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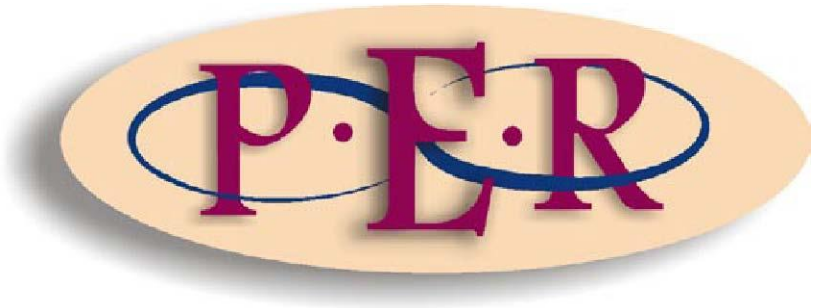

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THE RIGHTS GRANTED TO TRADE UNIONS UNDER THE *COMPANIES ACT* 71 OF 2008

HC Schoeman*

1 Introduction

The *Companies Act* 71 of 2008[1] was assented to by the President on 9 April 2009 and entered into force on 1 May 2011.[2]

Although trade unions played some role in the operation of businesses prior to the *Companies Act*, this act grants trade unions far more rights. Some of the rights granted to trade unions include restraining a company from any practices that are inconsistent with the provisions of the *Companies Act*,[3] and the right to receive notice, together with all shareholders,[4] of the granting of financial assistance or loans to directors, for example.[5]

The *Labour Relations Act*[6] differentiates in principle between rights that are granted to any registered trade union and those that are granted to registered but sufficiently representative or majority trade unions only. By contrast, the *Companies Act* does not make such an in principle differentiation. It will be argued that the *Companies Act* ought in principle to differentiate between rights granted to any registered trade union representing employees in the workplace and rights granted

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1 *Companies Act* 71 of 2008 (hereafter "the *Companies Act*").

2 Proc 32 in GG 34239 of 26 April 2011.

3 Section 20(4) of the *Companies Act*. This right is also granted to directors, prescribed officers and shareholders.

4 Unless all the shareholders are also directors of the company.

5 Section 45(5) of the *Companies Act*.

6 *Labour Relations Act* 66 of 1995 (hereafter "LRA").

to registered majority trade unions or, at the very least, sufficiently representative trade unions in the workplace.

The aim of this article is, therefore, to explore some of the rights granted to trade unions by the *Companies Act*, to highlight some concerns, and to make recommendations arising from these concerns.

2 Rights of trade unions in the *Companies Act*

2.1 Trade unions

The *Companies Act* defines a registered trade union as being "a trade union registered in terms of section 96 of the *Labour Relations Act*, 1995 (Act No 66 of 1995)".[7] The LRA defines a trade union as "an association of *employees* whose principal purpose is to regulate relations between *employees* and employers, including *employers' organisations*".[8]

The LRA affords rights only to registered trade unions, whereas the *Companies Act* does not consistently refer to registered trade unions and often refers only to "a trade union representing employees of the company".[9] It is unfortunate that the *Companies Amendment Act* 3 of 2011[10] does not rectify this situation despite one of the aims of the *Companies Amendment Act* being "to correct certain errors resulting in inconsistency, disharmony and ambiguity in the principal Act".[11] The *Companies Amendment Act* presented the perfect opportunity to address this shortcoming in the

7 Section 1 of the *Companies Act*. S 96 of the LRA provides for the process of registering a trade union. Upon registration of a trade union it becomes a body corporate with all the advantages of separate legal personality (s 97 of the LRA).

8 Section 213 of the LRA.

9 Sections 20(4) and 45(5) of the *Companies Act*. S 31(3) refers only to "trade unions". Item 12(3)(b) of schedule 5 of the *Companies Act* makes reference only to "trade union parties". However, as the introductory sentence refers to a collective agreement, which can be concluded only between an employer and a registered trade union, it could be read as if the reference were to a registered trade union. It would, however, have been prudent to include reference to a registered trade union.

10 *Companies Amendment Act* 3 of 2011 (hereafter "*Companies Amendment Act*"), which was assented to by the President on 26 April 2011.

11 As formulated in the long title of the *Companies Amendment Act*.

Companies Act for example either by referring to registered trade unions throughout the act or by defining a trade union as a trade union registered in terms of the LRA.

There are a number of ways in which a trade union can obtain organisational rights under the LRA. Firstly, a trade union is entitled to enforce organisational rights in accordance with a collective agreement[12] concluded between the trade union and the employer.[13] It should be noted that, in terms of the LRA, only registered trade unions can enter into a collective agreement with the employer.[14] Secondly, a trade union which is party to a bargaining council or a statutory council can enforce the right to deduct subscriptions as provided for in section 13 of the LRA. Thirdly, a sufficiently representative trade union or a majority trade union at the workplace[15] (if the employer does not want to meet with the trade union to conclude a collective agreement) can rely on the procedure set out in section 21 of the LRA to enforce its organisational rights.[16] A trade union, or two or more trade unions acting jointly and representing more than 50% of the employees in the workplace, is also entitled to enforce additional organisational rights.[17] In sum, organisational rights are not granted to an unregistered trade union nor to individual employees.[18] Organisational rights are also not granted to a non-representative trade union, unless they are

12 Section 213 of the LRA defines a collective agreement as "a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered *trade unions*, on the one hand and, on the other hand: (a) one or more employers; (b) one or more registered *employers' organisations*; or (c) one or more employers and one or more registered *employers' organisations*."

13 The rights of access to the workplace and to organise at the workplace, (s 12), to deduct subscriptions (s 13) and to take leave for trade union activities (s 15).

14 Mischke 2004 *CLL* 54 contends that employers may conclude collective agreements with unregistered trade unions but that the enforceability thereof would be problematic.

15 In *OCGAWU v Volkswagen SA (Pty) Ltd* 2002 23 ILJ 220 (CCMA) it was remarked that the workplace is either the total bargaining unit or the place or places where the employees that are represented by the trade union work.

16 Section 65(2) of the LRA also deals with the right to strike over organisational rights. (See Mischke 2004 *CLL* 55 for a discussion of when a union can strike to enforce organisational rights and the procedure to be followed in terms of s 21 of the LRA.)

17 The right to appoint trade union representatives (shop stewards), and the right to take time off for trade union activities during working hours to perform their duties as union representatives (s 14), and the right to the disclosure of information (s 16), in addition to the rights referred to in s 15, including the right for a majority union to enter into a collective agreement with the employer.

18 Mischke 2004 *CLL* 53.

granted in terms of a collective agreement, or if the trade union is a member of a bargaining or statutory council.[19]

The term "representative trade union" is not defined in section 11 of the LRA, which deals with organisational rights. Section 11 merely states that a representative trade union means "a registered *trade union*, or two or more registered *trade unions* acting jointly, that are sufficiently representative of the *employees* employed by an employer in a *workplace*". By contrast, section 39 of the LRA,[20] which deals with applications to establish a statutory council, defines a representative trade union as a:

> registered *trade union*, or two or more registered *trade unions* acting jointly, whose members constitute at least 30% of the *employees* in a *sector* and *area*.

In *SACTWU v Sheraton Textiles (Pty) Ltd*[21] the commissioner found that, although one cannot solely rely on the numerical threshold to determine whether or not to grant organisational rights, the 30% threshold, as contemplated in section 39(1)(*a*) of the LRA, should provide guidance with regard to any consideration to grant organisational rights to a trade union.[22] In *Bader Bop (Pty) Ltd v NUMSA*[23] the Labour Appeal Court held that a minority trade union has the right to strike to demand the granting of organisational rights, although the Labour Appeal Court did not grant organisational rights to the minority trade union. The Constitutional Court confirmed a minority trade union's right to strike to demand the granting of organisational rights but stated that industrial action does not preclude a trade union from obtaining organisational rights in *NUMSA v Bader Bop (Pty) Ltd.*[24]

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19 A representative trade union, as defined as a majority trade union in s 25(2) of the LRA, can enter into an agency shop agreement with the employer and a majority trade union may enter into a closed shop agreement with the employer, after two thirds of the employees have voted in favour of the conclusion of a closed shop agreement with the employer (s 26 of the LRA).

20 Section 39(1)(a) of the LRA.

21 *SACTAWU v Sheraton Textiles (Pty) Ltd* 1997 18 ILJ 1421 (CCMA) 1419D–E.

22 Misckhe 2004 *CLL* 56 also refers to *UPUSA v Komming Knitting* 1997 4 BLLR 508 (CCMA), in which the Commission for Conciliation, Mediation and Arbitration (CCMA) ordered an employer to grant organisational rights to a minority trade union that represented only about 22% of the employees in the workplace. Various factors were taken into account in this case. In any event, the determination of representivity is not only a numbers game.

23 *Bader Bop (Pty) Ltd v NUMSA* 2002 2 BLLR 139 (LAC).

24 *NUMSA v Bader Bop (Pty) Ltd* 2003 2 BLLR 103 (CC).

2.2 Rights granted to trade unions in the Companies Act

2.2.1 Introductory remarks

Trade unions play an important role in the business environment. Their members are the lifeblood of most companies – the latter cannot exist and make a profit without their employees.

The *Companies Act* provides a more inclusive role for trade unions with regard to the running and administration of companies. This section will explore some of the rights granted to trade unions by the *Companies Act*, and will make recommendations regarding an in-principle differentiation between any registered trade union in the workplace and a representative registered trade union in the workplace in respect of the rights granted to such trade unions.

2.2.2 Aspects related to directors and prescribed officers[25]

Trust is a prerequisite for a good working relationship between labour and management. Trust is built over a period of time, for example through negotiations and by good decision-making on the part of both parties. Directors are effectively the decision-makers of a company.

The *Companies Act* provides in section 162 that upon application to a court the directors, including former directors in some instances,[26] may under certain

[25] Regulation 38 in GN R351 in GG 34239 of 26 April 2011 defines prescribed officers as any person who exercises general executive control and management over the business and activities of the company, or a person who regularly exercises executive control over the business and activities of the company. In both instances it is stated that the executive control can be over the management of the company as a whole or a significant portion thereof. Neither the title given to a person nor the function performed by the person in the company has an effect on whether or not the person is a prescribed officer of the company.

[26] A person who was a director within 24 months immediately preceding the application to declare a person delinquent or to place a person under probation (s 162(2)(a) of the *Companies Act*). Also see Cassim *Law of Business Structures* 253-254.

circumstances be declared as delinquent[27] or be placed under probation.[28] There is no comparable provision in the *Companies Act* 61 of 1973.[29] In this instance the legislature appropriately refers to a registered trade union that may apply to a court to have a director declared delinquent or to place a director under probation. It is suggested that any registered trade union representing employees in the workplace should be allowed to make an application in terms of this section, because directors' non-compliance with the provisions of the *Companies Act* may have a damaging effect on the smooth running of the company which, in turn, may adversely affect the employees of the company, who are the constituency of trade unions.

Trade unions and their members have an interest in the financial well-being of a company. Thus, when a company grants financial assistance to persons any additional disposable money that a company may have decreases in any given financial year. This then has a possible roll-on effect, meaning that during salary negotiations, in which trade unions play an important role, there is less money available to be used for increases.

The granting of financial assistance, which includes loans, guaranteeing loans or other obligations, and securing any debt obligation to directors and prescribed officers of the company, amongst others, is regulated in section 45 of the *Companies Act*.[30] Section 45(2) states that the board of directors may authorise the granting of direct or indirect financial assistance to directors or prescribed officers of the company, amongst others. The granting of such financial assistance is tempered by the provisions of section 45(3) in that such financial assistance must be approved by means of a special resolution by the shareholders of the company and the board

27 As provided for in s 162(5)(a)-(c) of the *Companies Act*. Also see Cassim *Law of Business Structures* 254.

28 As provided for in s 162(7)(a) and s 162(8) of the *Companies Act*.

29 *Companies Act* 61 of 1973 (hereafter "*Companies Act* of 1973").

30 By contrast to s 45 of the *Companies Act*, s 226(1) of the *Companies Act* of 1973 contains a prohibition on the granting of financial assistance to directors of the company, amongst others. Also see Cassim *Law of Business Structures* 205-208.

must confirm that the solvency and liquidity test would be satisfied immediately following the granting of such financial assistance.[31]

After a board resolution to provide financial assistance as contemplated in section 45(2), the board must give notice to all shareholders, unless all the directors are the only shareholders of the company, and to any trade union representing employees, within ten days of such resolution having been passed, if the loan or assistance exceeds one-tenth of 1% of the company's net worth,[32] or within 30 days of the end of the company's financial year in all other instances.[33] It is of concern that this section does not refer to registered trade unions but to any trade union representing employees in the workplace. It is therefore recommended that notice be sent only to registered trade unions that represent employees in the workplace.

Prior to the granting of financial assistance, as provided for in section 45 of the *Companies Act*, financial information must be disclosed to a trade union representing its employees.[34] It should be borne in mind that the *Companies Act* aims to promote greater transparency and such a disclosure will go a long way towards establishing greater trust between the management and a trade union. However, an employer may be unaware of a very small minority trade union that may exist in the workplace with which there is no collective agreement unless all employees are required to disclose their trade union affiliation upon appointment or, in the case of employees who were appointed prior to 1 May 2011, employees would be required to disclose their trade union membership, if any, to the employer. This may cause an undue administrative burden on employers in the case of large companies. It is therefore recommended that such notice be given only to registered trade unions that are sufficiently representative.

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31 The solvency and liquidity test is set out in s 4(1) of the *Companies Act*, which in essence means that the company's assets fairly valued must exceed its liabilities fairly valued and the company must be able to pay its debts in the ordinary course of business as and when they become due for a period of 12 months after the financial assistance was rendered.

32 Section 45(5)(a) of the *Companies Act*.

33 Section 45(5)(b) of the *Companies Act*.

34 Section 45(5) of the *Companies Act*.

2.2.3 Business rescue

The business rescue procedure is contained in chapter 6 of the *Companies Act* and replaces the old judicial management procedure contained in chapter XV of the *Companies Act* of 1973.[35]

Trade unions are granted more rights in regard to business rescue than under judicial management. There was no obligation placed on the company under judicial management to inform the registered trade unions in the workplace that the company had been placed under judicial management. Such information would, obviously, have had to have been shared if there was such an obligation in terms of a collective agreement or otherwise. Section 197B of the LRA, however, requires that an employer is obliged to make a consulting party, as contemplated in section 189(1)[36] of the LRA, aware of the fact that the employer is facing financial difficulties that may result in the liquidation or sequestration of the employer,[37] or if an employer either applies for its liquidation or sequestration or receives an application for its liquidation or sequestration.[38] Due to the strict requirements[39] that had to be met before an order for judicial management could be granted, it seems impossible that such a company had an obligation as contemplated in 197B of the LRA to inform a consulting party of its intended application for judicial management.[40]

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35 For a discussion of the business rescue procedure see Rushworth 2010 *Acta Juridica* 375-408; Loubser (Part 1) 2010 *TSAR* 501–514; Loubser (Part 2) 2010 *TSAR* 689–701; Davis (ed) *Companies and Other Business Structures* 225-246; and Cassim *Law of Business Structures* 458-492

36 A consulting party includes the persons with whom the employer needs to consult in terms of a collective agreement; or, if there is no collective agreement, a workplace forum and a registered trade union whose members are likely to be affected by a dismissal on the basis of operational requirements; or the employees themselves if there is no registered trade union that represents the employees.

37 Section 197B(1) of the LRA.

38 Sections 197B(2) and 197B(3) of the LRA respectively.

39 Section 427(1) of the LRA requires that if a company, as a result of mismanagement or for any other cause, is unable to pay its debts or if it is probably unable to meet its obligations, and the company has not become or is not prevented from becoming a successful concern, and if there is a reasonable probability that the company, if placed under judicial management, will be able to pay its debts or meet its obligations and become a successful concern, a court may grant an order for judicial management.

40 It should be noted that the s 346(4A) of the *Companies Act* of 1973 places an obligation on any party that applies for the liquidation of a company to inform every registered trade union of which the applicant is aware and the employees themselves of its application.

Business rescue is defined as proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for the temporary supervision of the company and the management of its affairs; by placing a temporary moratorium on the rights of claims against the company; and the development and implementation of a business rescue plan.[41] A company is financially distressed if –

> it appears reasonably unlikely that the company will be able to pay all of its debts as and when they become due within the immediately ensuing six months; or if it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months.[42]

The board can resolve to place a company in business rescue if it believes that the company is financially distressed and there appears to be a reasonable prospect of rescuing the company.[43] The resolution must be published and a copy must be served on all affected persons within five days of having passed the resolution.[44] An affected person is defined as a shareholder or creditor of a company, any registered trade union representing employees in the workplace, or the employees or their representatives themselves if there is no registered trade union that represents the employees in the company.[45] An affected person may, on application to the court, apply for the setting aside of a resolution to place the company in business rescue.[46]

Any affected person may at any time apply to court to place a company in business rescue if no resolution has been adopted to place a company in business rescue.[47] Once such an application has been lodged a copy of the application must be served on the Companies and Intellectual Property Commission (the "Commission")[48] and all affected persons must be notified.[49] While the requirements for a resolution to place a company in business rescue are set out in section 129, the grounds upon which a

41 Section 128(1)(b) of the *Companies Act*.
42 Section 128(1)(f) of the *Companies Act*.
43 Section 129(1) of the *Companies Act*.
44 Section 129(3)(a) of the *Companies Act*.
45 Section 128(1)(a) of the *Companies Act*.
46 Section 131 of the *Companies Act*.
47 Section 131(1) of the *Companies Act*.
48 Established by s 185 of the *Companies Act*.
49 Section 131(2) of the *Companies Act*.

court may grant an order are set out in section 131(4). Section 131(4) states that the court may order that the company is placed in business rescue if the company is financially distressed, or if the company fails to pay over any amount in terms of a contract in respect of employment-related matters, for example if the company fails to pay over the union membership subscriptions that it deducts from employees in accordance with a collective agreement between the company and a trade union, or if it otherwise appears just and equitable to do so for financial reasons.[50]

Once a company is in business rescue, there are potentially dire consequences for the company. For example, the company's credit rating with suppliers may fall, and suppliers may decide to do business with the company only on a "cash on delivery basis", which would have a negative impact on the company's liquidity. In the case of a listed company its share price may fall.

As stated above, the aim of business rescue proceedings is to rehabilitate a company that is financially distressed. Any other use of business rescue proceedings is inappropriate. It is therefore important to note the date when business rescue commences, in particular with reference to when a trade union makes a premature or unjust application. Firstly, business rescue proceedings commence as soon as the company files the resolution to place itself in business rescue with the Commission.[51] Secondly, it commences when an affected person,[52] such as a trade union, applies to the court to place the company in business rescue[53] or, thirdly, when a court makes an order to place a company in business recue during liquidation proceedings or proceedings to enforce a security interest.[54]

Business rescue proceedings terminate when the business rescue practitioner files a notice with the Commission to terminate such proceedings;[55] or if a business rescue

50 Section 131(4) of the *Companies Act*.
51 Section 132(1)(a) of the *Companies Act*.
52 As contemplated by s 79(a) of the *Companies Amendment Act* where "affected" was added before "person" as is the current wording of s 132(1)(b) of the *Companies Act*.
53 Section 132(1)(b) of the *Companies Act*.
54 Section 132(1)(c) of the *Companies Act*.
55 Section 132(2)(b) of the *Companies Act.*

plan has either been adopted or rejected in part D (Development and approval of business rescue plan) of chapter 6;[56] or when a court sets aside the resolution or order.[57] On a literal interpretation, this means that the company is placed in business rescue as soon as an application is made to court to place the company in business rescue. Because business rescue proceedings terminate when a court sets aside the order or resolution, or when it has converted the application into liquidation proceedings, it thus appears that a literal interpretation is unlikely as it would mean that such a company would always remain in business rescue. Such an interpretation does not make any sense and could not have been the intention of the legislature.

Section 348[58] of the *Companies Act* of 1973 could be of assistance in this regard. This section states that the winding up of the company commences at the time at which the application for the winding up of the company is presented to the court. In *Kalil v Decotex (Pty) Ltd*[59] the Appellate Division, as it was then called, held that the deeming provision (section 348) ante-dates the granting of the winding up order to the date that the order was presented to the court only if the court actually granted the order.[60] Although section 132 of the *Companies Act* does not contain a deeming provision as it merely states when business rescue proceedings end, it is suggested that business rescue proceedings commence only once the court grants an order to place a company in business rescue.

Section 31(3) of the *Companies Act* states that trade unions must be given access to a company's financial information, through the Commission, for the purposes of initiating business rescue proceedings. This provision is of concern because the section does not refer to registered trade unions.[61]

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56 Section 132(2)(c) of the *Companies Act*.

57 Section 132(2)(a)(i) of the *Companies Act*

58 "A winding-up of a company by the Court shall be deemed to commence at the time of the presentation to the Court of the application for the winding-up."

59 *Kalil v Decotex (Pty) Ltd* 1988 2 All SA 159 (A).

60 *Vermeulen v Bauermeister (Edms) Bpk* 1982 4 SA 159 (T).

61 It should be noted that s 16 of the LRA already places an obligation on an employer to disclose certain information to a majority trade union in order to allow such a trade union to perform its duties effectively. Such disclosure is, however, tempered by the provisions of s 16(5).

Of far greater concern, however, is the fact that an individual employee, who is also an affected person, may make an application to court to place a company in business rescue. The ability to lodge such an application may have disastrous effects on the business, as set out above. Disgruntled employees may abuse this right to force a company into accepting their demands in a situation in which the company may have a perfectly good reason for example to dismiss the employee in accordance with the ordinary provisions of the relevant labour legislation.

In view of the above, it is therefore argued that the legislature needs to revisit the provisions dealing with business rescue. It is recommended that only majority registered trade unions or, at the very least, sufficiently representative registered trade unions in the workplace be given the right to apply to a court to place a company in business rescue. It is furthermore recommended that the representativeness of a trade union in the workplace should not be limited to the place where an employee works, for example an outlet of a retail-store, but rather should refer to the company as a whole. Thus, only if a registered trade union is the majority trade union in a company or, at the very least, a registered trade union that is sufficiently representative, should it be allowed to make an application to place a company in business rescue unless, of course, the trade union is a creditor of the company. It is furthermore recommended that individual employees not be granted the right to apply to have a company placed in business rescue unless they are owed wages and thus become creditors of the company. Of course, an individual employee who is not represented by a trade union should be informed of the fact that a company may be or is being placed in business rescue.

2.3.4 Miscellaneous matters

Any action taken by a company has an effect on employees, regardless of whether or not they are represented by a trade union. Section 20 of the *Companies Act* deals with the validity of company actions. Sub-section 20(4) of the 2008 Act enables

shareholders, the directors or prescribed officers of the company, or a trade union to interdict a company from doing anything inconsistent with this act.[62] Such proceedings by a trade union, representative or otherwise, are unknown in the *Companies Act* of 1973. Section 20(4) does not refer to registered trade unions and it is, therefore, suggested that the legislature amend this section to refer to any registered trade unions representing employees in the workplace, as any action taken by a company that is inconsistent with the *Companies Act* could adversely affect the company.

Section 165(1) of the *Companies Act* abolishes the common law derivative action. A shareholder, director or prescribed officer, a registered trade union representing employees in the workplace, another representative of employees of the company, or any person with the leave of the court may initiate a derivative action.[63] The initiation of derivative actions was not within the domain of trade unions, registered or otherwise, because section 266(1) of the *Companies Act* of 1973 merely provides that a member may initiate a statutory derivative action. Neither does the common law provide for trade unions to initiate a derivative action. It is therefore argued that any registered trade union representing employees in the workplace should be able to initiate a derivative action because this would be in the interest of the company as a whole. For example, where a personal loan was made to a director of the company contrary to the provisions of section 45 of the *Companies Act* a trade union would be able to initiate legal proceedings on behalf of the company, where the company fails to take action, to hold the directors liable for failure to comply with the *Companies Act*.

Section 159 of the *Companies Act* deals with protected disclosures in terms of the *Protected Disclosures Act*,[64] the so-called "Whistle-blowing Act", and aligns itself with the salient provisions of the *Protected Disclosures Act*. In brief, the *Protected*

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62 Section 14(a) of the *Companies Amendment Act* amends the *Companies Act* by replacing the words "may take proceedings" with the words "may apply to the High Court for an appropriate order."

63 Section 165(2)(a)-(d) of the *Companies Act.*

64 *Protected Disclosures Act* 26 of 2000 (hereafter the *Protected Disclosures Act*), which applies to both the public and the private sector.

Disclosures Act provides that employees who make disclosures in terms of this act may not be unfairly discriminated against in the workplace[65] for having made a protected disclosure. It also provides for the manner in which such disclosures may be made. Section 187(1)(h) of the LRA states that the dismissal of any employee pursuant to such a protected disclosure automatically constitutes an unfair dismissal. In addition, a disclosure in terms of the *Protected Disclosures Act* that leads to any occupational detriment other than dismissal, where such a disclosure results in any unfair act or omission between the employer and employee, constitutes an unfair labour practice.[66]

Section 159(4)(b) of the *Companies Act* provides that any registered trade union that represents employees of a company, or any other representative who represents employees who make a disclosure in terms of section 159, is immune from any civil, criminal or administrative liability for that disclosure. Bearing in mind the relevant provisions of both the *Protected Disclosures Act* and the LRA, it is argued that this section is correctly formulated except for its failure to provide that only registered trade unions can act on behalf of their members.

3 Conclusion

It is recommended that the *Companies Act* consistently refers to registered trade unions only, as only registered trade unions are afforded the rights contemplated in the LRA.

It is regrettable that the *Companies Act* does not differentiate in principle between registered trade unions representing employees in the workplace and sufficiently representative trade unions or majority trade unions as is the case in labour law. Labour law contains a longstanding jurisprudence that grants certain rights to any registered trade union and other rights only to sufficiently representative trade

65 Section 3 of the *Protected Disclosures Act* reads as follows: "No *employee* may be subject to any *occupational detriment* by his or her *employer* on account, or partly on account of having made a protected disclosure."

66 Section 187(2)(d) of the LRA.

unions and additional rights to majority trade unions. It is therefore suggested that the *Companies Act* be amended to differentiate in principle between rights that are granted to any registered trade union that represents employees at the workplace and cases where it would be advisable only to grant rights to sufficiently representative or majority trade unions. In addition, it is recommended that the workplace be defined to indicate that it refers to all workplaces of the company as a whole.

It is proposed that any registered trade union representing employees in the workplace be allowed to exercise the rights granted to trade unions in the *Companies Act* where such exercising of the rights would be to the advantage of the company as a whole, for example, the right to apply to court to have a director declared delinquent or to place a director under probation, and the right to initiate a derivative action.

However, it is argued that where the rights granted to a trade union will place an undue onus on the company, such as in the case of informing any trade union of any financial assistance granted to directors or prescribed officers, the obligation on the company be restricted to sufficiently representative trade unions, that is, a trade union that represents at least 30% of the employees of the company as a whole.

Insofar as it pertains to business rescue, allowing a minority registered trade union or an individual employee the right to apply to place a company in business rescue could be detrimental to the company as a whole and could negatively affect the wellbeing of the company. It is therefore recommended that neither individual employees nor minority trade unions be granted the right to apply for business rescue, unless they are creditors of the company. Only sufficiently representative trade unions, as set out above, or majority trade unions should be granted the right to apply for business rescue if the company is financially distressed. In determining the representativeness of the trade union, its representativeness should be determined with regards to the company as a whole and not only at one of the plants where employees work, for example.

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List of abbreviations

BLLR	Butterworths Labour Law Reports
CCMA	Commission for Conciliation, Mediation and Arbitration
CLL	Contemporary Labour Law
ILJ	Industrial Law Journal
LRA	Labour Relations Act 66 of 1994
TSAR	Tydskrif vir die Suid-Afrikaanse Reg / Journal of South African Law