and programmes of a trade union; and (c) to strike.”

³⁸ S 23(4) of the Constitution, 1996 provides that “[e]very trade union has the right to organize.”

³⁹ S 23(5) of the Constitution, 1996 provides that “[E]very trade union, employers’ organisation and employer has the right to engage in collective bargaining... To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

⁴⁰ S 23(5) of the LRA of 1995.

⁴¹ This is the limitation of the paper in that it does not address the issues of constitutionality of the security arrangements. See also s 23(2) which provides as follows:

“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...”

Minority trade unions may require the services of the trade union representative in a disciplinary hearing or a grievance. It is unfortunate that these are only accommodated in the exclusive statutory right to elect trade unions afforded to majority trade unions in terms of the LRA of 1995 besides the possibility of a section 20 collective agreement. In the same vein, it can be argued that any provision in labour legislation which permits agreements to be concluded by majority trade unions and the employer that explicitly exclude minority trade unions from representing their member in these individual cases may and should be found to be unconstitutional.

In relation to the right to engage in collective bargaining in terms of section 23(5) of the Constitution, 1996 the issue of thresholds comes out of the envisaged national legislation. It is submitted that there would be no challenge within the context of a majoritarian collective bargaining system to legislate a provision that permits the establishment of thresholds for purposes of collective bargaining over substantive collective bargaining issues such as wages, improvement in conditions of employment of employees. The establishment and setting of thresholds in exercising the collective bargaining right and all statutory organisational rights ancillary to it may thus not pose a constitutional challenge.

It is argued in this thesis that the exercise of the fundamental labour rights in the Constitution, 1996 cannot be divorced from the premise of constitutional democracy and international norms. This paper identifies the disjuncture between the rights to freedom of association and collective agreements that have the effect of excluding trade unions from representing members in individual cases.

The current labour dispensation provides for the thresholds of representivity not only in the sphere of collective bargaining, but also in the pure exercise of the right to freedom of association and to partake in activities of a trade union at an individual level.⁴² The thresholds agreements that emanate from the collective bargaining exercise and their

⁴² See ss 14, 18 and 20 in conjunction with s 23(10)(d) of the LRA of 1995 as avenues by which majority trade unions may enter agreement that exclude unrepresentative trade unions from effectively representing their members in disciplinary or grievance proceedings.

effect may thus not comply with the Constitution's limitation provision and/or international norms. What happened to Madiba's fight against all forms of domination?

5. The ILO on the Right to Freedom of Association and Collective Bargaining

5.1 Introduction

The Constitution provides that when interpreting the Bill of Rights, courts or tribunals

“(b) must consider international law; and
(c) may consider foreign law.”⁴³

This part considers ILO principles relevant to the promotion of freedom of association and the promotion of collective bargaining and it also considers how the Committee on Freedom of Association (“CFA”) and the Committee of Experts on the Application of Conventions and Recommendations (“CEACR”) have addressed complaints regarding the infringement of trade unions rights.⁴⁴

5.2 ILO Principles – Determinations by ILO Supervisory Committees

The CFA and CEACR's interpretation of some of the key articles of Convention 87 of 1948 could provide valuable guidance in relation to the validity and feasibility of the South African model.

Article 2 of Convention 87 of 1948 provides that:

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

⁴³ S 39(1) of the Constitution of South Africa, 1996.

⁴⁴ See General Survey (1994) 8 para 20. The nature of the function of the CEACR and the CFA is to apply the same universal principle although their composition differs because when a case is referred they may draw each other's attention to it.

Article 3 directs that:

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

The committees of the ILO have considered these articles and are aware that having small and multiple trade unions in the workplace compromises the unity of the collective workforce.⁴⁵ However, both the CFA and CEACR also equally recognize workers’ right to freedom of association. In this regard the CFA mentions that inasmuch as the proliferation of trade unions is undesired, this referred to proliferation should not be curtailed through a monopoly system imposed by law as this would be contrary to the principle of freedom of association.⁴⁶ This premise bolsters the diversity that can only be realized through a pluralist form of democracy which the Constitution, 1996 safeguards.⁴⁷ It has to be mentioned that pluralism is not the equivalent of proliferation which the LRA of 1995 seeks to prevent.

There is no specific provision in Convention No 87 of 1948 that deals with trade union pluralism. The aim of the ILO when formulating Convention, No 87 of 1948 is said to be to safeguard the right of workers to create and belong to the trade union of their choice and not to promote pluralism and fragmentation, although it required at the very least that diversity remains intact all areas.⁴⁸

The CFA does not have a problem with majoritarianism. However, they very same CFA has determined that:

⁴⁵ Digest of Decisions (2006) 67 para 319.

⁴⁶ See also 338th Report Case No 2348 para 995.

⁴⁷ See also Digest of Decisions (2006) 67 para 320.

⁴⁸ *Digest of Decisions* (2006) 222 para 1097.

“the mere fact that the law of a country draws a distinction between the most representative trade union organizations and other trade union organizations is not in itself a matter for criticism. Such a distinction...should not result in the most representative organizations 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 organizations that are not recognized as being among the most representative of the essential means for defending the occupational interests of their members...”⁴⁹

There are two points reflected by the ILO within the context of a member state’s majoritarian model of collective bargaining. Thresholds as a component and premise of the majoritarian system are only relevant in determining representivity for purpose of collective bargaining and as specified above. They serve no relevance during the representation of members in individual grievances.⁵⁰ The same principle of the CFA can be extended to disciplinary hearings which involve an individual member. This international norm has been confirmed in the Constitutional Court cases of *NUMSA v Bader Bop*⁵¹ and *AMCU v Chamber of Mines*⁵² where the Constitutional Court in these two judgements held vociferously that unrepresentative trade unions are to be allowed to represent their members in disciplinary hearings and grievance proceedings. This will be in compliance with international norms to which South Africa is obliged to comply with in terms of section 39(1) of the Constitution, 1996.

As unrepresentative trade unions are not able to exercise the statutory right to elect trade union representatives in terms of section 14 of the LRA pf 1995, the only way to exercise the right to have their representatives representing members in individual cases will have to be in terms of an instrument other than section 14. This is where section 20 comes in handy. As alluded to, the possibility of having two collective agreements, one between the employer and the majority trade union or bargaining council and one between the unrepresentative trade union and the employer was also held to be possible in *South*

⁴⁹ *Digest of Decisions* (2006) para 346.

⁵⁰ *Digest of Decisions* (1996) 194 para 974.

⁵¹ [2003] 24 ILJ 305 (CC) at para 34.

⁵² (2017) 38 ILJ 2009 paras 43-47.

*African Correctional Services Workers Union v Police and Prisons Civil Rights Union*⁵³
wherein it held that:

“[t]his means that even where a s18(1) agreement exists, this does not preclude the conclusion of a s20 collective agreement between an employer and a minority union which has bargained for the rights contained in that agreement.”

The CFA has held that it is desirable to seek to encourage trade unions to join together voluntarily to form strong and united organisations than to impose upon them by legislation a compulsory unification which deprives the workers of the free exercise of their right to freedom of association.⁵⁴ Less or no interference as far as trade union organisation is concerned is the path favoured by the CFA instead of the compulsion of workers to unify even if it is for their own benefit. This path of non-interference does not seem to be the path that threshold agreements in terms of the LRA of 1995 are premised upon.

Notwithstanding the understanding that the current organisational rights dispensation is limiting to unrepresentative trade unions insofar as representation in individual cases is concerned, the complication towards justifying the limitation is further occasioned by section 200 of the LRA of 1995 which provides that:

“(1) A registered trade union...may act in any one or more of the following capacities in any dispute to which any of its members is a party -
(a) in its own interest;
(b) on behalf of its own members;
(c) in the interest of any of its members.
(2) A registered trade union or a registered employers’ organisations entitled to be a party to any proceedings in terms of this Act if one or more of its members is a party to those proceedings.”⁵⁵

⁵³ (2017) 38 ILJ 2009 (LAC) para 34.

⁵⁴ See also Digest of Decisions (2006) 67 para 320. The CFA indicated that the imposition of a “monopoly situation” just to avoid the “proliferation of competing organisations” is contrary to workers’ freedom of choice.

⁵⁵ S 200 of the LRA of 1995.

It is submitted that this provision cannot be wished away and confirms the view that the organisational right on representation especially in individual cases and all ancillary organisational rights that are attached to it is unjustifiably limited by the current organisational rights dispensation in Chapter III of the LRA of 1995. A read of the provision is clearly that there is that the need to satisfy some threshold for the activities identified does not feature.

6. Limitations on the Fundamental Rights

Constitutional rights are not absolute and constitutional labour rights are not an exception. Currie and De Waal explain that an invasion of rights should not take place further than the purpose sought to be achieved by the invasion and there must be a balance between the possible harm and the benefits sought to be achieved.⁵⁶ The majoritarian model of collective bargaining that permits threshold agreements is an infringement of the right to freedom of association where the conclusion of a collective agreement disallowing unrepresentative trade unions from representing their members in individual cases. It is submitted that organisational rights serve to provide trade unions with an organisational foothold and also indirectly enable the trade union to represent its members in individual proceedings despite the unrepresentative status. Denying them the right to elect trade unions representatives and subsequently to represent their members in individual cases may be going beyond a justifiable limitation.

As already alluded to there is no challenge with the principle that the encouragement and existence of majority trade unions often lead to stability at the workplace. However, this principle should not weigh so much that it prevents minority trade unions from gaining an organizational foothold in totality and effectively unable even to represent members in individual proceedings. On the limitation clause's standards, this would hugely disproportionate. The right to be able to at least represent members in individual cases such as grievance and disciplinary proceedings does serve as the required oxygen or life-

⁵⁶ See Currie & De Waal "The Bill of Rights Handbook" (2013) 162. As confirmed by Woolman & Botha "Limitations" in Woolman & Bishop "Constitutional Law of South Africa" (2014) 34:67-68.

blood of trade unions and restricting this right to the extent that the LRA does may be unjustifiable.⁵⁷

7. Conclusion and Recommendations

7.1 Concluding Remarks

The organisational rights dispensation in the LRA of 1995 that provides for thresholds agreements constitutes provisions that promote the principle of majoritarianism. The ILO endorses this model of collective bargaining. However, it clearly demarcates how far the rights to freedom of association of an unrepresentative trade union may be negatively impacted upon. The collective bargaining process may have trade unions at an advantage abuse their right to enter into collective agreements and may utilise the same agreements to ensure that rival trade unions are unable to establish themselves in the workplace including even representing members who have exercised their right to freely associate with them.

The ILO supervisory committees, namely, the CFA and the CEACR, without imposing it on member states prefer the existence of a system where a unified workforce is in place to engage in collective bargaining whilst maintaining a reasonable level of pluralism to ensure that freedom of association thrives. Unreasonably high thresholds of representativeness for the enjoyment of organisational rights prevent unrepresentative trade unions from being able to organise and to establish their mark, even minimally in the workplace, that is, in disciplinary and grievance proceedings.

In South Africa the LRA of 1995 was subjected to amendments. The LRA now allows non-majority trade unions to acquire organisational rights exclusively enjoyed by majority trade unions. These amendments therefore include the right to elect trade union representatives and the right to disclosure of information. However, there is no reconciliation between the powers of the arbitrators and the strong majority trade union or bargaining council that

⁵⁷ See Esitang and Van Eck *ILJ* 37 (2016) 763.

could insist on excluding a rival trade union through strike action. In light of the fact that the LRA of 1995 is voluntarist in nature, it is difficult to imagine that this was not anticipated by the drafters of the amendments when the provisions on thresholds were left intact in the LRA.

The ILO principle is that thresholds are relevant in collective bargaining on substantive matters such as wage increases and other service conditions and improvement of members conditions of employment. It has been argued that organisational rights are not only relevant for collective bargaining exclusively but are also equally applicable in the sphere of enjoyment of the right to freedom of association.

The spirit and purport of the Constitution, 1996 promotes and protects the participation of minority political parties in institutions of government. Further, the rights of minorities irrespective of race, colour or creed are fully protected. It may be argued that the rights of unrepresentative entities such as unrepresentative trade unions should also enjoy the same promotion and protection. This will ensure that they “get a foothold in the workplace.”⁵⁸ Further to that they serve to put majority trade unions to check.

It may therefore not be correct to have the status of a trade union as a majority, sufficiently representative and minority trade union being the determiner for the enjoyment of the right to freedom of association. Organisational rights are the lifeblood of all registered trade unions irrespective of numerical strength. The current organisational rights dispensation does not see these as “serving to get the foot at the door” but rather as rights enjoyed by the trade unions that are already recognized by the employer. Organisational rights provide trade unions with the essential instruments not only to secure an organisational foothold in the business, but also laying the foundations for a future collective bargaining relationship with the employer.

⁵⁸ See Du Toit *et al Labour Relations Law – A Comprehensive Guide* LexisNexis (2015)261 and Mischke C “Getting the Foot at the Door: Organisational Rights and Collective Bargaining in terms of the LRA” (2004) 60.

The consequences of threshold agreements are that unrepresentative trade unions become frustrated and resist the dominance by the majority trade union to the extent that labour peace is compromised as was demonstrated by the “Marikana massacre” and general violence in the recruitment arena.⁵⁹ Within the context of South Africa and its accommodation within the ILO framework the denial of the right to represent members in a disciplinary hearing or individual grievance may not pass constitutional muster as there is no backing for it, both from a constitutional perspective or based on international norms.

7.2 Recommendations

What requires to be done in order address the negative impact of thresholds of representivity for the acquisition of organisational rights insofar as election of trade union representatives and their ability to represent members in individual cases is concerned?

The only way to enable an unrepresentative trade union to be able to represent members in disciplinary and grievance proceedings is to permit them to elect trade union representatives. This would require that the right to represent members in grievance and disciplinary proceedings should be unaffected by the threshold provisions. This would place this proposed state of affairs at loggerheads with the right to extend collective agreements to non-parties and members of unrepresentative trade unions. This would be an allowable and justifiable limitation to the right to engage in collective bargaining which is an incident of the right to freedom of association.

This conclusion also ensures that the right to elect trade union representatives is to be divorced from being related exclusively to the right to engage in collective bargaining but that it should be recognized as worthy of protection in the context of the right to freedom of association. This premise will find the right of unrepresentative trade unions to represent

⁵⁹ *National Union of Mineworkers v Lonmin Platinum Comprising Eastern Platinum Ltd and Western Platinum Ltd and another* [2013] 10 BLLR 1029 (LC) 1033 and 1034. The two trade unions NUM and AMCU have had a go at each in their quest to become the majority trade union. On getting majority status, the majority trade union enters into a collective agreement with the employer to prevent the minority trade union from enjoying organisational rights. This vicious cycle is accompanied by violence and intimidation as is normative of strikes in South Africa.

members in individual cases reconcilable with section 200 of the LRA of 1995 which in any event provides for the right of the trade union to act on behalf of its members without any reference to thresholds of representivity.

Collective agreements providing for the exclusion of unrepresentative trade in representing members in individual cases are unable to stand or find justifiable basis for protection in terms of South African law. Bargaining councils and workplaces are therefore to avoid them.
