

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**CCT Case No:**

**LAC Case No: DA8/2018**

In the matter between:

**NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA (KZN)** Applicant

and

**LUFIL PACKAGING (ISITHEBE)** First Respondent  
**(A division of Bidvest Paperplus (Pty) Ltd)**

**COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION** Second Respondent

**LEON PILLAY N.O.** Third Respondent

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**FOUNDING AFFIDAVIT**

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I, the undersigned,

**NJABULO MNCUBE**

do hereby make oath and state:

1.

I am an adult male, legal officer of the applicant based at the applicant's regional office at 129 Che Guevara Street, Berea, Durban. I am duly authorised, in so far as is necessary to depose to this affidavit. I am now charged with the oversight of this matter on behalf of the applicant and its regional members. I have read the papers in this matter including the judgments and have discussed the matter with the applicant's attorney.

2.

The contents of this affidavit are true and correct as far as they fall within my knowledge save where is made clear by the context. Where I make submissions of a legal nature, I do so on the basis of advice given to me.

### **THE PARTIES**

3.

The applicant is the National Union of Metalworkers of South Africa (KwaZulu Natal Region) ("NUMSA") which has its offices at 26 Isithebe Commercial Centre, No. 3 Yellow Street, Isithebe.

4.

The first respondent is Lufil Packaging (Isithebe), a division of Bidvest

Paperplus (Pty) Ltd (“Lufil”), a company duly incorporated in terms of the company laws of the Republic of South Africa, with its head offices at 21 Green Street, Isithebe.

5.

The second respondent is the Commission for Conciliation, Mediation and Arbitration (“CCMA”), a juristic entity constituted in accordance with the provisions of section 112 of the Labour Relations Act, 66 of 1995 (“LRA”) and charged with the resolution of certain labour disputes in terms of the Act. The Durban offices of the CCMA are situated at Aquasky Towers, 275 Anton Lemedede Street, Durban.

6.

The third respondent is Mr Leon Pillay, an adult male commissioner of the CCMA, appointed as such in accordance with the provisions of section 117 of the LRA, who is cited in his capacity as the commissioner who arbitrated the initial dispute referred to the second respondent by the applicant.

**NATURE OF THE APPLICATION**

7.

NUMSA seeks leave to appeal against the judgment and order of the Labour Appeal Court (“LAC”) delivered on 13 June 2019 attached hereto as annexure “**FA1**”.

8.

In about January 2015, NUMSA approached Lufil requesting that Lufil deduct union fees for its members who are employed by Lufil. Lufil refused the request on the basis that its operations did not fall within the scope of NUMSA, alleging that accordingly NUMSA was not entitled to organise members within Lufil’s workplace. NUMSA referred a dispute to the CCMA under case number KNDB14987-14.

9.

Lufil filed an application in terms of rule 31 of the CCMA rules, raising what it termed a jurisdictional point, alleging that NUMSA did not have the requisite *locus standi* to bring the dispute before the CCMA. NUMSA filed an answering affidavit and Lufil replied thereto. The application was decided on the papers and the third respondent delivered his ruling on 19 June 2015 a copy of which is annexed hereto marked “**FA2**” in which he found that NUMSA was entitled to claim organisational rights from Lufil. The CCMA set the remainder of the dispute down for hearing in terms of section 21(7) of the LRA.

10.

Lufil launched proceedings to review the third respondent's ruling in the Labour Court, Durban under case number D722/15 on 31 July 2015. It also sought to have the arbitration proceedings in the CCMA adjourned pending the finalisation of the review under case number D722/15. The application for an adjournment was refused and the arbitration proceeded on 1 March 2016.

11.

The third respondent delivered his award, awarding NUMSA certain organisational rights on 14 March 2016 a copy of which is annexed hereto marked "**FA3**". Lufil filed an application to review this award on 6 May 2016 under case number D459/16. The grounds of review herein were but a 'cut and paste' of the first review and did not otherwise address the award of the organisational rights.

12.

The applications under case number D722/15 and D459/16 were consolidated and argued on 23 November 2017. Judgment was delivered on 20 April 2018. The Labour Court dismissed the application to review and upheld the third respondent's ruling. A copy of the Labour Court

judgment is annexed hereto marked “**FA4**”.

13.

The first respondent then sought and was granted leave to appeal to the LAC under case number DA8/2018. The appeal was heard on 15 May 2019 and judgment was delivered on 13 June 2019 (“**FA1**” hereto). The LAC upheld the appeal and set aside the CCMA’s arbitration award under case number KNDB14987-14.

14.

This application raises key constitutional issues of the right to fair labour practises and the right to freedom of association and how it is that the LRA is to be interpreted as the statute that advances these rights in the workplace.

15.

NUMSA’s grounds of appeal are, in summary:

15.1 the LAC erred in holding that trade unions are precluded from admitting as members, employees who are not employed in a particular sector;

15.2 the LAC erred in relying on *Van Wyk and Taylor v Dando and*

*Van Wyk Print (Pty) Ltd* [1997] 7 BLLR 906 (LC);

15.3 the LAC erred in interpreting section 4(1)(b) of the LRA in isolation and without proper regard to the rights afforded by sections 18 and 23 of the Constitution;

15.4 the LAC erred in its analogous reasoning regarding collateral challenges.

### **LEAVE TO APPEAL**

16.

In terms of section 167(3)(b) of the Constitution, this Court has jurisdiction to decide constitutional matters and issues connected with constitutional matters.

17.

This application concerns the interpretation of provisions of the LRA. The applicant submits that the interpretation adopted by the LAC constitutes an infringement of its right to fair labour relations and its right to freedom of association and also infringes its members' rights to fair labour relations and freedom of association. The applicant contends that the provisions of the LRA relevant to this application must be construed consistently with

the Constitution.

18.

In section 23, the Constitution recognises the importance of ensuring fair labour relations. The entrenchment of the right of workers to form and join trade unions, as well as the right of trade unions, employers and employer organisations to engage in collective bargaining, illustrates that the Constitution contemplates that collective bargaining between employers and workers is key to a fair industrial relations environment. Section 23(2)(a) puts no obvious restriction on that right to join a union.

19.

Section 18 of the Constitution recognises the right to freedom of association. The LRA itself also recognises this right in section 4.

20.

The interpretation adopted by the LAC restricts the ability of the union and its members to claim organisational rights. It is submitted that this restriction results in a limitation of the union's and its members' constitutional right to fair labour relations and unnecessarily curtails the right to freedom of association. The LAC interpretation, if it stands, will affect all trade unions and their members who are similarly situated. Several cases are pending before the Labour Court dealing with the same

or similar issues. The importance of the issue thus extends beyond the interests of those directly involved in it.

21.

It is accordingly submitted that in light of the constitutional issue at stake and its importance in the greater scheme of things, it is in the interests of justice that leave to appeal be granted.

22.

It is further submitted that the ruling of the third respondent in particular sets out the correct interpretation of the relevant sections. The Labour Court agreed with this ruling. A correct reading of the provisions of the LRA makes it clear that there is no prohibition on a union from claiming organisational rights from an employer whose business does not fall within the scope of the industries listed in an addendum of the union constitution. Moreover, the union constitution is merely a contract that governs the relationship between the union and its members, and the employer does not have a right to interfere with that relationship, nor to impose its interpretation of that document.

23.

The issues raised in this application require a careful consideration of the

provisions of the LRA in the context of the Constitution. It accordingly submitted that there are sufficient prospects of success on appeal.

## **LEGAL FRAMEWORK**

24.

Section 18 of the Constitution simply states:

'Everyone has the right to freedom of association.'

25.

Section 23 of the Constitution provides:

'(1) Everyone has the right to fair labour practices.

(2) Every worker has the right -

- (a) to form and join a trade union;
- (b) to participate in the activities and programmes of a trade union;
- and
- (c) to strike.

(3) Every employer has the right -

- (a) to form and join an employers' organisation; and
- (b) to participate in the activities and programmes of an employers' organisation.

(4) Every trade union and every employers' organisation has the right -

- (a) to determine its own administration, programmes and activities;
- (b) to organise; and
- (c) to form and join a federation.

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this chapter, the limitation must comply with s 36(1).

(6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this chapter, the limitation must comply with s 36(1).'

## 26.

Chapter I of the LRA deals with the purpose, application and interpretation of the provisions of the Act.

## 27.

Section 1 expressly states the purpose of the Act as follows:

'The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are-

- (a) to give effect to and regulate the fundamental rights conferred by

section 23 of the Constitution of the Republic of South Africa, 1996;

- (b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;
- (c) to provide a framework within which employees and their trade unions, employers and employers' organisations can-
  - (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and
  - (ii) formulate industrial policy; and
- (d) to promote-
  - (i) orderly collective bargaining;
  - (ii) collective bargaining at sectoral level;
  - (iii) employee participation in decision-making in the workplace; and
  - (iv) the effective resolution of labour disputes.'

## 28.

Section 3 sets out the interpretative tools to be considered when applying the Act as follows:

'Any person applying this Act must interpret its provisions-

- (a) to give effect to its primary objects;
- (b) in compliance with the Constitution; and
- (c) in compliance with the public international law obligations of the

Republic.'

29.

This provision emphasises that the LRA is to be interpreted to give effect to constitutional rights and to international law obligations. The LRA gives legislative effect to international treaty obligations arising from the ratification of International Labour Organisation (ILO) conventions. South Africa's international obligations are also of great importance to the interpretation of the LRA.

30.

Section 39(1) of the Constitution provides that:

'When interpreting the Bill of Rights, a court, tribunal or forum -

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) may consider foreign law.'

31.

This Court has already recognised that in interpreting section 23 of the Constitution an important source of international law will be the

conventions and recommendations of the ILO (*South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC) at para [25]).

32.

The two key ILO Conventions relevant to the issue at hand are firstly, the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87) and secondly, the Right to Organise and Collective Bargaining Convention, 1949 (No 98).

33.

Of importance to this case in the ILO jurisprudence is 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 is closely related to the principle of freedom of association entrenched in section 18 of our Constitution, which is given specific content in the right to form and join a trade union entrenched in section 4 and section 23(2)(a), and the right of trade unions to organise in section 23(4)(b).

34.

Chapter II of the LRA deals with freedom of association. Section 4(1)

provides:

‘Every employee has the right-

- (a) to participate in forming a trade union or federation of trade unions; and
- (b) to join a trade union, subject to its constitution.’

### 35.

Chapter VI, Part A deals *inter alia* with the registration and regulation of trade unions. The sections relevant to this application are sections 95(1) and 95(5)(b) and (c). Section 95(1) provides:

‘Any trade union may apply to the registrar for registration if-

- (a) it has adopted a name that meets the requirements of subsection (4);
- (b) it has adopted a constitution that meets the requirements of subsections (5) and (6);
- (c) it has an address in the Republic; and
- (d) it is independent.’

### 36.

Sections 95(5)(b) and (c) provide that the constitution of any trade union (or employer’s organisation) that intends to register as a trade union must

*prescribe* qualifications for, and admission to, membership and establish the circumstances in which a member will no longer be entitled to the benefits of membership.

### 37.

Chapter III, Part A of the LRA regulates organisational rights. In particular, sections 12, 13 and 15 of the LRA confer enforceable organisational rights upon 'sufficiently representative' trade unions. These rights relate to access to the workplace, stop-order facilities and time off for union activities. Sections 14 and 16 confer enforceable organisational rights on unions who are representative of a majority of the employees at a particular workplace. Section 14 relates to the recognition of union shop stewards, and section 16 relates to the disclosure of information.

### 38.

The mechanism for enforcement of the organisational rights conferred by Chapter III Part A of the Act is provided in section 21 of the LRA. The section provides that a union must notify an employer of the rights it is seeking to exercise and must then meet with the employer to conclude a collective agreement in respect of those rights. If an agreement cannot be reached, either the union or the employer may refer the dispute to the CCMA which must seek to resolve the dispute through conciliation. If that

fails, either party has a right to refer the matter to arbitration.

## **GROUND OF APPEAL**

### 39.

The following facts are common cause.

39.1 Chapter 2(2) of NUMSA's constitution provides:

'All workers who are or were working in the metal and related industries are eligible for membership of the Union subject to the discretion of the relevant Shop Stewards Council ...'

39.2 Annexure B of NUMSA's constitution deals with "the scope of the Union" and provides that "the Union shall be open to all workers employed in any of the following industries". The annexure lists 21 different industries but does not include the packaging industry.

39.3 NUMSA is a registered trade union.

39.4 NUMSA has as members approximately 70% of Lufil's employees.

**First Ground of Appeal**

***The LAC erred in holding that trade unions are precluded from admitting as members, employees who are not employed in a particular sector.***

40.

The LAC erred in holding that trade unions are precluded from admitting as members, employees who are not employed in a particular sector. It ought to have found that concerns regarding a union's membership requirements are between the union and its members and that a third-party employer has no right to interfere with that relationship.

41.

Section 95(5)(b) requires that a trade union prescribe qualifications for and admission to membership in its constitution. Terms of a constitution that are prescriptive (as opposed to proscriptive) are recommendations. Accordingly, the union constitution recommends that employees from certain industries be accepted to membership. There is nothing in the

LRA that suggests that a union cannot accept as members employees who are employed in an industry not listed as an area of scope for the particular union. The employer did not otherwise challenge the applicant's competence to organise in this sector.

42.

Membership of a union is a matter between the union and the prospective member. This is the essence of the right to freedom of association on the part of the union and on the part of its members.

43.

The LAC should have interpreted section 4(1)(b) in a manner which is consistent with the right of freedom of association enshrined in the Constitution.

44.

Such an interpretation has been employed by the Labour Court in *NUM obo Mabote v Commission for Conciliation Mediation and Arbitration and Others* (2013) 34 ILJ 3296 (LC) where Steenkamp J held that the restriction in section 4(1)(b) 'subject to its constitution', should be read to regulate the relationship between the trade union and its members *inter se* and that it is for the trade union to decide whether or not to accept an application for membership and whether or not that member is covered by

its constitution. Steenkamp J held further that it could not have been the intention of the legislature to unduly restrict the right to representation by a trade union to the extent that it is up to a third party to deny a worker that right, based on the trade union's constitution.

45.

That view was endorsed by the LAC in *MacDonald's Transport Upington (Pty) Ltd v Association of Mineworkers & Construction Union & others* (2016) 37 ILJ 2593 (LAC) at paras [41] to [44] ("*MacDonald's Transport*"). The Court held that a union constitution is no more than a contract between an institution and its members. Its terms and compliance with its terms, as in all contractual relationship, involves only the parties to the union constitution. If the union and its members are satisfied it is not open to the employer to challenge membership.

### **Second Ground of Appeal**

***The LAC erred in relying on Van Wyk and Taylor v Dando and Van Wyk Print (Pty) Ltd***

46.

The LAC erred in relying on *Van Wyk and Taylor v Dando and Van Wyk Print (Pty) Ltd* [1997] 7 BLLR 906 (LC) ("*Van Wyk*") as authority for the proposition that a union acts *ultra vires* its own constitution when it allows

membership of individuals who are not permitted to be members of that union in terms of the union's own constitution and that when a union does so it is not immune to attack from third parties.

47.

The doctrine of *stare decisis* obliges the LAC in this matter to follow the approach in *MacDonald's Transport* and not that in *Van Wyk*. Furthermore, the facts in *Van Wyk* are entirely distinguishable as the members concerned were accepted as members for an ulterior purpose.

### **Third Ground of Appeal**

***The LAC erred in interpreting section 4(1)(b) of the LRA in isolation and without proper regard to the rights afforded in sections 18 and 23 of the Constitution***

48.

Interpretation is a unitary exercise requiring the decision-maker to have due regard to the provisions and purpose of the LRA and the Constitution.

49.

The LAC held that the submission that section 4(1)(b) of the LRA was unconstitutional because it infringes the fundamental rights in section 18

and 23(2)(a) of the Constitution was unsustainable. This was never a submission made on behalf of the union either in oral argument or in heads of argument.

50.

What was submitted was that when interpreting section 4(1)(b) due regard had to be had to the fact that its enactment was in order to give effect to the constitutional rights of freedom of association and fair labour relations and as such it had to be interpreted in a manner that did not infringe these rights.

51.

The LAC interpreted it in isolation without due regard to the Constitutional rights that the LRA was designed to protect and without due regard to the provisions of the LRA as an entire document.

52.

This is contrary to the rules of interpretation encapsulated in the Constitution and the LRA.

53.

The LAC ought to have interpreted section 4(1)(b) in a unitary manner and

had it done so it would have arrived at an interpretation that did not limit the union's and its members' right to freedom of association or fair labour relations.

#### **Fourth Ground of Appeal**

***The LAC erred in its analogous reasoning regarding collateral challenges***

54.

The statutory requirements for a trade union to refer a dispute under section 22(1) of the LRA to the CCMA are that the trade union is registered and that it must have notified the employer in writing that it seeks to exercise the rights conferred by part A of the LRA.

55.

It is common cause that NUMSA met those requirements. The CCMA in those circumstances cannot be said to be imposing its coercive power on Lufil.

56.

The analogy was inappropriate. The issue of the so-called validity of

NUMSA's membership arose in regard to whether it was sufficiently represented.

57.

The LAC ought to have disregarded the analogy. That said, it is unclear whether the LAC decided the matter on the collateral challenge argument.

### **REMEDY**

58.

It would be just and equitable for this Court to uphold the appeal, set aside the decision of the Labour Appeal Court and confirm the decision of the Labour Court, with costs including the costs of two counsel where so employed.

### **CONCLUSION**

59.

The interests of justice and prospects of success set out above, merit the granting of leave to appeal.

**WHEREFORE** the applicant prays that the relief sought in the Notice of

Motion be granted.

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**DEPONENT**

I HEREBY CERTIFY that the deponent has acknowledged that he / she knows and understands the contents of this affidavit which was signed and sworn to before me at ..... on the ..... day of ..... 2019, the requirements of Section 10 of Act 16 of 1963, as read with Regulations published under Government Notice R1258 in Gazette No. 3619 dated the 21st of July 1972, having been fulfilled.

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**COMMISSIONER OF OATHS**