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UNREPRESENTATIVE TRADE UNION REPRESENTATION IN INDIVIDUAL ORIENTED CASES

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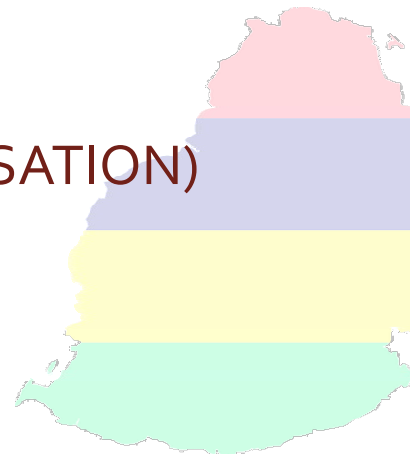
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MAIN QUESTIONs PONDERED?

1. WHAT IS THE IMPACT OF THE RIGHT TO ESTABLISH THRESHOLD OF REPRESENTIVITY ON THE RIGHT TO REPRESENT MEMBERS IN INDIVIDUAL CASES IN A WORKKPLACE?
2. IN THE EVENT THERE IS SUCH AN IMPACT WHETHER IT CONSTITUTES AN INFRINGEMENT OF THE RIGHT TO FREEDOM OF ASSOCIATION THAT AN EMPLOYEE HAS IN INDIVIDUAL CASES.?

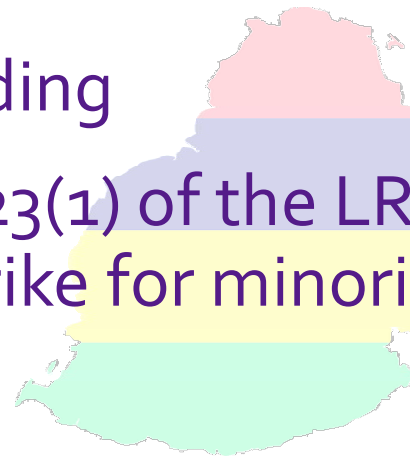
ATTEMPT AT THE ANSWER:

- SA LRA OF 1995 (RELEVANT PROVISIONS ON CURRENT DISPENSATION)
- SA CONSTITUTIONAL FRAMEWORK
- INTERNATIONAL LAW



SA LRA OF 1995

- Collective bargaining strongly inclined towards majoritarianism (s 18 s 20) - others exist such as security arrangements and the establishment of WPF.
- S. 18 (thresholds on access, stop order and leave)
- S. 20 - thresholds on any or all OR.
- S 23(1) (d) – binds all employees and trade unions including
- non parties. (*AMCU v Chamber of Mines* 2017 CC held s 23(1) of the LR to be constitutional – purpose to restrict the right to strike for minority TUs bound by a collective agreement)



SACOSWU v POPCRU (2017) 38 ILJ 2009 (LAC)

- “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.” (para 34)

NOTE: The LAC decision raises same challenge as s. 21(8C) in the 2014 amendments of the LRA of 1995 - What then happens where the majority TU/BC is adamant it wants to exclude the unrepresentative TU from enjoying OR including being prepared to strike over it. Is this not a recipe for conflict as was the case in Marikana between AMCU and NUM.

Impediments on current status as per the LRA?

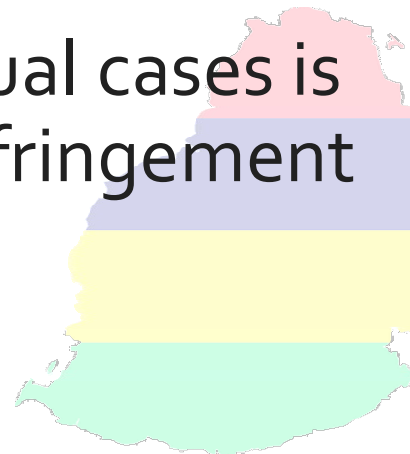
- S. 18 still intact (ss 12, 13 and 15)
 - S. 20 (all OR) still available to a majority TU or BC is still intact -the CCs not hold a different interpretational view to the POPCRU v Ledwaba decision.
 - Voluntarism confirmed YES!
- * **BUT** is voluntarism and majoritarianism still or really the model descriptive of SA collective bargaining regime. YES? BUT CAUTIOUSLY I WOULD SAY.



Constitutional Framework

- *NUMSA v BaderBop* (2003) 24 ILJ 304 (CC)
- *AMCU v Chamber of Mines* (2017) 38 ILJ 831 (CC)

* MESSAGE: Disallowing representation in individual cases is contrary to ILO stds and may be an unjustifiable infringement of the right to freedom of association.



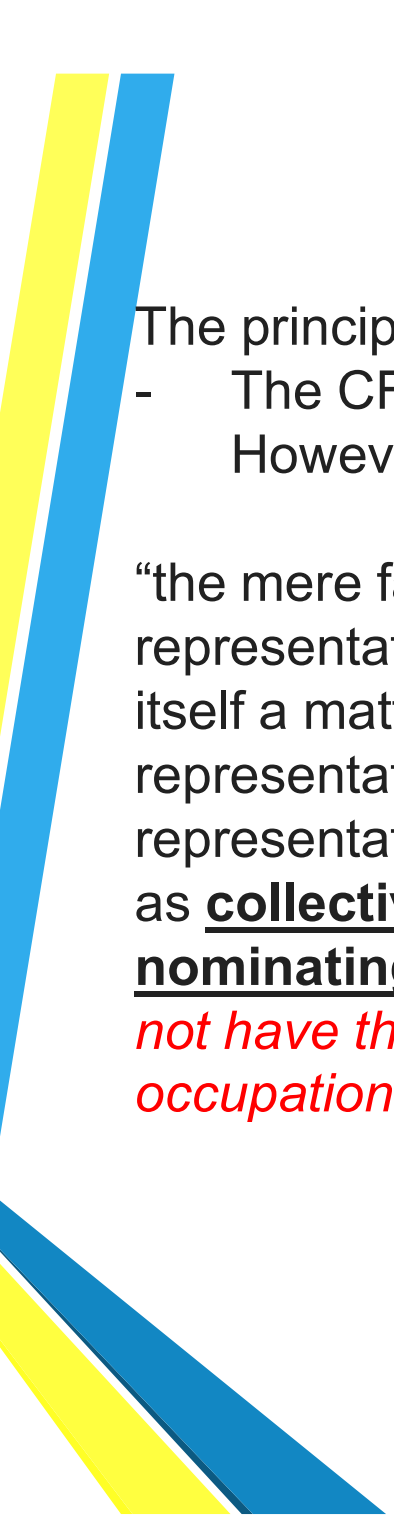
International Standards

2x Key Committees of the ILO that consider contraventions and/or compliance with international standards by member states.

SA has ratified the two Conventions (No 87 of 1948 and 98 of 1949).

- 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.”





The principles emanating from the CFA and CEACR are:

- The CFA does not have a problem with majoritarianism.

However, the very same CFA has determined that:

“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 the ... means for defending the occupational interests of their members...*”



Conclusions

- Collective Agreements are bolstered by voluntarism – principle- parties have a choice.
- BCs and Majority TUs agreements that disallow unrepresentative TUs from exercising the right to represent their members in individuals problematic!
- Does this then not call for a revisit of ss. 18 and 20 to expressly provide for the right to represent in individual cases.
- The right – may entail (right to elect TU reps – proportionate to the number of members “10 members – 1 ss ?” – consonant to the constitutional principle of proportionality of representation in institutions of government. OR **ALREADY ACTIVE**
- Proliferation and Pluralism are not equivalents. Courts in my view have muddled these concepts and invoked purpose out of context.