

The Constitutional Court on the Rights of Minority Trade Unions in a Majoritarian Collective Bargaining System

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ABSTRACT: The collective bargaining framework in South Africa as set out in the Labour Relations Act 66 of 1995 is based on the principle of ‘majoritarianism’. Notwithstanding the premise of our legal system, minority trade unions have an important role to play in advancing workers’ rights and have turned to the courts for an endorsement of these rights. In this respect, there are three significant Constitutional Court decisions that form the foundation of this article. The key focus is on exploring the extent to which these judgments advance such rights and, particularly, whether and to what extent the Constitutional Court has developed coherent and consistent principles relative to the rights of minority trade unions.

KEYWORDS: collective bargaining, Labour Relations Act, majoritarianism, minority organisational rights, trade union, workplace

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I INTRODUCTION

Three collective labour law disputes dealing with the rights of minority trade unions have wound their way through the dispute resolution pathways of the Labour Relations Act 66 of 1995 ('LRA') to the Constitutional Court (the Court). These cases have one feature in common. They deal with the rights of minority trade unions in the context of the LRA's collective bargaining framework that is based on the principle of majoritarianism.¹

In the first decision, *National Union of Metalworkers of SA and Others v Bader Bop (Pty) Ltd and Another*,² the question was whether minority trade unions are entitled to strike to gain statutory organisational rights despite the fact that these rights are only accorded to majority and sufficiently representative trade unions. In this instance the minority trade union succeeded in defending its right to strike and its right to gain organisational rights.

The second decision, *Police and Prisons Civil Rights Union v SA Correctional Services Workers Union and Others*,³ again dealt with the acquisition of organisational rights. However, in this instance the dispute related to threshold agreements concluded between employers and majority trade unions. The question was whether such agreements should be permitted to exclude minority trade unions from gaining organisational rights through the process of collective bargaining. The Court decided in favour of minority trade unions and held that their right to freedom of association would unjustifiably be limited if threshold agreements were permitted to have such a restricting effect.

In the third matter, *Association of Mineworkers and Construction Union v Chamber of Mines*,⁴ a minority trade union contested the extension of a collective agreement by majority trade unions to them.⁵ Here, the collective agreement contained a no-strike clause. The Court upheld the argument that the majority trade union's collective agreement bound the minority trade union, thereby justifiably limiting the right of its members to strike. This was a setback for minority trade unions.

¹ This is evident from various sections of the LRA. For example, in terms of s 18.1 only a majority union has the power to enter into a collective agreement with the employer after establishing a 'threshold of representativeness' required for one or more of the organisational rights referred to in s 12 (trade union access to the workplace), s 13 (deduction of trade union subscriptions and s 15 (leave for trade union activities). When an arbitrator considers a dispute about the representativeness of a trade union for the purpose of awarding organisational rights, he or she must seek to minimise the proliferation of trade union representatives in a workplace and encourage a representative trade union system. Arbitrators must also seek to minimise the financial and administrative burden on an employer in granting organisational rights to more than one registered trade union (s 21(8)(a)). See also BPS Van Eck 'In the Name of "Workplace and Majoritarianism": Though Shalt not Strike' *Association of Mineworkers & Construction Union v Chamber of Mines* (2017) 38 *ILJ* 831 (CC) and *National Union of Metalworkers of SA & Others v Bader Bop (Pty) Ltd & Another* (2003) 24 *ILJ* 305 (CC)' (2017) 38 *Industrial Law Journal* 1496, 1506 and Du Toit et al *Labour Relations Law a Comprehensive Guide* (6th Ed, 2015) 283.

² *National Union of Metalworkers of SA & Others v Bader Bop (Pty) Ltd & Another* [2002] ZACC 30, 2003 (3) SA 513 (CC), (2003) 24 *ILJ* 305 (CC) ('*Bader Bop*'). Some authors have criticised the Court for not going far enough to protect the rights of minority trade unions. See MA Chicktay 'Democracy, Minority Trade Unions, and The Right to Strike: A Critical Analysis of *Numsa v Bader Bop (Pty) Ltd* 2003 2 BCLR (CC)' (2007) 28 *Obiter* 159, 159.

³ *Police & Prisons Civil Rights Union v SA Correctional Services Workers Union & Others* [2018] ZACC 24, 2019 (1) SA 73 (CC) ('*SACOSWU*').

⁴ *Association of Mineworkers and Construction Union v Chamber of Mines* [2017] ZACC 3, 2017 (3) SA 242 (CC) ('*Chamber of Mines*').

⁵ In addition, Van Eck (note 1 above) 1496–1510.

The Constitution of the Republic of South Africa, 1996 ('Constitution') protects the rights of workers and trade unions to freedom of association,⁶ to organise,⁷ to strike⁸ and to engage in collective bargaining.⁹ From the wording of the Constitution it is apparent that these rights are not only accorded to majority or representative trade unions. Some of these rights are accorded to 'everyone'¹⁰ and others to 'every trade union and every employer's organisation'.¹¹ To a large extent, the LRA promotes majoritarianism. Due to the fact that the Constitution accords labour rights to 'everyone' and to 'every trade union', and the fact that the LRA bestows rights on majority trade unions, the courts need to engage in a balancing act between labour rights accorded to members of minority unions and the rights of majority trade unions.¹² With this background in mind, this contribution seeks to consider to what extent the Court has developed coherent and consistent principles regarding the rights of minority trade unions. At a more conceptual level the question will be asked whether the architects of the LRA were successful in developing a coherent framework for collective bargaining; one which adequately acknowledges the participation of minority trade unions. These focus areas are underpinned by the values of the Constitution, as well as international norms as formulated by the International Labour Organisation ('ILO').

II CONSTITUTIONAL FRAMEWORK AND INTERNATIONAL NORMS

South Africa's transition into the democratic era was characterised by the introduction of the Interim Constitution of the Republic of South Africa, 1994¹³ and thereafter the Constitution of 1996. This signalled 'the birth of a free and democratic South Africa'.¹⁴ The Preamble to the Constitution explains that the Constitution is the supreme law of the country and that it seeks to 'heal the divisions of the past and establish a society based on democratic values, social justice, and fundamental human rights'.¹⁵

The Constitution must be interpreted in a manner that accords with the protection of these values. In order to give effect to these values, an essential element of the Constitution is the Bill of Rights,¹⁶ which among others sets out several fundamental labour relations rights. The various labour rights enshrined in the Constitution illustrate that collective bargaining is regarded as the key to a fair industrial relations environment.¹⁷

⁶ Constitution s 18.

⁷ Ibid s 23(4).

⁸ Ibid s 23(2)(c).

⁹ Ibid s 23(5).

¹⁰ Notably ibid ss 18 and 23(2)(c).

¹¹ Notably ibid ss 23(4) and (5).

¹² J Kruger & C Tshoose 'The Impact of the Labour Relations Act on Minority Trade Unions: A South African Perspective' (2013) 16(4) *Potchefstroom Electronic Law Journal* 284, 295, TG Esitang & BPS Van Eck 'Minority Trade Unions and the Amendments to the LRA: Reflections on Thresholds, Democracy and ILO Conventions' (2016) 37 *Industrial Law Journal* 763, 763, S Snyman 'Principle of Majoritarianism in the Case of Organisational Rights for Trade Unions — Is it Necessary for Stability in the Workplace or Simply a Recipe for Discord?' (2016) 37 *Industrial Law Journal* 865, 865.

¹³ The Interim Constitution has been repealed.

¹⁴ *Association of Professional Teachers & Another v Minister of Education & Others* (1995) 16 *ILJ* 1048 (IC) 1076.

¹⁵ Preamble to the Constitution.

¹⁶ Chapter 2 of the Constitution.

¹⁷ *Bader Bop* (note 2 above) at para 13.

The Constitution makes provision for a number of rights under two spheres. The one can be categorised under ‘collective labour law’, and by implication ‘collective bargaining’, and the other under ‘freedom of association’.

Section 23(4) to (5) regulates collective labour law by, in the main, providing for:

- a) the right of ‘every trade union and every employers’ organisation’ to determine its own administration, programmes and activities; to organise; and to form and join a federation; and
- b) the right of ‘every trade union, employers’ organisation and employer’ to engage in collective bargaining.

It is significant to note that these collective bargaining rights are accorded to trade unions and employers’ organisations and not to individual employees. In addition, but contrary to the s 23(4) and (5) rights, s 18 of the Constitution stipulates that ‘[e]veryone has the right to freedom of association’. As will be hypothesised further in this contribution, the drafters of the LRA may not have taken account of the distinction between the right to freedom of association that is accorded to ‘everyone’ and collective bargaining rights that are accorded to trade unions and employers’ organisations. As will become apparent, it is argued that at least some of the organisational rights that have been placed under ch III of the LRA that deals with collective bargaining, should have been placed under ch II that deals with freedom of association.

The Constitution accords significant status to international law principles. Section 232 of the Constitution provides that when ‘interpreting any legislation, every court must prefer any reasonable interpretation ... that is consistent with international law’. Added to this, s 39(1) of the Constitution directs that when interpreting the Bill of Rights, courts and tribunals ‘must consider international law’ and ‘may consider foreign law’.

In the arena of labour law, South Africa’s main international law obligations are derived from ratified ILO conventions and related recommendations.¹⁸ Whereas ILO conventions only become binding on those member states that have ratified particular conventions, recommendations are not eligible to be approved. Recommendations merely provide support and guidance on the way in which a particular convention may be interpreted and adopted.¹⁹ Section 1(b) of the LRA also confirms the importance of norms established by the ILO. It states that it is one of the primary objectives of the LRA to ‘give effect to obligations incurred by the Republic as a member state’ of the ILO.

The ILO has for many years recognised the rights conferred on workers and employers to freedom of association, to organise and to participate in collective bargaining. The ILO’s key conventions of relevance here, which have been ratified by South Africa, are the Convention on Freedom of Association and Protection of the Right to Organise 87 of 1948 (‘Convention 87 of 1948’) and the Convention on the Right to Organise and Collective Bargaining 98 of 1949 (‘Convention 98 of 1949’).

¹⁸ A Van Niekerk & N Smit *Law@work* (4th Ed, 2018) 23. This is confirmed by M Van Staden ‘Towards a South African Understanding of Social Justice: The International Labour Organisation perspective’ (2012) *Tydskrif vir die Afrikaanse Reg* 91, 91.

¹⁹ Van Niekerk & Smit (ibid) at 25. In a significant development, when interpreting whether soldiers fall within the ambit of the term ‘worker’ the Court in *SA National Defence Union v Minister of Defence & Another* [1999] ZACC 7, 1999 (4) SA 469, (1999) 20 ILJ 2265 (CC) at 2278B–D held that ‘when a court is interpreting chap 2 of the Constitution, it must consider international law. In my view, the conventions and recommendations of the International Labour Organisation ... are important resources for considering the meaning and scope of “worker” as used in s 23 of the Constitution’.

Convention 87 of 1948 does not define ‘freedom of association’. However, art 2 confirms that ‘[w]orkers and employers, without distinction whatsoever, shall have the right to establish and ... to join organisations of their own choosing without previous authorisation’. To this, art 3 adds that ‘[w]orkers’ and employers’ organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom ... and to formulate their programmes’. It is to be noted that here also, the ILO grants the right to freedom of association to workers, and not to trade union and employers’ organisations. Article 4 of Convention 98 of 1949 provides that policy-makers should adopt appropriate measures ‘to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers’ organisations and workers’ organisations.’

ILO Conventions are deliberately constructed in a wider sense to provide member states with the required flexibility to import them into their own unique legal systems.²⁰ However, the ILO’s supervisory and expert committees have provided valuable guidance pertaining to collective bargaining models and the rights of minority trade unions within such frameworks in its *Digest of Decisions and Principles of the Freedom of Association* (*Digest of Decisions*).²¹ As will be seen in the parts that follow, the Court has quite correctly, taken account of not only ILO conventions and recommendations, but also of the decisions of the ILO’s supervisory and investigatory bodies that amplify the conventions.²² However, an issue that has not sufficiently come to the fore in the cases discussed below, is the fact that the Constitution accords the right to freedom of association to ‘everyone’ and the fact that collective bargaining rights are not framed in a similar fashion.

The ILO and its supervisory bodies are not prescriptive regarding whether member states should adopt collective labour law models that either promote majoritarianism, or pluralism. Majoritarianism encourages single, but strong, trade unions and encourages the existence of trade unions and employers’ organisations that represent the majority of workers in particular industries. Pluralism leaves room for multiple trade unions and bargaining agents to exist and bargain on their members’ behalf, irrespective of their representivity. The *Digest of Decisions* emphasises that it ‘is contrary to Convention No. 87 to prevent two enterprise trade unions coexisting.’²³

To this, the ILO’s expert committees have said that even though it may be ‘to the advantage of workers to avoid a multiplicity of trade union organizations, unification of the trade union movement imposed through state intervention by legislative means runs counter to the principle embodied in arts 2 and 11 of Convention No. 87.’²⁴ In conclusion it is the ILO’s point of departure that ‘a provision authorizing the refusal of an application for registration if another union, already registered, is sufficiently representative of the interests which the union seeking registration proposes to defend, means that, in certain cases, workers may be denied

²⁰ A Wisskirchen ‘The Standard-setting and Monitoring Activity of the ILO: Legal Questions and Practical Experience’ (2005) 144(3) *International Labour Review* 253, 259.

²¹ The most significant of these bodies are namely the Committee on Freedom of Association (‘CFA’) and the Fact-Finding and Conciliation Commission on Freedom of Association. The reports of the Committee on Freedom of Association are condensed into the *Digest of Decisions and Principles of the Freedom of Association* (6th Ed, 2018) (*Digest of Decisions*) which is a rich source of international law.

²² *Bader Bop* (note 2 above) at para 29.

²³ *Digest of Decision* (note 21 above) at para 480.

²⁴ *Ibid* para 485.

the right to join the organization of their own choosing, contrary to the principles of freedom of association.²⁵

From the above, it is clear that the South African courts are enjoined to prefer an interpretation of the Constitution and labour legislation that acknowledges the rights of minority trade unions even though the LRA has adopted a model that seeks to minimise the proliferation of trade unions in a single workplace.²⁶ It remains to be seen whether the structure, that the architects of the LRA followed, leaves room for everyone to enforce their right to freedom of association.

III ORGANISATIONAL RIGHTS FOR MINORITY UNIONS (*BADER BOP*)

Almost 14 years ago, the Court in *Bader Bop* grappled with the issues of majoritarianism, pluralism and the rights of minority trade unions. The Court had to deal with the question whether trade unions that represent low numbers of workers at the workplace, also referred to as minority trade unions, are entitled to the acquisition of organisational rights.

As a starting point, it is important to explain the structure of the LRA. The Act makes provision for ‘freedom of association and general protections’ under ch II. Sections 4 and 6 state that ‘every employee’ and ‘every employer’ has the right to freedom of association. The regulation of organisational rights has been included under ch III with the title ‘collective bargaining’.

Section 11 of the LRA, under ch III, makes provision for ‘representative trade unions’ to acquire any of the organisational rights.²⁷ This would include trade unions that represent the majority of workers at a workplace or those that are sufficiently representative, but excludes minority trade unions. It is submitted that these trade union rights serve as the lifeblood of trade unions and make it possible for them to exist. There are five organisational rights provided for, being, the right to access the workplace (s 12); the right to deduct trade union subscriptions (s 13); the right to elect trade union representatives or shop stewards (s 14);²⁸ the right to leave for trade union officials (s 15); and the right to the disclosure of information needed by a trade union to perform its functions effectively (s 16). The rights provided for in ss 12, 13 and 15 are applicable to a sufficiently representative trade union, while a majority trade union is entitled to all five rights. Even though we, the authors of this contribution, do recognise that rights to freedom of association and the right to engage in collective bargaining are interrelated, we question whether the drafters of the legislation were in fact correct in placing organisational rights, which should arguably have been placed under freedom of association, under the heading of collective bargaining in ch III, which importantly, does not accord its rights to everyone. This question is discussed further below.

In this instance the employer, Bader Pop (Pty) Ltd, a manufacturer of leather products, employed approximately 1 000 employees. The General Industrial Workers Union of South

²⁵ Ibid para 494.

²⁶ LRA s 21(8)(a)(i). See also E Fergus ‘The Disorganisation of Organisational Rights — Recent Case Law and Outstanding Questions’ (2019) 40 *Industrial Law Journal* 685, 687.

²⁷ LRA s 11 states that ‘representative trade union’ refers to a registered trade union that is sufficiently representative of the employees employed in a workplace.

²⁸ LRA s 14, among others, directs that shop stewards have the right to assist and represent an employee in grievance and disciplinary proceedings; to monitor the employer’s compliance with the workplace-related provisions of the LRA; to report alleged contraventions of the workplace-related provisions of the LRA; and to perform any other functions agreed to with the employer.

Africa ('GIWUSA') represented the majority of the workers and it was entitled to, and enjoyed, all of the statutory organisational rights in terms of the LRA. A second trade union, the National Union of Metalworkers of South Africa ('NUMSA'), only represented 26 per cent of the workers at the employer's workplace and it neither constituted a majority, nor was it a sufficiently representative trade union. Nonetheless, NUMSA claimed access to the workplace and the right to elect shop stewards. The employer refused to recognise NUMSA's shop stewards and this led to NUMSA giving notice of its intention to strike to enforce its demands.

Ultimately, the Court in *Bader Bop* had to grapple with the fundamental rights of minority trade unions that we argue are closely related to freedom of association, and the right to strike that falls squarely under collective bargaining.

In its application for an interdict against the strike, the employer contended that NUMSA could not strike as it was not entitled to claim the organisational rights in question in terms of the LRA. It further argued that the only available option to smaller trade unions would be to rely on the tailor-made conciliation and arbitration process in terms of s 21 of the LRA to gain these rights.²⁹

In relation to workers' right to strike, the Court noted that s 65(1)(c) of the LRA provides that:

- (1) No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if [...] (c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act;

It is trite that in general terms, workers' right to strike are justifiably limited in instances such as s 65(1)(c) where their dispute can be resolved through arbitration or adjudication. However, s 65(2) creates an exception to this rule. It provides that:

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

Accordingly, a trade union has the right to either refer a dispute about the acquisition of organisational rights to conciliation and arbitration in terms of s 21 of the LRA, or it may opt for strike action. In this instance NUMSA opted to strike.

NUMSA argued that the limitation on minority trade unions which precludes them from gaining the rights to access and to appoint representatives was unconstitutional and should be struck down on grounds of limiting their rights to freedom of association and to strike. In the alternative, it argued, the Court should interpret s 65(1)(c) and 65(2) of the LRA in such a way that these fundamental rights would not be infringed.³⁰

As a starting point, *Bader Bop* highlighted the fact that the first purpose of the LRA is to give effect to constitutional rights. Secondly, the LRA should give legislative effect to South Africa's obligations arising from the ratification of ILO conventions. Thus, the Court held, international obligations are of great importance to the interpretation of the LRA.³¹ The Court emphasised that a significant principle of freedom of association is enshrined in art 2 of ILO Convention 87 of 1948 that states that workers 'without distinction whatsoever' shall have the right to 'establish and join organisations of their own choosing'. As to its interpretation, the Court held that:

²⁹ LRA s 21 describes the process that must be followed by a registered trade union which seeks to exercise one or more of the organisational rights provided for in the LRA.

³⁰ *Bader Bop* (note 2 above) at para 12.

³¹ *Ibid* at para 26.

Although both [ILO] committees have accepted that this does not mean that trade union pluralism is mandatory, they have held that a majoritarian system will not be incompatible with freedom of association, as long as minority unions are allowed to exist, to organise members, to represent members in relation to individual grievances and to seek to challenge majority unions from time to time.³²

As we point out in the rest of the discussion, some of these rights, such as the right to organise members and to represent members in relation to individual grievances, may, incorrectly have been placed under ch III, rather than ch II of the LRA, thus making them available only as members of representative trade unions and not as aspects of the right to freedom of association — a right available to every employee under ch II.

Nonetheless, the Court held that the principle of freedom of association ‘is ordinarily interpreted to afford unions the right to recruit members and to represent those members at least in individual workplace grievances.’ This principle, the Court continued, ‘is closely related to the principle of freedom of association entrenched in section 18 of our Constitution.’ Rather than giving serious thought to striking relevant provisions from the LRA on grounds of unconstitutionality, the Court then grappled with the question whether the LRA is capable of being interpreted in a manner that does not infringe the Constitution. If the LRA is capable of such a broader interpretation, the Court held that it would prefer such an interpretation.³³

The Constitutional Court took note of the fact that the Labour Appeal Court (LAC) had relied heavily on the provisions of s 21 of the LRA before reaching its decision.³⁴ Section 21(8) provides that in determining whether a union is representative for the purposes of organisational rights, the commissioner must seek ‘to minimise the proliferation of trade unions’ in a workplace and ‘encourage a system of a representative union[s]’. These principles are of specific import where the commissioner is concerned with a disagreement about whether a trade union is ‘sufficiently representative’ for the purposes of ss 12, 13 and 15 of the LRA.

In addition, the Constitutional Court considered the content of ss 18 and 20 of the LRA and the interpretation given to it by the LAC. Section 18 permits employers and unions to conclude a collective agreement to establish the specific threshold necessary to exercise the rights in ss 12, 13 and 15, defined in the LRA as ‘sufficiently representative’. This, the Court held, the LAC had incorrectly interpreted to mean that minority unions could not use strike action to obtain organisational rights in conflict with such an agreement.³⁵ Should such an interpretation be accepted, the Court held, it would fail to take into account the principles contained in the ILO Conventions and it would not avoid the limitation of constitutional rights. The Court considered whether the LRA is capable of an interpretation that does not unjustifiably limit constitutional rights,³⁶ which it answered in the affirmative. The Court held that ‘the Act expressly confers enforceable organisational rights on certain unions — unions that are either sufficiently representative (sections 12, 13 and 15) or majority unions

³² Ibid at para 31.

³³ Ibid at paras 35, 36.

³⁴ Ibid at para 37. See also *Bader Bop (Pty) Ltd v National Union of Metal and Allied Workers of SA & Others* (2002) 23 ILJ 104 (LAC) paras 41, 42. The Constitutional Court overruled this seemingly narrow approach of the Labour Appeal Court. See also s 21(8) of the LRA, *SA Clothing and Textile Workers Union v Marley (SA) (Pty) Ltd* (2000) 21 ILJ 425 (CCMA), C Mischke ‘Getting a Foot in the Door’ (2004) 13(6) *Contemporary Labour Law* 51, 51.

³⁵ *Bader Bop* (note 2 above) at para 38.

³⁶ Ibid at para 39.

(sections 14 and 16). These are enforceable rights and the mechanism for their enforcement ... is conciliation followed by arbitration.³⁷

However, the Court alluded to the fact that in this instance the LRA gives unions and employers a choice between arbitration and industrial action should conciliation fail. The Court continued that:

There is nothing in Part A of Chapter III, however, which expressly states that unions which admit that they do not meet the requisite threshold membership levels are prevented from using the ordinary processes of collective bargaining and industrial action to persuade employers to grant them organisational facilities such as access to the workplace, stop-order facilities and recognition of shop stewards. These are matters which are clearly of 'mutual interest' to employers and unions and as such matters capable of forming the subject matter of collective agreements and capable of ... strike action.³⁸

To this, the Court added, s 20 of the LRA provides that nothing in this part of the LRA 'precludes the conclusion of a collective agreement that regulates organisational rights.'³⁹ Whereas the LAC was of the view that this provision was meant to clarify that only representative unions within the definition of s 11 and employers, may conclude such agreements, the (Constitutional) Court concluded that such a reading of s 20 'is a narrow one' in 'an Act committed to freedom of association'. In the Court's view 'a better reading is to see section 20 as an express confirmation of the internationally recognised rights of minority unions to seek to gain access to the workplace, the recognition of their shop-stewards as well as other organisational facilities through the techniques of collective bargaining.'⁴⁰

Nonetheless, the Court, did recognise that a right to engage in collective bargaining such as this could only have a limited impact on collective bargaining practice. The more members any union has, the stronger the chance that they will be able to engage in a successful strike. The Court opined that this judgment would probably have its greatest impact in relation to the recognition of shop stewards. The Court underlined that this judgment did not have the effect that minority unions would be entitled to have their shop stewards recognised, or that employers would be obliged to recognise shop stewards for the content and purposes of s 14. The exact rights and duties for which recognition is approved, if agreed upon at all, would be a matter for the process of collective bargaining to resolve.

In reflecting upon *Bader Bop*, the following prominent points stand out. The Court's ultimate decision was inspirational and appropriate in so far as it not only recognised, but also embraced South Africa's obligation to adhere to its international law obligations imposed by, among others, the ILO and the decisions of its expert committees. The Court had no doubt about protecting minority trade unions' right to freedom of association, despite the fact that the LRA establishes a majoritarian system which clearly seeks to limit the proliferation of trade unions. However, the Court could conceivably have gone further by placing emphasis on the fact at least some of the organisational rights that have been included under ch III clash with the principle that these rights are only accorded to representative trade unions and not to 'everyone'.

Despite the positive aspect that the Court was swayed by ILO principles, the question has quite correctly been posed whether the Court went far enough in protecting the right to

³⁷ Ibid at para 40.

³⁸ Ibid.

³⁹ Ibid at para 41.

⁴⁰ Ibid.

freedom of association. Chicktay, for example, argues that the Court should have grabbed the bull by the proverbial horns and should have declared the limitations imposed on minority trade unions by means of the s 21 procedure to be unconstitutional.⁴¹ Chicktay's argument continues that the emphasis that the LRA places on the 'minimisation' of trade unions ostensibly clashes with ILO and constitutional provisions. Chicktay did not, however, pose the question, as is done in this contribution, of whether a number of the organisational rights, such as the right to appoint shop stewards, and the right to be represented by trade representatives of choice during individual grievance and disciplinary hearings, should rather be placed under ch II of the LRA, which deals with freedom of association for 'every employee' and 'every employer'. However, the Court in *Bader Bop* was not willing to be as bold as it could have been. Rather than this, it sought a more lenient, almost artificial mid-way, of interpreting the LRA to leave room for the existence of minority trade unions. The Court's method of doing this was to find that despite the fact that the LRA clearly encourages the formation of single, strong trade unions, there was nothing explicitly included in the LRA which prohibited minority trade unions from gaining trade union rights through the mechanisms of collective bargaining. This, it is argued, policy-makers could resolve by reconsidering where the organisational rights that are closely linked to freedom of association particularly should be placed in the LRA. It is submitted that organisational rights would fit better under the chapter that accords rights to everyone, rather than the chapter that deals with collective bargaining and accords rights to representative trade unions.

V THRESHOLD AGREEMENTS PERTAINING TO ORGANISATIONAL RIGHTS (*SACOSWU*)

SACOSWU, a case that was similar to *Bader Bop*, dealt with the right of minority unions to be accorded organisational rights. However, the case did not centre around whether or not a minority union has the right to strike to acquire such rights, but rather the impact of a threshold agreement on a minority union that seeks to be afforded organisational rights.

The issue in dispute before the Court in *SACOSWU* was whether an employer and minority trade union may engage in collective bargaining over the awarding of organisational rights when there is already a collective agreement in place with a majority union in terms of s 18 of the LRA. A section-18 agreement prescribes the threshold of representativeness that trade unions are required to meet in order to acquire certain organisational rights.⁴² Section 18(1) states:

- (1) An employer and a registered trade union whose members are a majority of the employees employed by that employer in a workplace, or the parties to a bargaining council, may conclude a collective agreement establishing a threshold of representativeness required in respect of one or more of the organisational rights referred to in sections 12, 13 and 15.

In this instance the employer was the Department of Correctional Services ('DCS'), the majority union was the Police and Prisons Civil Rights Union ('POPCRU') and the minority union was the South African Correctional Services Workers' Union ('SACOSWU'). It was common cause that the DCS entered into a threshold agreement with POPCRU in 2001, which provided that a trade union must have a minimum of 9 000 members in order to be

⁴¹ M A Chicktay 'Democracy, Minority Trade Unions, and The Right to Strike: A Critical Analysis of *Numsa v Bader Bop (Pty) Ltd* 2003 2 BCLR (CC) (2007) 28 *Obiter* 159, 159.

⁴² *SACOSWU* (note 3 above) at paras 1 and 64.

admitted to the Departmental Bargaining Chamber⁴³ and to consequently be awarded the organisational rights provided for in ss 12, 13 and 15 of the LRA.⁴⁴ As discussed earlier, these organisational rights relate to trade union access to the workplace, the deduction of trade union subscriptions and the granting of leave to office bearers for trade union activities.⁴⁵

When SACOSWU was registered in 2009, and despite not meeting the prescribed threshold of 9 000 members, it approached the DCS for the awarding of certain organisational rights.⁴⁶ The DCS subsequently granted them the right to represent their members at disciplinary and grievance proceedings, as well as the deduction of trade union subscriptions.⁴⁷

POPCRU was aggrieved by the decision of the DCS and declared a dispute.⁴⁸ It contended that the 2001 threshold agreement that the DCS concluded with it barred the DCS from bargaining with SACOSWU over the granting of organisational rights.⁴⁹ SACOSWU counter argued that the 2001 threshold agreement merely set out the minimum membership that a trade union must have in order to automatically acquire the organisational rights provided for in ss 12, 13 and 15 of the LRA.⁵⁰ However, it reasoned that the existence of the threshold agreement did not prevent a minority union that did not satisfy the threshold requirement from bargaining with the employer to obtain organisational rights. It relied on s 20 of the LRA to support its argument.⁵¹ Section 20 states that ‘nothing in this Part precludes the conclusion of a collective agreement that regulates organisational rights’.⁵²

The case essentially turned on the interpretation of ss 18 and 20 of the LRA.⁵³ The majority judgment found that the existence of a s 18 agreement between the employer and a majority union does not preclude the conclusion of a collective agreement between the same employer and a minority union.⁵⁴ Therefore, the 2001 threshold agreement concluded between the DCS and POPCRU did not prevent SACOSWU from bargaining with the DCS.

The Court based its decision on the Constitution, notably the Bill of Rights, which provides for the right to freedom of association, the right to form or join a trade union and the right of a trade union to engage in collective bargaining.⁵⁵ Considering the fact that constitutional rights were at play, the Court highlighted the application of s 39(2) of the Constitution which requires that the objects of the Bill of Rights be promoted when interpreting legislation.⁵⁶ The Court emphasised the importance of interpreting the LRA in a manner that is in compliance

⁴³ Ibid at paras 14–18.

⁴⁴ Emphasis added.

⁴⁵ LRA ss 12, 13, 15.

⁴⁶ *SACOSWU* (note 3 above) at para 20.

⁴⁷ Ibid at para 21. Although the parties did not dispute that the right given to SACOSWU to represent its members at disciplinary and grievance proceedings fell within the ambit of a section-12 right (para 51), the Court considered the correctness of this due to the fact that these rights are expressly provided for in s 14 of the LRA (para 108). While this does not detract from the interpretation to be accorded to ss 18 and 20, s 14 rights do not fall within the ambit of a collective agreement concluded in terms of s 18. However, it does not prevent a minority union from bargaining with the employer to acquire such rights (para 110).

⁴⁸ Ibid at para 23.

⁴⁹ Ibid at para 4.

⁵⁰ Ibid at para 5.

⁵¹ Ibid at paras 5 and 9.

⁵² LRA s 20.

⁵³ *SACOSWU* (note 3 above) at para 65.

⁵⁴ Ibid at para 101.

⁵⁵ Ibid at paras 71–72.

⁵⁶ Ibid at para 84.

with the Constitution.⁵⁷ Therefore s 18 had to be interpreted in a manner that advanced the applicable constitutional rights. The Court concluded that:

Any statutory provision that prevents a trade union from bargaining on behalf of its members or forbidding it from representing them in disciplinary and grievance proceedings would limit rights in the Bill of Rights. Forcing workers who belong to one trade union to be represented by a rival union at disciplinary hearings seriously undermines their right to freedom of association described earlier.⁵⁸

Essentially, the Court advocated for a purposive interpretation of s 18, which avoided a meaning that limited the applicable constitutional rights.⁵⁹ The Court further supported the purposive interpretation given to s 20 in the earlier judgment of *Bader Bop*.⁶⁰ It is submitted, though, that the Court may have missed a golden opportunity to highlight the fact that the right to freedom of association relates to everyone and that the right to engage in collective bargaining in terms of s 23(5) applies to trade unions and employers' organisations. One of the rights alluded to by the Court, namely the right to be represented during individual hearings by a trade union of choice, in our mind would fit better under ch II of the LRA to be dealt with as a right under freedom of association.

The Court acknowledged that subsequent to this dispute being declared there had been amendments to the LRA,⁶¹ which impacted on the right of minority unions to acquire organisational rights.⁶² This impact arose from an amendment, s 21(8C), which allows a minority union that does not meet the threshold of representativeness set out in a collective agreement concluded in terms of s 18 to acquire ss 12, 13 and 15 organisational rights through arbitration. These organisational rights can be awarded to a minority union, provided that certain requirements are complied with.⁶³ However, the Court found that despite these amendments, the meaning to be attached to ss 18 and 20 are still relevant⁶⁴ as these amendments do not take away the right of a minority union to obtain organisational rights through collective bargaining. Instead, the section provides a further avenue through which minority unions can pursue the acquisition of organisational rights.⁶⁵ The Court held:

When properly construed Chapter III of the LRA reveals that a minority union may access organisational rights in sections 12, 13 and 15 in a number of ways. *First*, it may acquire those rights if it meets the threshold set in the collective agreement between the majority union and the employer. In that event, a minority union does not have to bargain before exercising the rights in question. *Second*, such union may bargain and conclude a collective agreement with an employer, in terms of which it would be permitted to exercise the relevant rights. *Third*, a minority union may refer the question whether it should exercise those rights to arbitration in terms of section

⁵⁷ LRA s 3(b).

⁵⁸ *SACOSWU* (note 3 above) at para 90. See also Van Eck & Esitang (note 12 above) 763, 768.

⁵⁹ *SACOSWU* (note 3 above) at para 92.

⁶⁰ *Ibid* para 97.

⁶¹ *Ibid* at paras 63 and 65.

⁶² The explanatory memorandum to the LRA (2014).

⁶³ These requirements are set out in the LRA s 21(8)(C)a–b. The first requirement is that all parties to the collective agreement must have been given an opportunity to participate in the arbitration proceedings. The second requirement is that the trade union or trade unions acting jointly must represent a significant interest or a substantial number of employees in the workplace.

⁶⁴ *SACOSWU* (note 3 above) at para 65 and 67. See also Fergus (note 26 above) 688, 695.

⁶⁵ *SACOSWU* (note 3 above) at para 68.

21(8C) of the LRA. If the union meets the conditions stipulated in that section, the arbitrator may grant it organisational rights in the relevant provisions.⁶⁶

It is noteworthy that the above pronouncements made by the majority were contrary to the view expressed by the minority.⁶⁷ Cachalia AJ held that the dispute was moot due to the fact that the 2001 threshold agreement ceased to exist in 2013.⁶⁸ It followed, according to the minority, that it was not in the interests of justice to entertain the matter as disputes regarding threshold agreements concluded in terms of s 18 would in future have to be dealt with in terms of the new statutory regime, which includes s 21(8C).⁶⁹

It is clear that *SACOSWU*'s majority judgment relied on constitutional imperatives and the need to advance the rights protected by the Bill of Rights. The Court can be commended for adopting a purposive interpretation of provisions of the LRA, which ties in with the approach followed in *Bader Bop*.⁷⁰

However, there is undoubtedly one area of difficulty in the majority judgment's interpretation of the LRA. This is the anomaly created by, on the one hand, giving majority unions the power to conclude threshold agreements with an employer for the granting of organisational rights, while on the other, giving a minority union the right to conclude a separate collective agreement with the same employer that circumvents the purpose of the threshold agreement. Zondo DCJ, who concurred with the majority but for different reasons,⁷¹ took issue with this. He stated as follows:

A conclusion that says or implies that an employer may be party to both a section 18(1) collective agreement fixing a certain threshold of representativeness in the workplace that unions must meet if they want certain statutory organisational rights and at the same time also be party to a collective agreement granting those statutory organisational rights to a trade union which does not meet that threshold will spell the end of section 18(1) collective agreements. This is because such a conclusion will mean that a section 18(1) collective agreement has no efficacy and is not helpful to anybody, be it the employer or the majority union. The effect of such a conclusion will be that an employer who is party to a section 18(1) collective agreement may breach such an agreement with impunity.⁷²

We agree with Zondo J's contention. Section 18(1) of the LRA is in fact irrelevant if it can be overridden by a section-20 agreement. Against the background of the anomaly created by the majority's interpretation of s 20, it is admittedly difficult to understand the purpose of s 20, other than in the way postulated by the majority.⁷³ Even though s 21(8C) sought to improve

⁶⁶ *Ibid* at para 102. Emphasis added.

⁶⁷ The minority judgment was delivered by Cachalia AJ at paras 1–61.

⁶⁸ *SACOSWU* (note 3 above) at paras 25, 33, 37, 43 and 44.

⁶⁹ *Ibid* at paras 47–48.

⁷⁰ In addition, see *National Education Health & Allied Workers Union v University of Cape Town* [2002] ZACC 27, 2003 (3) SA 1 (CC), (2003) 24 ILJ 95 (CC) where a purposive interpretation of LRA provisions was followed.

⁷¹ *SACOSWU* (note 3 above) at para 113.

⁷² *Ibid* at para 141.

⁷³ This was also the interpretation of s 20 adopted by the Court in *Bader Bop* (note 2 above) para 41. The Court rejected the interpretation of s 20 afforded by Zondo JP and Du Plessis AJA in the LAC. These judges were of the view that s 20 did not provide for minority unions to conclude collective agreements with employers over the granting of organisational rights, but was rather a 'clarificatory provision' that agreements between representative unions and employers could regulate rights. The Constitutional Court rejected this interpretation as being narrow and did not accord with the ordinary language of the provision.

the rights of a minority union that is disadvantaged by s 18 threshold agreements,⁷⁴ s 20 was not repealed following the introduction of s 21(8C), nor was it amended to make the provision applicable exclusively to representative trade unions.

Though not regarded as a justifiable interpretation, it is important to consider Zondo DCJ's connotation of s 20. While stating that a minority union is not barred from negotiating with the employer to obtain organisational rights despite the existence of a threshold agreement, the Judge sought to distinguish between statutory organisational rights regulated by a threshold agreement and contractual organisational rights, which are the type of rights that can be negotiated with the employer.⁷⁵ In Zondo DCJ's view, s 20 caters for contractual organisational rights. He states as follows, 'so, section 20 contemplates organisational rights in collective agreements whereas the organisational rights dealt with in Part A of Chapter III of the LRA are not rights in a collective agreement but in a statute or conferred by statute.'⁷⁶

Applying this interpretation to the case at hand, he stated that if the rights granted by the DCS to SACOSWU were statutory organisational rights then it was not permitted, because the s 18 threshold agreement precluded this.⁷⁷ However, in his view the organisational rights granted by the DCS to SACOSWU were not statutory organisational rights but rather contractual organisational rights.⁷⁸

In support of this contention, Zondo DCJ referred to the fact that contractual organisational rights were permitted under the old dispensation and that nothing in the current LRA suggests that these rights are no longer available or have been abolished.⁷⁹ It seems that Zondo DCJ's reference to contractual organisational rights are trade union rights in general, which could either be the same, overlap with or go beyond those granted in ss 12, 13, 14, 15 and 16 of the LRA.⁸⁰ The only difference lies in the methods of attainment: the one being through the mechanisms of s 21 of the LRA, and the other more difficult one for minority trade unions, through collective bargaining. Although we agree with the end result of both the majority's and Zondo's decisions, the granting of organisational rights with substantively the same content, but under two names, seems to be an artificial delineation.⁸¹

While *SACOSWU* adopted an approach that complies with international and constitutional law in relation to the right to freedom of association, it does create incongruity amongst LRA

⁷⁴ Memorandum of Objects Labour Relations Amendment Bill, 2012 at 2 and 3 state that the section is amended to broaden the discretion of a commissioner toward organisational rights in certain circumstances. The commissioner may overlook a threshold agreement if applying it would unfairly affect another trade union. A commissioner applying the new provision must draw an appropriate balance between the rights of the trade union wishing to exercise organisational rights and the rights of the majority trade union. See also Esitang & Van Eck (note 12 above) 768–769.

⁷⁵ *SACOSWU* (note 3 above) at paras 134, 138 and 139.

⁷⁶ *SACOSWU* (note 3 above) at para 134.

⁷⁷ *Ibid* at para 140.

⁷⁸ *Ibid* at para 142.

⁷⁹ *Ibid* at paras 130–133.

⁸⁰ *Ibid* at para 145 Zondo DCJ drew an analogy between contractual organisational rights and the notice periods provided in the Basic Conditions of Employment 75 of 1997. He stated that while the BCEA provides for at least two weeks written notice, this notice period can be extended in a contract of employment to one month. In other words, the organisational rights provided for in the LRA are minimum rights and these rights can be extended through a contractual agreement.

⁸¹ Fergus (note 26 above) 698–700 discusses the problems that can arise through a distinction between statutory and contractual rights.

provisions. Therefore, we argue that s 18 should be removed. As suggested by Zondo, what is the use of keeping s 18 in the LRA if agreements concluded in terms of it can be disregarded with impunity when agreements are concluded in terms of s 20? Added to this, and as argued towards the end of this contribution, it is suggested that policy-makers should review the whole structure relating to the granting of organisational rights within the LRA. Some of these rights, like access to the workplace, the appointment of shop stewards and the right to be represented by a trade union of choice, fit better under the part of the LRA that deals with freedom of association than the part that deals with collective bargaining.

IV THE EXTENSION OF COLLECTIVE AGREEMENTS (*CHAMBER OF MINES*)

Whereas *Bader Bop* and *SACOSWU* dealt with the rights of minority trade unions within the domains of freedom of association and the realisation of organisational rights of minority trade unions, *Chamber of Mines* fell under the spheres of collective bargaining, the right to strike and the extension of collective agreements.

In this instance the Chamber of Mines, an employers' organisation, concluded a collective agreement pertaining to wage increases between three employers on the one hand, and three trade unions bargaining in an alliance, on the other. Each employer operated more than one mine in different parts of South Africa. The three trade unions represented the majority of mine workers counted across all the mines of the three employers. Even though not part of the coalition of trade unions in this part of the mining sector, the up-and-coming Association of Mineworkers and Construction Union ('AMCU'), had majority membership at some of the three employers' mines. However, it was common cause that AMCU did not have majority membership at all the mines added together. The collective agreement concluded with the coalition of trade unions contained a 'no-strike clause' which spanned two years.

AMCU did not agree with the wage increase contained in the collective agreement and it gave notice to strike. If AMCU was to succeed with its industrial action, their gains would be obvious amidst the trade union rivalry. They would attract members if they succeeded in negotiating a higher increase than the one contained in the collective agreement. The Labour Court (LC) granted an interdict against AMCU's planned strike.⁸² This decision was taken on appeal and was ultimately considered by the Constitutional Court. Central to the dispute was the question of whether AMCU's right to strike was legitimately restricted by the collective agreement that had been concluded with the majority trade unions and to which AMCU had not been a party.

The first provision of the LRA that is of importance relates to the limitations that are placed on the right to strike. Section 65 states that:

⁸² The interim order was published in *Chamber of Mines of SA acting in its own name & on behalf of Harmony Gold Mining Company Ltd & Others v Association of Mineworkers and Construction Union & Others* (2014) 35 ILJ 1243 (LC) and was confirmed on the return date in *Chamber of Mines of SA acting in its own name & on behalf of Harmony Gold Mining Company Ltd & Others v Association of Mineworkers & Construction Union & Others* [2014] ZALCJHB 223, 2014 (11) BCLR 1369 (LC), (2014) 35 ILJ 3111 (LC) ('*Chamber of Mines LC*'). This decision was taken on appeal and reported in *Association of Mineworkers & Construction Union & Others v Chamber of Mines of SA acting in its own name and on behalf of Harmony Gold Mining Co (Pty) Ltd & Others* [2017] ZACC 3, 2017 (3) SA 242 (CC), (2016) 37 ILJ 1333 (LAC) ('*Chamber of Mines LAC*').

(1) No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if – (a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of an issue in dispute.

As a consequence, if AMCU had been bound by the collective agreement, it would have been precluded from initiating the strike. The second provision central to the Court's finding is s 23(1) of the LRA. It deals with the binding effect of collective agreements on parties and non-parties. However, it does not contain an expansion mechanism coupled with safeguards, as is the case with the extension of bargaining council agreements.⁸³ Amongst others, there must be an effective procedure, and fair criteria, for non-parties to apply for exemptions through an independent body.⁸⁴ As could be expected, collective agreements bind the signatories to the collective agreement as well as their members. However, s 23(1)(d)(iii) goes further and provides that collective agreements also bind employees who are not members of the signatory unions if '(i) the employees are identified in the agreement;' and '(iii) that trade union or trade unions ... [that are party to the collective agreement] have as their members the majority of employees employed by the employer in the *workplace*.'⁸⁵

What is of significance here, is that the requirement for extension ties the majoritarian principle to the notion 'workplace' and not to the sector.⁸⁶

In respect of the private sector, s 213 of the LRA defines a workplace as 'the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are *independent* of one another by reason of their *size, function or organisation*, the place or places where employees work in connection with each independent operation constitute the workplace for that operation.'⁸⁷

In *Chamber of Mines*, the employers relied on the fact that the grouping of three trade unions added up to a majority at the workplace and the minority trade union AMCU was bound by the agreement that contained a no-strike clause. AMCU raised the point that s 23(1) (d) is constitutionally invalid in so far as it infringes every worker's right to strike.⁸⁸

Secondly, it contended that the term 'workplace' should be accorded a broad interpretation which means that each of the mines where the workers render services is a separate workplace rather than all of an employer's operations taken together.⁸⁹

The third argument was that the agreement was in effect extended as if it was a bargaining council agreement to this part of the mining sector. This occurred even though the same safeguards that are applicable to bargaining council agreements do not apply to the extension of this type of agreement.⁹⁰ The argument was that the Chamber of Mines had in effect circumvented s 32 by extending the agreement to non-parties by means of s 23.

The Court rejected AMCU's first argument and held that even though s 23 has the effect of limiting the fundamental right to strike, such limitation is justifiable. The Court held that:

⁸³ LRA s 32(1) requires that a bargaining council make a written application to the Minister of Labour for the extension of a collective agreement to non-parties if the majority union/s and majority employer's organisation/s vote in favour of such extension.

⁸⁴ LRA s 32(3)(e)–(f).

⁸⁵ Emphasis added.

⁸⁶ Emphasis added.

⁸⁷ Van Eck (note 1 above) 1496.

⁸⁸ *Chamber of Mines* (note 4 above) at para 15.

⁸⁹ *Ibid* at para 11.

⁹⁰ *Ibid* at paras 12–14.

AMCU is right that the codification of majoritarianism in section 23(1)(d) limits the right to strike. The key question is whether the principle provides sufficient justification for that limitation. ... In short, the best justification for the limitation the principle imposes is that majoritarianism, in this context, benefits orderly collective bargaining.⁹¹

The Court accepted that it is internationally recognised that ‘majoritarianism is functional to enhanced collective bargaining’.⁹² A noteworthy observation is that the Court did not explore further whether South Africa has adopted an exclusively majoritarian approach, which has the effect that the right to strike is a collective right which belongs to unions, or whether it remains an individual right which is exercised collectively. The Constitution designated it an individual right and stated that ‘every worker’ has the right to strike.⁹³

Rather than relying on the importance of the right to freedom of association as a point of departure, as was done in *Bader Bop*, the Court relied on the advantages of majoritarianism to support its decision that s 23(1)(d)’s limitation on the right to strike was justifiable.⁹⁴ The Court accepted the approach of the LAC in *Kem-Lin Fashions CC v Brunton* ‘*Kem-Lin Fashions*’⁹⁵ where it held that the legislature had made the policy choice in the LRA ‘that the will of the majority should prevail over that of the minority.’ This, *Kem-Lin Fashions* said, is conducive to ‘orderly collective bargaining as well as for the democratisation of the workplace.’ The Court also pointed out that ‘a situation where the minority dictates to the majority is ... untenable’ and that the ‘proliferation of trade unions in one workplace or in a sector should be discouraged.’

Turning to the interpretation of the definition of ‘workplace’, the Court held that firstly, the definition’s ‘focus [is] on employees as a collectivity’ and, secondly, there is a ‘relative immateriality of location’ where the employees work.⁹⁶ It held that the definition that the LRA accords to ‘workplace’ is something different from its ordinary meaning, namely the actual place where an employee works. The Court held that the phrase, ‘the place or places where the employees of an employer work’, refers to all the places where the employer’s employees collectively work.⁹⁷ The second part of the definition makes provision for an exception, namely that a number of operations may be different workplaces only if each operation is independent.⁹⁸ The Court accepted the findings of both the LC and the LAC that each of the individual mining houses shared the same financial, information technology and human resources systems; and consequently operated in an integral fashion thereby constituting a single workplace.⁹⁹ The Court concluded that ‘no reason in constitutional principle, legal analysis or factual assessment provides a reason for this court to overturn those findings’.¹⁰⁰ Essentially, the stance of the Court is that there is no basis to favour minority trade unions in the interpretation of a workplace.

⁹¹ Ibid at para 50.

⁹² Ibid at para 56.

⁹³ Constitution s 23(2)(c).

⁹⁴ *Chamber of Mines* (note 4 above) at paras 43, 44 and 50. See also IM Rautenbach ‘The Constitutionality of Statutory Authorisation to Conclude Collective Agreements that Bind Non-Parties to Strike’ (2017) *Tydskrif vir die Afrikaanse Reg* 857, 861.

⁹⁵ *Kem-Lin Fashions CC v Brunton* [2001] ZALAC 23, (2001) 22 ILJ 109 (LAC) at para 19.

⁹⁶ *Chamber of Mines* (note 4 above) para 24.

⁹⁷ Ibid para 27.

⁹⁸ Ibid.

⁹⁹ Ibid at para 31.

¹⁰⁰ Ibid at para 37.

In relation to AMCU's final argument, the Court also rejected the trade union's contention that the extension of the agreement should not have occurred under s 23(1)(d) but under s 32 with its sectoral nature and safeguards. The Court accepted the 'constitutional warrant for majoritarianism in the service of collective bargaining'.¹⁰¹ However, it pointed out that s 23(1)(d) is not without safeguards. It explained that AMCU's argument that s 23(1)(d) 'does not allow for judicial checks on extensions of collective agreements', as opposed to s 32, 'is wrong'.¹⁰² This is because an agreement concluded under s 23(1)(d) is subject to judicial scrutiny, by way of a review under the principle of legality.¹⁰³ The Court concluded that the interdict against AMCU had been valid under these circumstances and that the order's restriction on the right to strike was reasonable and justifiable within the collective bargaining framework established by the LRA.

There is an apparent divergence of approach between *Chamber of Mines* and the two previous cases. While the preceding cases heeded the principle of majoritarianism, the right to freedom of association was of primary importance. This led to a purposive interpretation of LRA provisions, to such an extent that in *SACOSWU* s 18 of the LRA, which promotes majoritarianism, was defeated through the majority judgment's interpretation of s 20. Conversely, in *Chamber of Mines* protecting the principle of majoritarianism was of primary importance in interpreting s 23(1)(d) of the LRA and the definition of workplace. The Court in *Chamber of Mines*, as in *SACOSWU*, considered the principles laid down in *Bader Bop*.¹⁰⁴ The Court found that although AMCU and the employees that it represented lost their right to strike due to the effect of the agreement, AMCU had been provided with and did not lose its organisational and collective bargaining rights.¹⁰⁵ The Court went on to say that 'this means that the LRA, though premised on majoritarianism, does not make it an implement of oppression'.¹⁰⁶ This suggests that while the Court acknowledged the importance of giving minority unions a voice by allowing them to co-exist, to organise, to represent members and to challenge majority unions, the view was that this could be sufficiently achieved through the right to freedom of association. However, at a collective bargaining level majoritarianism must be championed. The divergence in approach can thus be attributed to the fact that *Bader Bop* and *SACOSWU* dealt with the right of minority trade unions to freedom of association, while *Chamber of Mines* focused on the rights of minority trade unions during collective bargaining.

While the right to freedom of association and collective bargaining are admittedly related, there may be justification for the *Chamber of Mines*' advocacy of the principle of majoritarianism in considering the right to engage in collective bargaining. It is a credible argument that once sufficient room has been left for trade unions to establish and organise themselves, it would create an untenable situation if it was to be required of employers to negotiate with each and every trade union irrespective of its representivity. However, it is submitted that the LRA ought to be reorganised. The aspects that relate to freedom of association, like the right to be represented by a trade union of choice, should ideally be placed under ch II of the LRA that deals with the right of every employee and every employer to freedom of association.

¹⁰¹ Ibid at para 57.

¹⁰² Ibid at para 73.

¹⁰³ Ibid at para 84.

¹⁰⁴ Ibid at para 52.

¹⁰⁵ Ibid at para 54.

¹⁰⁶ Ibid at para 55.

VI ARE THE JUDGEMENTS ALIGNED?

There can be no doubt that the decision of *SACOSWU* accords with the approach followed in *Bader Bop*. However, it is notable that s 21(8C) was not in existence at the time that *Bader Bop* was decided. This position has changed, as s 21(8C) caters specifically for minority unions. Therefore, the question is whether this would alter the right of a minority union to strike. The answer is probably not, as s 65(2)(a) remains intact. This means that a minority union has a choice between following the s 21(8C) procedure or striking in respect of the acquisition of organisational rights.

Although *Bader Bop* and *SACOSWU* did not deal with exactly the same set of facts, what is evident from a consolidation of these two judgments is the following:

- a) A minority union can bargain with an employer to acquire organisational rights. This is irrespective of the existence of a s 18 threshold agreement and is an avenue that they can follow despite the existence of s 21(8C).
- b) If the collective bargaining process is successful, a minority union can enter into a collective agreement.
- c) If the collective bargaining process is unsuccessful, the minority union has the right to embark on a strike to try to acquire the organisational rights that it seeks.

It is significant to note that these Court decisions were reached by applying the provisions that exist in the LRA. The Court did not depose the principle of majoritarianism. Instead, through a purposive interpretation of LRA provisions, the Court was able to reconcile this principle with freedom of association. The Court will not perform the role of the social partners and policy-makers to redraft the LRA by making a new policy choice of pluralism instead of majoritarianism. Such policy choices need to be made by organised business, organised labour and the state.

While *Chamber of Mines* did not delve into the arena of organisational rights, it dealt with the rights of minority trade unions. Whereas the disputes in *Bader Bop* and *SACOSWU* fell under the broad international and local constitutional right to freedom of association, the dispute in *Chamber of Mines* fell under the right to engage in collective bargaining and the concomitant right to strike. In this case, one of the LRA provisions under scrutiny was s 23(1)(d). On a plain reading of the section it is clear that collective agreements can be extended to non-parties, as long as it was the majority union or unions that had concluded the collective agreement in question and had provided that the rule of law had been observed, and the extension met the legality requirement. It came down to whether or not the unions that concluded the collective agreement were the majority, which is a question that was dependent on the interpretation of the definition of 'workplace'. Considering the definition contained in the LRA, the Court cannot be faulted for its interpretation of the concept. Where *Chamber of Mines* may have differed with *Bader Bop* and *SACOSWU* was in its approach to interpreting the LRA. In the last two mentioned cases the Court was willing to interpret the LRA in such a manner that the rights of minority trade unions were given preference over the principle of majoritarianism. In *Chamber of Mines*, the Court was not persuaded to find that s 23(1)(d) of the LRA unjustifiably limited the right of minority trade unions to strike. In this instance the principle of majoritarianism trumped the rights of minority trade unions.

While the decision of *Chamber of Mines* is a credible one, there is one aspect that should have been more carefully considered. This is the question of whether the extension of collective

agreements as per s 23(1)(d) should be regulated, in the same way that is done in s 32 of the LRA. This came under discussion in both the LC and LAC in deciding whether there was a less restrictive way of limiting the right to strike caused by s 23(1)(d).¹⁰⁷ While both the LC and LAC rejected the administrative regulation of the extension of a collective agreement, this should have been discussed by the Constitutional Court.¹⁰⁸

While it is understandable that the Court favoured majoritarianism to bring about orderly collective bargaining, it could have at the same time sanctioned the provision of safeguards in such instances, so that some protection is afforded to minority trade unions. Even though the section-32 procedure of the LRA, that deals with the extension of bargaining councils, deals with formal requirements, it could have a substantive bearing on minority trade unions. This section provides that the Minister of Labour must be requested to extend bargaining council agreements to minority trade unions.¹⁰⁹ Such agreements will not be extended if the Minister is not satisfied that the bargaining council has a mechanism in place in terms of which minority parties may apply for exemption from the provisions of the collective agreement to an independent panel.¹¹⁰ Such an independent decision-making panel has the function of determining whether, on the facts, the minority union has provided reasons why the agreement should not be extended to them. It is submitted that this opportunity to be heard, provides protection to minority unions. There are no such safeguards for the extension of collective agreements that are not concluded at bargaining councils that could potentially assist the protection of the rights of members of minority trade unions. Although the Court in *Chamber of Mines* explained that a s 23(1)(d) agreement is not without safeguards, as it is subject to judicial scrutiny, by way of a review under the principle of legality, it is not an accessible procedure, as the one prescribed under s 32.

VII CONCLUSION AND RECOMMENDATIONS

It is submitted that none of the cases were wrongly decided in the context of the current wording of the LRA. As it stands, the LRA is the result of a policy choice that the architects of the LRA crafted in the early 1990s. Yes, the cases dealing with organisational rights followed an accommodating approach towards minority trade unions, and the one dealing with the extension of collective agreements gave credence to majoritarianism. However, this occurred under different fundamental rights: the one under freedom of association and the other under collective bargaining.

What is clear is that there is some misalignment between the LRA and international norms and constitutional values in that the LRS fails to articulate these norms and values expressly. It took creative interpretation from the courts to get to a point where the door is not closed on minority trade unions to gain organisational rights that essentially fall under the right to freedom of association.

How then, should the LRA have been differently structured? Admittedly so, the suggestions that follow should be viewed from a hypothetical and academic point of view. The proposal should be viewed as broad brush strokes devoid of details that should ideally foster and feed future debates and negotiations between social partners. Future discussion would necessitate

¹⁰⁷ *Chamber of Mines* LC (note 82 above) at para 72. *Chamber of Mines* LAC (note 82 above) at para 120

¹⁰⁸ *Chamber of Mines* LC *ibid* at para 72 and *Chamber of Mines* LAC *ibid* at paras 120–123.

¹⁰⁹ LRA s 32(1).

¹¹⁰ LRA s 32(3)(dA).

a broader reconfiguration of the LRA in a significant way and the points raised here would undoubtedly need to be balanced with other aspects of the LRA that were not covered here. These include the tweaking of aspects such as lock-outs, the use of replacement labour, picketing, the resolution of violent strikes and those of long duration, and the dismissal of employees based on operational grounds during strikes.

The first aspect that should theoretically be changed is to remove aspects relating to access to the workplace, the deduction of trade union dues and the right to appoint trade union representatives for the purpose of addressing individual grievances and disciplinary matters from the chapter dealing with collective bargaining and to place these aspects under the chapter that deals with freedom of association. The alternative would be to change the current requirements for the acquisition of statutory organisational rights to the effect that there is no requirement pertaining to representivity regarding these organisational rights.

The second aspect would be to remove s 18 from the LRA. It does not make sense to keep a section in the LRA that seemingly permits majority trade unions and employers to establish threshold agreements to the exclusion of minority trade unions and then in the next breath to permit minority unions to conclude collective agreements about any of the organisational rights. In line with the removal of s 18 of the LRA, s 21(8C) would likewise need to be eliminated as it is directly linked to threshold agreements entered into in terms of s 18.

Thirdly, similar safeguards should be included in respect of the extension of collective agreements not concluded at bargaining councils to the ones that apply to the extension of bargaining council agreements.

A longer term solution requires the legislature's interrogation of the continued relevance of the principle of majoritarianism. This has been the subject of debate.¹¹¹ The questioning of this principle is understandable considering the fact that the circumstances that existed when the LRA was adopted are no longer the same. Perhaps it is time that the legislature started to engage with the idea of changing its policy stance.

¹¹¹ T Cohen 'Limiting Organisational Rights of Minority Unions: *Popcru v Ledwaba* 2013 11 BLLR 1137(LC)' *Potchefstroom Electronic Law Journal* (2014) 17(5) 2209, 2221.

