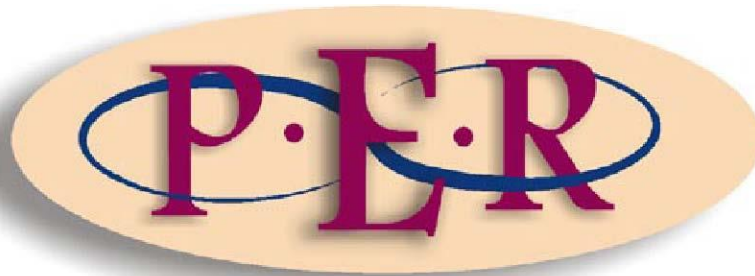


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LIMITING ORGANISATIONAL RIGHTS OF MINORITY UNIONS: *POPCRU V LEDWABA* 2013 11 BLLR 1137 (LC)

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1 Introduction

The labour unrest and strike violence that has brutalised the South African labour market in recent times can be attributed, in part, to inter-union rivalry.¹ Minority unions, seeking to stake their claim in a sector or business, have declared "turf-war" against majority unions – with this often escalating into loss of life,² damage to property, and dire economic consequences. This labour unrest have had both local and global repercussions, which is evidenced in a weakened currency, reduced global investment, declining productivity, and increasing unemployment rates in the sectors affected.³ The condition of the mining sector – ravaged by inter-union rivalry between the minority union Association of Mineworkers & Construction Union (AMCU) and the majority union National Union of Mineworkers (NUM) – bears testament to these effects.⁴

The *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*) guarantees freedom of association, the rights of employees to form and join trade unions and to strike, and the rights of trade unions, employers and employees'

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¹ See Ngcukaitobi 2013 *ILJ* 836.

² During August-September 2012 44 people died due to strike-related violence at Lonmin's Marikana mine – including 34 people killed by police in a single day. The South African Institute of Race Relations reports that between January 1999 and October 2012 181 people have died in strike violence, 313 people were injured, and over 3058 were arrested (see Windgrin 2013 http://www.defenceweb.co.za/index.php?option=com_content&view=article&id=29097:nearly-200-killed-in-strike-action-in-13-years-sairr&catid=3:Civil+Security&Itemid=113).

³ In the mining sector, mining production dropped 4.5% (R12 billion) between June 2012 and March 2013 – resulting in a negative impact on South Africa's GDP and currency depreciation. In 2013, the Fraser Institute downgraded South Africa to 64th out of 96 countries in respect of investor friendliness (see Leon 2013 <http://politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=427549&sn=Detail&pid=71616>).

⁴ In the platinum sector, labour stoppages since late 2012 have cost the sector approximately R18 billion in lost revenue and 900 000 oz in lost output. The ongoing strikes in early 2014 at Implats are estimated to be costing the mine R400 million per day in lost revenue (see Burkhardt 2014 <http://mg.co.za/article/2014-02-04-platinum-pay-strike-costs-south-africa-36-million-a-day>).

organisations to bargain collectively.⁵ In furtherance of these objectives, the *Labour Relations Act* 66 of 1995 (LRA) provides a regulatory framework for collective bargaining and organisational rights – in keeping with international and constitutional obligations. Trade unions are the vehicles for effective collective bargaining, while the LRA unequivocally promotes the policy choice of majoritarianism.⁶ The Labour Appeal Court in *Kem-Lin Fashions CC v Brunton*⁷ explains the majoritarian principle as being that:

the will of the majority should prevail over that of the minority. This is good for orderly collective bargaining as well as for the democratization of the workplace and sectors ... a proliferation of trade unions in one workplace or in a sector should be discouraged.

In keeping with these objectives, section 21(8)(a)(i) of the LRA directs commissioners, in resolving recognition disputes, to:

seek to minimise the proliferation of trade union representation in a single workplace, and where possible, to encourage a system of a representative trade union in a workplace.

"Sufficiently representative" unions are afforded organisational rights which regulate access to the workplace,⁸ stop-order facilities,⁹ and time off for union activities.¹⁰ Majority unions representative of the majority of workers at a workplace are provided with further entitlements in the form of the recognition of shop stewards¹¹ and the disclosure of information.¹² Furthermore, section 18(1) of the LRA enables majority unions to enter into collective agreements setting thresholds of representivity for the granting of access, stop-order and trade-union leave rights to minority unions.¹³ Brassey¹⁴ explains the object of this provision as being:

⁵ Ss 18 and 23 of the *Constitution of the Republic of South Africa*, 1996.

⁶ See ss 14(1); 16(1); 18(1); 25(1), (2); 26(1), (2); 32(1)(a), (b); 32(3)(a), (b), (c), (d); 32(5); 78(b) of the *Labour Relations Act* 66 of 1995 (LRA).

⁷ *Kem-Lin Fashions CC v Brunton* 2001 22 ILJ 109 (LAC)

⁸ S 12 of the LRA.

⁹ S 13 of the LRA.

¹⁰ S 15 of the LRA.

¹¹ S 14 of the LRA.

¹² S 16 of the LRA.

¹³ A collective agreement concluded in terms of s 18(1) is not binding unless the thresholds of representativeness are applied equally to any registered trade union seeking these organisational rights.

to enable the parties to put a numerical figure to the otherwise somewhat indeterminate concept of 'sufficiently representative' for which the stipulated sections (12, 13 and 15) provide. But the primary object of the section is to promote workplace majoritarianism, that is, the system under which a single union or group of unions enjoy exclusive rights or representation within a workplace ...

In furtherance of the majoritarian framework, collective agreements concluded between majority unions and employers can be extended to non-parties to the agreement in terms of section 23(1)(d) of the LRA – provided specified requirements are satisfied.¹⁵

In *Police & Prisons Civil Rights Union v Ledwaba*¹⁶ (hereafter *POPCRU*) the Labour Court was required to consider whether collective agreements concluded between the employer and the majority union Police & Prisons Civil Rights Union (POPCRU) were binding on the minority union – SA Correctional Services Workers Union (SACOSWU). The court was required to consider further whether the extension of such collective agreements to SACOSWU could be relied upon by POPCRU to prohibit SACOSWU from securing organisational rights. In so doing, the Labour Court had to reconcile the fundamental principle of freedom of association and the right to fair labour practices (to organise and engage in unfettered collective bargaining) within the context of the majoritarian framework created by the LRA.

2 The facts

The employer in this matter, the Department of Correctional Services (the Department), operates in terms of a formal and agreed bargaining and dispute-resolution structure composed of two bargaining councils and a central bargaining forum – the Departmental Bargaining Chamber (DBC) – in which collective bargaining is conducted. While POPCRU, as a majority union, was a member of

¹⁴ *Brassey Commentary on the Labour Relations Act* A3-23–24. Referred to with approval in *United Association of SA v BHP Billiton Energy Coal SA Ltd* 2013 34 ILJ 2118 (LC), in which the court noted that "given the nature of s 18 and the agreements flowing from it, it is, of course, ordinarily permissible for the parties to a threshold agreement to enter into a new agreement or amend the existing agreement and, in so doing, increase the threshold for the grant of organizational rights".

¹⁵ The provision requires such employees to be identified in the agreement, the agreement to expressly bind them, and it must be concluded by union/unions that have, as members, a majority of employees at the workplace.

¹⁶ *Police & Prisons Civil Rights Union v Ledwaba* 2013 11 BLLR 1137 (LC) (hereafter *POPCRU*).

these bargaining structures, the minority union SACOSWU was not, despite all of its members falling under the scope and jurisdiction of the DBC as employees of the Department. In terms of a series of resolutions concluded between POPCRU and the Department between 2001 and 2006, the thresholds of representativeness for entry into the DBC¹⁷ and organisational rights¹⁸ were agreed upon. The application of these agreements was extended to all employees of the Department in terms of section 23(1)(d), regardless of whether they were POPCRU members or not. In 2010 SACOSWU concluded a collective agreement with the Department in terms of which it secured itself organisational rights, despite having acquired neither the threshold of representativeness nor having been admitted to the DBC. POPCRU challenged this agreement, alleging that it was in breach of the pre-existing and binding collective agreements with the Department.

The bargaining council arbitrator held that the collective agreement between the Department and SACOSWU had been validly concluded in terms of section 20 of the LRA and, in keeping with the finding of the Constitutional Court in *National Union of Mineworkers v Bader Bop* (hereafter *Bader Bop*),¹⁹ it was binding on the parties.²⁰ The *Bader Bop* judgment recognised that a minority union can lawfully strike or conclude an agreement to secure organisational rights in circumstances where they do not meet the statutory threshold.²¹ The arbitrator in POPCRU held that to deny the minority union such rights would contravene section 23(5) of the *Constitution*, which provides that every trade union has the right to engage in collective bargaining.

¹⁷ Adoption of the public service job summit framework agreement signed in Pietersburg, Resolution 7 of 2001 available at Public Service Co-ordinating Bargaining Council date unknown http://www.pscbc.org.za/?page_id=2568.

¹⁸ Disciplinary Code and Procedure for the Department of Correctional Services Resolution 1 of 2006 available at General Public Service: Sectoral Bargaining Council 2006 <http://www.gpsbc.org.za/resolutions/2006/Resolution%201%20of%202006%20DCS%20Disciplinary%20Code%20and%20Procedure.pdf>. Procedure manual regulating relations between the department of correctional services and unions admitted to the departmental bargaining chamber Resolution 3 of 2006.

¹⁹ *National Union of Mineworkers v Bader Bop* 2003 24 ILJ 305 (CC) (hereafter *Bader Bop*).

²⁰ GPBC1754/2011 and GPBC1754/2011 (16 Feb 2012).

²¹ *Bader Bop* para 40.

3 The finding of the Labour Court

On review, the Labour Court was required to consider if the agreement conferring organisational rights on SACOSWU conflicted with the collective agreements concluded between POPCRU and the Department, and if it was therefore invalid and unenforceable.

In keeping with the ethos of voluntarism and in the absence of a duty to bargain,²² the LRA makes provision for collective bargaining between "sufficiently representative" unions and the employers.²³ The Code of Good Practice: Dismissal²⁴ expressly notes that collective agreements should be given primacy over provisions of the LRA – in keeping with the primary purpose of the LRA, which is to promote orderly collective bargaining.²⁵ In terms of section 23 of the LRA, a collective agreement is binding on the parties to the agreement – and also on non-parties to the agreement – provided that such employees are identified in the agreement,²⁶ the agreement expressly binds them, and the agreement is concluded by a union or unions that have as members a majority of employees at the workplace.²⁷

The right to strike is an integral part of the collective bargaining process and, as noted by the Court in *Bader Bop*, is fundamental to effective collective bargaining. In *Bader Bop* the Constitutional Court was satisfied that section 23(2)(c) of the Constitution and section 64(1) of the LRA (that confers upon every worker the right to strike) could be read to extend the right to strike to minority unions seeking to obtain organisational rights in circumstances when they were not sufficiently

²² *SA National Defence Union v Minister of Defence* 2006 27 ILJ 2276 (SCA) para 25; *National Union of Mineworkers v Eskom Holdings Soc Ltd* 2012 33 ILJ 669 (LC) para 24; *SA Municipal Workers Union v SA Local Government Association* 2010 31 ILJ 2178 (LC) para 16. See, also, Ministerial Task Team 1995 ILJ 293.

²³ Organisational rights are regulated by Part A and B of Chapter 111 of the LRA, and the right to strike is regulated by Chapter IV of the Act.

²⁴ Item 1.2.

²⁵ S 1(d) of the LRA.

²⁶ The requirement of identification is satisfied by reference to general categories of workers – as opposed to specified employees. *In casu*, the collective agreements concluded with POPCRU expressly bound all employees in the Departmental Bargaining Unit and extended the application of such agreement to all employees at the workplace.

²⁷ S 23(1)(d). See, also, *Aunde South Africa (Pty) Ltd v NUMSA* 2011 10 BLLR 945 (LAC); *Mzoku v Volkswagen SA (Pty) Ltd* 2001 8 BLLR 857 (LAC); *Fakude v Kwikot (Pty) Ltd* 2013 34 ILJ 2024 (LC).

representative, and thus not legally entitled to such rights. Nonetheless, section 65(3)(a) of the LRA clearly states that the right to strike is prohibited where the issue in dispute is regulated by a collective agreement – in keeping with the legislative purpose of prohibiting strikes over rights' disputes and minimising the incidence of strikes.

The facts revealed that in *POPCRU* – unlike in *Bader Bop*²⁸ – the minority union was bound by the collective agreements concluded with the majority union, which fully "regulated"²⁹ the organisational rights in dispute and the thresholds of representativeness. The Labour Court was accordingly of the view that, as an existing collective agreement regulated the issue in dispute, SACOSWU would have been prohibited from striking to secure organisational rights in terms of section 65(3) of the LRA. On this basis, and in a strange twist of logic, the Court noted that in the absence of the right to strike and in the light of the "inextricable relationship between collective bargaining and the right to strike",³⁰ there was "no point to collective bargaining on the issue"³¹ and the parties were thus "not entitled to collectively bargain on the same".³² More logical was the court's finding that collective bargaining between SACOSWU and the employer on organisational rights – when such issues were comprehensively regulated by a pre-existing and binding collective agreement with POPCRU – was not a "legitimate labour issue"³³ and a strike in furtherance of such a right constitutes an "unlawful demand".³⁴ On this basis, the court in *POPCRU* was satisfied that the arbitrator's reliance on the dictum of the court in *Bader Bop* was misplaced, and was not binding in the circumstances. In reaching its decision, the court held that a collective agreement concluded with a majority trade union:

²⁸ In *Bader Bop* the minority union was not bound by the collective agreement concluded with the majority union.

²⁹ The court in *POPCRU*, relying on the dictum of the court in *Air Chefs (Pty) Ltd v SA Transport and Allied Workers Union* 2013 34 ILJ 119 (LC) para 27, noted that an issue is "regulated" where contained in a substantive rule, or if the process for dealing with the issue is regulated in the agreement.

³⁰ *POPCRU* 1153.

³¹ *POPCRU* 1153.

³² *POPCRU* 1153.

³³ *POPCRU* 1153.

³⁴ *POPCRU* 1154.

that regulates or even excludes organisational rights of minority trade unions in the particular employer, must have preference over the organisational rights such minority union may be entitled to in terms of the Constitution or the LRA. Organisational rights must have a purpose and no such purpose can be achieved by affording organisational rights to a minority trade union where an employer and a majority trade union have already fully regulated all their affairs relating to their relationship, and the structure of collective bargaining, in a collective agreement made binding on all the employees in the employer. To simply afford organisational rights without a purpose or reason would make organisational rights an end in itself and not a means to an end, which is not what is intended by the LRA.³⁵

The Court proceeded to consider whether – in spite of this finding – section 20 of the LRA enabled SACOSWU to validly conclude a collective agreement on organisational rights through collective bargaining. Section 20 clearly stipulates that nothing in Part A of Chapter III "precludes the conclusion of a collective agreement that regulates organisational rights". In *Bader Bop* the court confirmed that, in terms of section 20, unrepresentative unions are entitled to bargain for organisational rights outside of the parameters of Part A of Chapter III. A valid collective agreement can therefore be concluded and will be subject to the provisions governing collective agreements in Part B of Chapter III of the LRA – irrespective of whether the union is representative or not. The facts in *POPCRU* revealed that the agreement concluded in 2001 between POPCRU and the Department in terms of section 18(1) set the representivity threshold at 9 000 members per trade union – making the attainment of such a threshold a prerequisite for admission to the DBC. Organisational rights, made contingent upon admission to the DBC, were regulated by a collective agreement.³⁶ More importantly, the court was satisfied that the application of these agreements had been lawfully extended to SACOSWU members.³⁷ As SACOSWU had a membership of 2 000 employees and could not comply with the threshold – nor could it gain access to the DBC and concomitant organisational rights – the agreement concluded with SACOSWU was in conflict with the pre-existing dispensation.

³⁵ *POPCRU* 1149.

³⁶ Concluded in 2006.

³⁷ See, also, *Bravo Group Sleep Products (Pty) Ltd v Chemical Energy Paper Printing Wood & Allied Workers Union* 2009 30 ILJ 1090 (LC).

The court was satisfied that a "collective agreement hierarchy"³⁸ should apply in a situation where a collective agreement concluded with a majority union is incompatible or conflicts with an agreement concluded with a minority union. In such a situation, the court held, the agreement concluded with the majority must take preference – in keeping with the interests of orderly collective bargaining and the principle of majoritarianism. The review was accordingly granted, and the collective agreement concluded with SACOSWU was declared invalid and set aside.

4 Reconciling sections 18 and 20 of the LRA

This decision raises the important issue of the apparent conflict between sections 18 and 20 of the LRA. A literal interpretation of the two provisions suggests that they can co-exist, with section 20 unequivocally stipulating that:

[n]othing in this Part precludes the conclusion of a collective agreement that regulates organisational rights.

Nonetheless, a purposive interpretation in keeping with the ethos of majoritarianism and the legislative purpose of orderly collective bargaining reveals that a collective agreement concluded by a minority union in breach of the thresholds set by section 18 undermines the fundamental purpose of the provision.³⁹ Judge Ngcobo,⁴⁰ delivering a separate concurring judgment in *Bader Bop*, noted that section 20 permits both:

unrepresentative and representative unions to conclude collective agreements to regulate organizational rights outside of part A⁴¹ ... provided such agreement does not prevent the exercise of statutory organisational rights by registered unions.

It can be argued that a majority union's statutory right to enjoy organisational rights – unfettered by a proliferation of unrepresentative trade unions at a workplace – will indeed be infringed by the extension of organisational rights to minority unions that do not meet the agreed threshold for representivity. To enforce the section 20

³⁸ *POPCRU* 1163.

³⁹ S 18 of the LRA has been criticised as supporting a cabal of sweetheart unions and their employers, and for undermining the constitutionally guaranteed freedom of association and the right to engage in collective bargaining. In this regard, see Kruger and Tshoose 2013 *PER/PELJ* 285.

⁴⁰ *Bader Bop* 334.

⁴¹ *Bader Bop* 336.

agreement concluded with SACOSWU, would, as the court held in *POPCRU*, "fly in the face of sections 18(1) and 23(1) of the LRA".⁴²

In keeping with this approach, the Labour Court in Chamber of Mines of SA acting in its own name & on behalf of Harmony Gold Mining Co Ltd v Association of Mineworkers & Construction Union⁴³ recently granted an interim interdict prohibiting the minority union AMCU from striking over a wage dispute – finding that:

the majoritarian principle should accordingly carry the day in a democratic collective bargaining exercise.

The basis for the application was that AMCU members were bound by a collective agreement which regulated wages and other terms and conditions of employment entered into between the employer's organisation, the Chamber of Mines, on behalf of its members, and the majority unions at the workplace. Judge Cele was satisfied that the wage agreement concluded by the Chamber of Mines had been extended in terms of section 23(1)(d) to AMCU members on a "per employer basis" and expressly prohibited a strike by those bound by the agreement. Importantly, Judge Cele⁴⁴ noted that:

The constitutional right of employees to strike in this matter must not be seen in isolation from the right of the members of NUM, Solidarity and UASA to collectively bargain with their employers. Accepting that NUM, Solidarity and UASA represented the majority of the employees in the workplace, it would be constitutional to allow the democratic process of the majoritarian representation to prevail. If the minority employees represented at the workplace by AMCU were to succeed and have a new wage agreement to come about and to supplant the existing collective agreement, the minorities would be governing for the majority in the workplace. That result is certainly undesirable.

On the return date of the *rule nisi*,⁴⁵ Judge Van Niekerk, in considering AMCU's counter-application challenging the constitutionality of section 23(1)(d), held that the limitation posed to the right to strike was justifiable and consistent with the

⁴² *POPCRU* 1165.

⁴³ *Chamber of Mines of SA v Association of Mineworkers & Construction Union* 2014 35 ILJ 1243 (LC).

⁴⁴ *Chamber of Mines of SA v Association of Mineworkers & Construction Union* 2014 35 ILJ 1243 (LC).

⁴⁵ *Chamber of Mines of SA v Association of Mineworkers & Construction Union* 2014 ZALCJHB 223 (23 June 2014) para 69 (hereafter *Chamber of Mines*).

legislative scheme applicable to collective bargaining. He noted that the majoritarian principle:

promotes orderly collective bargaining, a legitimate purpose of the LRA and serves the legislative purpose of advancing labour peace and the democratisation of the workplace and the creation of a framework within which parties can bargain collectively to determine wages and other terms and conditions of employment. If an employer and unions party to a collective agreement were denied the right to extend their agreement to non-party employees, collective bargaining would be characterised by opportunism and the attendant threat to the formation of stable relationships.⁴⁶

The conflict between sections 18 and 20 was again addressed by the Labour Court in *Transnet Soc Ltd v National Transport Movement* (hereafter *Transnet*).⁴⁷ Judge Van Niekerk considered whether or not a strike by a minority union to secure organisational rights was unprotected – in that it sought to compel the employer to perform the "unlawful act" of breaching a pre-existing and binding collective agreement with majority unions. In this matter the applicant, Transnet, had concluded a recognition agreement with a number of trade unions at the workplace, in terms of which thresholds of recognition were fixed for the attainment of organisational rights. Organisational rights were reserved for those unions that were deemed to be sufficiently representative – in that they represented a minimum of 30% of the employees at the workplace. The respondent, Transnet Soc Ltd – a minority union – sought to obtain organisational rights by means of strike action, despite falling well below the required threshold. The applicants argued that the collective agreement regulated the basis upon which organisational rights could be attained, and as the respondent did not meet the threshold requirements for organisational rights a demand for such entitlement would constitute a breach of the agreement. Judge Van Niekerk,⁴⁸ in determining the matter and without making reference to the finding of the court in *POPCRU*, noted that:

[w]hether a collective agreement concluded between an employer and third party unions may limit the right to strike by a non-party union, in my view, is a question that must be answered by the terms of the agreement, read with section 64 and section 65 of the Act.

⁴⁶ *Chamber of Mines* para 69.

⁴⁷ *Transnet Soc Ltd v National Transport Movement* 2014 1 BLLR 98 (LC) (hereafter *Transnet*).

⁴⁸ *Transnet* 103.

Judge Van Niekerk was satisfied, on the facts, that the collective agreement regulated the organisational rights of the parties to the agreement, and did not appear to have been extended to bind those employees that were not members of any of the union-parties to the collective agreement.⁴⁹ As the minority union was not a party to the collective agreement (unlike in the *POPCRU* matter), the court was satisfied that it was not bound by the terms of the agreement, and that it was entitled to strike. In this regard, the finding of the court was consistent with the ratio of the court in *POPCRU*.

In considering if section 18 of the LRA could be relied upon to limit the right of minority unions to strike, Judge Van Niekerk – in *Transnet* – was of the view that the provision contemplates an agreement between a single majority trade union and the employer – unlike sections 14(1) and 16(1), that permit "one or more" unions to act jointly to constitute a majority. As the collective agreement had been concluded between the employer and four trade unions, the court believed that it was not an agreement contemplated by section 18, and did not serve to bind the minority union. However, Judge Van Niekerk proceeded to find, albeit *obiter*, that even if section 18 permitted agreements between an employer and two or more minority unions acting jointly, there is no express limitation in sections 64 and 65 which prevents:

a minority union demanding those rights from seeking to bargain collectively to acquire them, or from exercising its right to strike should the employer resist the demand.⁵⁰

Judge Van Niekerk concluded that a correct interpretation – in keeping with international labour standards and constitutional protections – was that neither section 18 nor the terms of the collective agreement precluded the minority union from bargaining collectively or striking to secure organisational rights in the circumstances. In this regard, the court's view differed fundamentally from that in *POPCRU*.

⁴⁹ *Transnet* 103.

⁵⁰ *Transnet* 104.

5 Analysis

The fundamental principle of freedom of association and the right to engage in collective bargaining is enshrined in international instruments like the *International Labour Organisation Freedom of Association and Protection of the Right to Organise Convention* (1948) (No 87), and the *Right to Organise and Collective Bargaining Convention* (1949) (No 98) – both ratified by South Africa on 19 February 1996.⁵¹ The two key supervisory bodies responsible for the implementation of these Conventions are the Committee of Experts on the Application of Conventions and Recommendations, and the Committee on Freedom of Association.⁵² The position of the Committee of Experts is that the majoritarian system is compatible with freedom of association, and that a trade union which represents the majority, or a high percentage of the workers, in a bargaining unit may enjoy preferential or exclusive bargaining rights.⁵³ Such a system, according to the Committee of Experts, must not, however, prevent minority unions from functioning, making representations on behalf of their members, and representing members in individual grievance disputes.⁵⁴ In a similar vein, the constitutional guarantee of freedom of association and fair labour practices can be lawfully restricted in accordance with the limitation clause – where such a limitation is "reasonable and justifiable".⁵⁵ Closed shop and agency shop agreements – concluded in compliance with sections 25 and 26 of the LRA – are examples of such a reasonable and justifiable limitation of the right to freedom of association, as are legislative provisions restricting organisational rights to majority unions.⁵⁶

⁵¹ Freedom of Association 2006 http://www.ilo.org/wcmsp5/groups/public/ed_norm/normes/documents/publication/wcms_090632.pdf.

⁵² Adams 2000 http://www.law.utoronto.ca/documents/conferences2/StrikeSymposium09_Adams_fraser.pdf.

⁵³ Gernogon, Otero and Guido 2000 http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_087931.pdf.

⁵⁴ See ILO *Freedom of Association: Digest of Decisions and Principles* para 829.

⁵⁵ S 36(1) of the *Constitution* provides that the "... rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including- (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose".

⁵⁶ Ss 12, 13 and 15 of the LRA. See Du Toit *et al Labour Relations Law* 192.

While the finding of the Labour Court in *POPCRU* is correct on the facts, and is in keeping with the legislative choice of majoritarianism, questions have been raised about the suitability of this legislative model in the current South African labour context. As Kahn⁵⁷ (Director of the Commission for Conciliation, Mediation and Arbitration (CCMA)) notes:

This winner-takes-all approach was developed and adopted when there was a fair degree of union stability, a growing consolidation within the trade union movement, and a strong commitment to social dialogue and inclusive solutions within the government, labour, business and civil society. But much has changed since then.

Abject poverty, a loss of confidence in existing bargaining structures, and disappointed expectations have led to the alienation of unskilled and semi-skilled vulnerable employees from majority unions. Minority unions have taken up the cudgels of frustrated and disempowered employees – that have tired of the "co-dependent comfort zone"⁵⁸ that majoritarianism has engendered. The Marikana experience has largely been attributed to the unsuitability of the current collective bargaining model within the South African socio-economic and political landscape. As Brassey⁵⁹ notes:

Majoritarianism, the leitmotief of both industry bargaining and plant-level organizational rights, is too crude to give proper expression to the interests of minority unions, which frequently represent skilled or semi-skilled workers but, as the Marikana experience demonstrates, who may simply be acting on behalf of workers who feel alienated from the majority union.

The *Labour Relations Amendment Bill* of 2012⁶⁰ introduces section 21(8C), which empowers arbitrating commissioners to extend section 12, 13 and 15 rights to registered union/s that do not meet the threshold of representativeness established by a section 18 collective agreement. The section states that such rights may be granted – provided that all the parties have been given an opportunity to participate in the arbitration proceedings, and "the trade union or trade unions acting jointly represent a significant interest or a substantial number of employees, in the

⁵⁷ Kahn 2012 <http://www.ccma.org.za/ViewNews.asp?NID=184>.

⁵⁸ Hartford 2012 <http://groundup.org.za/content/mining-industry-strike-wave-what-are-causes-and-what-are-solutions>.

⁵⁹ Brassey 2013 *ILJ* 834.

⁶⁰ *Labour Relations Amendment Bill* B16 of 2012.

workplace".⁶¹ This provision clearly seeks to prevent an abuse of section 18 agreements, by providing minority unions that represent a "significant interest" or "sufficient number of employees" at the workplace with a right to challenge unfair or unreasonable threshold agreements at arbitration.⁶²

6 Conclusion

The purpose of section 18 of the LRA is explained by the court in *POPCRU* as being:

to regulate the admission of trade unions to the bargaining relationship with the employer so as to avoid a situation of proliferation by a multitude of small trade unions in one employer and in particular where there is already an established relationship with a majority trade union.⁶³

The finding of the court in *POPCRU* is in keeping with this intended purpose, and is appropriate within the context of a majoritarian regime. The purpose and intention of this provision is consistent with the legislative framework adopted by the drafters of the LRA, and is also in keeping with international conventions and the constitutional limitation clause. Nonetheless, the Marikana experience and the strike violence that has marred the South African labour market in recent times reveal the flaws in the majoritarian framework and the changed dynamic of the collective bargaining environment.

It may be time to return to the drawing board.

⁶¹ S 21(8D) of the *Labour Relations Amendment Bill* B16 of 2012. This provision is deemed to apply to any dispute referred to the CCMA after the commencement of the Act – irrespective of the date of conclusion of the s 18 agreement.

⁶² As with all rights-based disputes, it is assumed that the right to strike will be excluded in such circumstances. That being the case, the dictum of the court in *Bader Bop* will not extend to organisational rights regulated by binding s 18 agreements.

⁶³ *POPCRU* para 46.

BIBLIOGRAPHY***Literature***

Brassey *Commentary on the Labour Relations Act*

Brassey M *Commentary on the Labour Relations Act* (Revision Service 2) (Juta Cape Town 2006)

Brassey 2013 *ILJ*

Brassey M "Labour Law after Marikana: Is Institutionalized Collective Bargaining in SA Wilting? If So, Should We Be Glad or Sad?" 2013 *ILJ* 823-835

Du Toit *et al Labour Relations Law*

Du Toit D *et al Labour Relations Law* 5th ed (LexisNexis Durban 2006)

ILO *Freedom of Association: Digest of Decisions and Principles*

ILO *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* 4th revised ed (International Labour Office Geneva 1996)

Kruger and Tshoose 2013 *PER/PELJ*

Kruger J and Tshoose CI "The Impact of the Labour Relations Act on Minority Unions: A South African Perspective" 2013 *PER/PELJ* 285-326

Ministerial Task Team 1995 *ILJ*

Ministerial Task Team "Explanatory Memorandum to the Draft Labour Relations Bill" 1995 *ILJ* 278-336

Ngcukaitobi 2013 *ILJ*

Ngcukaitobi T "Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana" 2013 *ILJ* 836-858

Case law

Air Chefs (Pty) Ltd v SA Transport and Allied Workers Union 2013 34 ILJ 119 (LC)

Aunde South Africa (Pty) Ltd v NUMSA 2011 10 BLLR 945 (LAC)

Bravo Group Sleep Products (Pty) Ltd v Chemical Energy Paper Printing Wood & Allied Workers Union 2009 30 ILJ 1090 (LC)

Chamber of Mines of SA v Association of Mineworkers & Construction Union 2014 35 ILJ 1243 (LC)

Chamber of Mines of SA v Association of Mineworkers & Construction Union 2014 ZALCJHB 223 (23 June 2014)

Fakude v Kwikot (Pty) Ltd 2013 34 ILJ 2024 (LC)

Kem-Lin Fashions CC v Brunton 2001 22 ILJ 109 (LAC)

Mzeku v Volkswagen SA (Pty) Ltd 2001 8 BLLR 857 (LAC)

National Union of Mineworkers v Bader Bop 2003 24 ILJ 305 (CC)

National Union of Mineworkers v Eskom Holdings Soc Ltd 2012 33 ILJ 669 (LC)

Police & Prisons Civil Rights Union v Ledwaba 2013 11 BLLR 1137 (LC)

SA Municipal Workers Union v SA Local Government Association 2010 31 ILJ 2178 (LC)

SA National Defence Union v Minister of Defence 2006 27 ILJ 2276 (SCA)

Transnet Soc Ltd v National Transport Movement 2014 1 BLLR 98 (LC)

United Association of SA v BHP Billiton Energy Coal SA Ltd 2013 34 ILJ 2118 (LC)

Legislation

Constitution of the Republic of South Africa, 1996

Labour Relations Act 66 of 1995

Labour Relations Amendment Bill B16 of 2012

International instruments

ILO Freedom of Association and Protection of the Right to Organise Convention (1948) (No 87)

ILO Right to Organise and Collective Bargaining Convention (1949) (No 98)

Internet sources

- Adams 2000 http://www.law.utoronto.ca/documents/conferences2/StrikeSymposium09_Adams_fraser.pdf accessed March 2014
- Adams RJ 2000 *Fraser v Ontario and International Human Rights: A Comment*
http://www.law.utoronto.ca/documents/conferences2/StrikeSymposium09_Adams_fraser.pdf accessed 9 March 2014
- Burkhardt 2014 <http://mg.co.za/article/2014-02-04-platinum-pay-strike-costs-south-africa-36-million-a-day>
- Burkhardt P 2014 *Platinum Pay Strike Costs South Africa R400-million a Day*
<http://mg.co.za/article/2014-02-04-platinum-pay-strike-costs-south-africa-36-million-a-day> accessed 9 March 2014
- Freedom of Association 2006 http://www.ilo.org/wcmsp5/groups/public/ed_norm/normes/documents/publication/wcms_090632.pdf
- Freedom of Association 2006 *Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*
http://www.ilo.org/wcmsp5/groups/public/ed_norm/normes/documents/publication/wcms_090632.pdf accessed 2 February 2013
- General Public Service: Sectoral Bargaining Council 2006
<http://www.gpsbc.org.za/resolutions/2006/Resolution%201%20of%202006%20DCS%20Disciplinary%20Code%20and%20Procedure.pdf>
- General Public Service: Sectoral Bargaining Council 2006 *Disciplinary Code and Procedure for the Department of Correctional Services*
<http://www.gpsbc.org.za/resolutions/2006/Resolution%201%20of%202006%20DCS%20Disciplinary%20Code%20and%20Procedure.pdf>
- Gernogon, Odero and Guido 2000 http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_087931.pdf
- Gernogon B, Odero A and Guido H 2000 *Collective Bargaining: ILO Standards and the Principles of the Supervisory Bodies*

http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_087931.pdf accessed 30 July 2014

Hartford 2012 <http://groundup.org.za/content/mining-industry-strike-wave-what-are-causes-and-what-are-solutions>

Hartford G 2012 *The Mining Industry Strike Wave: What are the Causes and What are the Solutions?* <http://groundup.org.za/content/mining-industry-strike-wave-what-are-causes-and-what-are-solutions> accessed 9 July 2014

Kahn 2012 <http://www.ccma.org.za/ViewNews.asp?NID=184>

Kahn N 2012 *A Chance to Reassess our System of Industrial Relations* <http://www.ccma.org.za/ViewNews.asp?NID=184> accessed 9 July 2014

Leon 2013 <http://politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=427549&sn=Detail&pid=71616>

Leon P 2013 *The Mining Industry after Marikana* <http://politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=427549&sn=Detail&pid=71616> accessed 7 March 2014

Public Service Co-ordinating Bargaining Council date unknown http://www.pscbc.org.za/?page_id=2568

Public Service Co-ordinating Bargaining Council date unknown *Summary of PSCBC Resolutions* http://www.pscbc.org.za/?page_id=2568

Windgrin 2014 http://www.defenceweb.co.za/index.php?option=com_content&view=article&id=29097:nearly-200-killed-in-strike-action-in-13-years-sairr&catid=3:Civil+Security&Itemid=113

Windgrin D 2014 *Nearly 200 Killed in Strike Action in 13 Years – SAIRR* http://www.defenceweb.co.za/index.php?option=com_content&view=article&id=29097:nearly-200-killed-in-strike-action-in-13-years-sairr&catid=3:Civil+Security&Itemid=113 accessed 28 February 2014

LIST OF ABBREVIATIONS

AMCU	Association of Mineworkers and Construction Union
CCMA	Commission for Conciliation, Mediation and Arbitration
DBC	Departmental Bargaining Chamber
ILJ	Industrial Law Journal
ILO	International Labour Organisation
LRA	Labour Relations Act
NUM	National Union of Mineworkers
PER/PELJ	Potchefstroom Elektroniese Regstrydskrif / Potchefstroom Electronic Law Journal
POPCRU	Police and Prisons Civil Rights Union
SACOSWU	South African Correctional Services Workers' Union