IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT 172/19
Labour Appeal Court Case No: DA8/2018
Labour Court Case No: D 722/2015 and D459/2016

In the matter between:

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

and

LUFIL PACKAGNG (ISITHEBE) First Respondent
(*A division of Bidvest Paperplus ([ty) Ltd*)

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION Second Respondent

LEON PILLAY *N.O* Third Respondent

WRITTEN SUBMISSIONS OF THE APPLICANT (NUMSA)

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INTRODUCTION

1. This appeal addresses NUMSA's concerns over the rights to fair labour practises and to the freedom of association and how the Labour Relations Act 66 of 1995 (the "LRA") as the statute that advances these rights in the workplace is to be applied.

2. The applicant contends that the restrictive interpretation of section 4(1)(b) by the Labour Appeal Court (LAC) unnecessarily infringes the rights to fair labour practises and the right to freedom of association. It is submitted that this section can, and so must, be interpreted so as not to infringe upon these rights and accordingly should be interpreted as required by both the Constitution and the LRA.

3. 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 our Constitution contemplates that collective bargaining between employers and workers is key in a fair industrial relations environment. Section 23(2)(a) places no obvious limitation on the right to join a trade union.

4. Section 18 of the Constitution recognises the right to freedom of

association. The LRA itself also recognises this right in section 4.

5. 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. As such the interpretation is in obvious conflict with the Constitution, the purpose of the LRA and international law.

6. The result of the LAC application of section 4(1)(b) is to remove the union's right to claim organisational rights for Lufil's employees. But it also declares as *ultra vires* and so as unlawful the relationship that 70% of Lufil's employees[1] claim to be in with the union of choice.

LITIGATION HISTORY

7. In January 2015, NUMSA approached Lufil requesting that Lufil deduct union fees for members who are employed by Lufil.[2] Lufil refused the request on the basis that its operations did not fall within the scope of NUMSA, alleging that the union was not entitled to organise members

[1] Record: Vol 1: Page 112, lines 8 – 20 and page 127, lines 19 – 23.
[2] Record: Vol 1: Founding affidavit in Case No. KNDB14987-14 page 6 at paragraph 11 read with Annexure "PB1" at page 10.

within Lufil's workplace.[3] NUMSA referred a dispute to the CCMA under case number KNDB14987-14.

8. 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.[4] NUMSA filed an answering affidavit[5] and Lufil replied thereto.[6] The application was decided on the papers and the third respondent delivered his ruling on 19 June 2015 in which he found that NUMSA was entitled to claim organisational rights from Lufil.[7] The CCMA set the remainder of the dispute down for hearing in terms of section 21(7) of the LRA.

9. Lufil launched proceedings to review the third respondent's ruling in the Labour Court, Durban under case number D722/15 on 31 July 2015.[8] It also sought to have the arbitration proceedings in the CCMA adjourned pending the finalisation of the review under case number D722/15. This application for adjournment was refused and the arbitration proceeded

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[3] Record: Vol 1: Founding affidavit in Case No. KNDB14987-14 page 6 at paragraph 12 read with Annexure "PB2" at pages 11 - 12.
[4] Record: Vol 1: Notice of application and founding affidavit – jurisdictional point in Case No. KNDB14987-14 pages 1 - 16.
[5] Record: Vol 1: Answering affidavit – jurisdictional point in Case No. KNDB14987-14 pages 20 - 37.
[6] Record: Vol 1: Replying affidavit – jurisdictional point in Case No. KNDB14987-14 pages 38 - 44.
[7] Record: Vol 2: Third Respondent's Ruling – jurisdictional point in Case No. KNDB14987-14 pages 49 - 56.
[8] Record: Vol 3: Review application – Case No: D722/15 pages 254 – 267.

on 1 March 2016.[9]

10. The third respondent awarded NUMSA certain organisational rights on 14 March 2016.[10] Lufil filed an application to review this award on 6 May 2016 under case number D459/16.[11] The grounds of review are all but a 'cut and paste' of the first review and did not otherwise address the award of organisational rights. In other words, the grounds of review of the second award are the same as those advanced in the review of the jurisdiction/ *locus* point. No factual defence was raised to NUMSA's competence or otherwise to organise in the affected industry.

11. Affidavits in review applications serve two primary purposes i.e. to define the issues between the parties and to place the essential averments and evidence before the parties and the Court. As a general principle in reviews the applicant must make its case out in its founding affidavit and the role of the reviewing Court is limited to deciding issues that are raised in the founding affidavit.[12] Essentially, therefore where the case for review is not foreshadowed in the founding affidavit the application for

[9] Record: Vol 2: Third respondent's ruling - postponement in Case No. KNDB14987-14 pages 121 - 123.
[10] Record: Vol 3: Third respondent's ruling – organisational rights in Case No. KNDB14987-14 pages 246 - 253.
[11] Record: Vol 4: Review application – Case No. D459/16 pages 282 - 296.
[12] *Cusa v Tao Ying Metal Industries & Others* [2009] 1 BLLR 1 (CC) paragraph 67.

review must fail.[13]

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.[14] The Labour Court dismissed the review and upheld the third respondent's findings.

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.[15] The LAC upheld the appeal and set aside the CCMA's arbitration award under case number KNDB14987-14.

Case No. D722/2015 – Labour Court

14. The challenge by Lufil in the CCMA was raised as a "jurisdictional point".[16] It is evident however that it was in fact a challenge to NUMSA's *locus* to represent Lufil's employees in an application for organisational rights.[17] Lufil contended that because the printing and packaging

[13] *Rustenburg Platinum Mines Limited v CCMA & Others* [2004] 1 BLLR 34 (LAC) paragraph 15.
[14] Record: Vol 5: Judgment of the Labour Court, Gush, J pages 396 - 405.
[15] Record: Vol 5: Judgment of the Labour Appeal Court pages 444 – 459.
[16] Record: Vol 1: Founding affidavit in Case No. KNDB14987-14 page 8 paragraph 18.
[17] Record: Vol 1: Founding affidavit in Case No. KNDB14987-14 page 5 paragraph 7.

industry was not included in annexure B of NUMSA's constitution as part of its scope, its employees were not eligible to become members of NUMSA.[18]

15. The third respondent determined that this was not a jurisdictional issue[19] and that NUMSA had *locus standi* to seek organisational rights from Lufil in accordance with the provisions of the LRA.[20]

16. Lufil sought to review the third respondent's ruling essentially on the basis that that the third respondent had made an error of law and had made a ruling that no reasonable decision-maker in his position could have made.[21]

Case No: D459/2016 – Labour Court

17. Lufil applied to review the third respondent's award of 14 March 2016 on the grounds of the review against the "jurisdictional" ruling.[22] Lufil did not attack the union's suitability to represent its employees, save on the limited argument that the union's constitution did not extend to the paper

[18] Record: Vol 1: Founding affidavit in Case No. KNDB14987-14 page 7 paragraph 14.
[19] Record: Vol 1: Third respondent's ruling – jurisdictional point in Case No. KNDB14987-14 page 52 paragraph 31.
[20] Record: Vol 1: Third respondent's ruling – jurisdictional point in Case No. KNDB14987-14 page 56 paragraph 51.
[21] Record: Vol 3: Founding affidavit in the review application under case no. D722/2015 page 264 -265 paragraph 23.
[22] Record: Vol 4: Founding affidavit in the review application under case no. D459/2016 page 293 -295 paragraphs 28 - 31.

and plastics industry. So other than to look to the scope in annexure B Lufil did not attack the arbitration award on any other basis. At odds with what was argued before the LAC, Lufil made common cause that its employees were members of NUMSA – it did not attack that association.

18. At the review both parties identified the crisp issue to be determined as "whether the LRA entitled the Third Respondent [NUMSA] to represent its members in an application for organisational rights and whether it was entitled to those rights".[23]

19. The court held that the third respondent's ruling in case number D772/15 was not reviewable and that being so the review of the award in D459/18 also failed.[24]

20. The rational for such finding was summarised in paragraphs 28 to 30 of the judgement which reads as follows:

> '[28] As far as locus standi is concerned, the conditions precedent to a union wishing to exercise organisational rights, in accordance with the LRA, need only satisfy two conditions:
>
> a. Firstly, the union must be registered (see section 11, 14, 16 18 and 21). It is common cause that the third respondent is a registered union;

[23] Record: Vol 5: Judgment of the Court *a quo* page 373 paragraph 6.
[24] Record: Vol 5: Judgment of the Court *a quo* page 379 paragraph 31.

b. Secondly, that the union must be sufficiently representative (sections 11, 12, 13, 15, 16, 18 and 21. It appears from the papers that the third respondent is sufficiently representative of the applicant's employees. (70% of the applicant's employees are members of the third respondent.)

[29] Had the legislature intended the scope of registration or the union's constitution to be determinative of the right to organisational rights, it would have said so. The essence of the organisational rights contained in part A of Chapter 3 are rights enjoyed essentially at the instance of the employees as members of the union.

[30] In so far as this matter is an application to review and set aside the ruling, the parties were ad idem that the outcome of that application depends solely on whether the LRA precluded the third respondent from representing its members in applying for organisational rights. I am not persuaded that the provisions of the LRA do that. The LRA sets out specifically what is required for a union to seek organisational rights and it is beyond any doubt that the third respondent has satisfied those requirements.'[25]

Case No. DA8/2018 – Labour Appeal Court

21. Lufil then noted an appeal against the whole of the judgment of the court *a quo*.[26]

22. In its leave to appeal, Lufil stated the grounds upon which it intended to

[25] Record: Vol 5: Judgment of the Court *a quo* page 379 paragraphs 28 - 30.
[26] Record: Vol 5: Notice of appeal page 387 - 389.

rely as follows:

‘1. That another court might reasonably reach a conclusion other than –

1.1 that the ruling of the Second Respondents in respect of which the matter under CCMA case number D722/15 was brought was a decision to which a reasonable decision-maker would have come in the circumstances, and that the ruling of the Second Respondent in respect of which the matter under case number D459/16 was brought was a decision to which a reasonable decision-maker could have come in the circumstances; and

1.2 more particularly, and without derogating from the generality of the aforegoing, that another court might reasonably reach a conclusion other than –

1.2.1 that the prevailing case law on the issue in question supported the findings of the Second Respondent;

1.2.2 that third parties, such as the Applicant in this case, are not able to challenge the *locus standi* of unions, such as the Third Respondent in this case, to refer disputes on behalf of individuals who are not entitled to be members of that union, in terms of the union’s own Constitution;

1.2.3 that the First Respondent had jurisdiction to consider the dispute referred by the Third Respondent; and

1.2.4 that there are only two conditions precedent to a union in the position of the Third Respondent bringing such a dispute (registration and sufficient representativity).’

23. In the Labour Appeal Court, Lufil challenged NUMSA’s entitlement to

claim its employees as members.[27] It now sought to declare the association of union and member *ultra vires* or unlawful.

24. The Labour Appeal Court held that:

> 'The correct legal position, therefore, is that NUMSA had to show that it was sufficiently representative. The employees on which it relied in alleging it was sufficiently representative could not be and thus were not, in law members of NUMSA, as they did not fall within the scope of the union in terms of NUMSA's constitution. As such, NUMSA was not sufficiently representative of the employees at the workplace and therefore was not entitled to any organisational rights. The commissioner erred in not coming to that conclusion and committed a material error of law, which resulted in an unreasonable decision. The Labour Court erred equally in not setting aside the award on that basis.'[28]

25. It is against this decision that the Applicant seeks leave to appeal and seeks an order upholding this appeal with costs.

26. In summary the Applicant's grounds for leave to appeal are:

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

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[27] Record: Vol 5: Judgment of the Labour Appeal Court page 448 - 449 paragraph 13.
[28] Record: Vol 5: Judgment of the Labour Appeal Court page 457 paragraph 37.

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

26.3. the LAC erred in relying on *Van Wyk and Taylor v Dando and Van Wyk Print (Pty) Ltd* [1997] 7 BLLR 906 (LC);

26.4. the LAC erred in its analogous reasoning regarding collateral challenges.[29]

COMMON CAUSE FACTS

27. The following facts are common cause, on the pleadings before the Labour Court.

27.1. 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 …'

27.2. Annexure B of NUMSA's constitution deals with "the scope of the Union" and provides that "the Union shall be open to all workers

[29] Record: Vol 6: Founding affidavit in Application for Leave to Appeal to the Constitutional Court page 469 – 470 paragraph 15.

employed in any of the following industries". The annexure lists 21 different industries but does not include the packaging industry.

27.3. NUMSA is a registered trade union.

27.4. NUMSA has as members a majority of Lufil's employees.[30]

28. It is against that factual background that the interpretation of section 4(1)(b) becomes important.

CONSTITUTIONAL INTERPRETATION

29. 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;

[30] The first respondent denies that this is common cause in its answering affidavit to the applicant's application for leave to appeal to this Court. See Record: Vol 6: answering affidavit to the application for leave to appeal to the Constitutional Court page 512 paragraph 39. It avers that it has 'purported members'.
In its review applications under case numbers D722/15 and D459/16 it avers that 'A number of Lufil's employees are members of NUMSA'. See Record: Vol 3: Founding affidavit in application for review under case number D722/15 page 262 paragraph 12 and Record: Vol 4: Founding affidavit in application for review under case number D459/16 page 288 paragraph 13.
See Also Vol 2: Page 127, Lines 19-24.

(b) must consider international law; and

(c) may consider foreign law.'

30. Section 3 of the LRA declares that its provisions must be construed purposively and in compliance with the Constitution and the public international law obligations of the Republic. It reads:

'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.'

31. The primary objects of the LRA are listed in section 1 thereof. In part A section 1 reads:

'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.'

32. The LRA accordingly recognises the importance of fair labour practises and the role that collective bargaining plays in achieving this constitutional objective.

33. Section 4 is headed ‘Employees' right to freedom of association’ and section(1)(b) reads:

‘Every employee has the right to join a trade union, *subject to its constitution*.’

34. Compliance with the Constitution includes the discharge of the obligation imposed by s 39(2) which obliges, in mandatory terms, every court to

promote the objects of the Bill of Rights when interpreting legislation.[31]

35. In *Makate* this Court stated the following in regard to section 39(2):

> 'The objects of the Bill of Rights are promoted by, where the provision is capable of more than one meaning, adopting a meaning that does not limit a right in the Bill of Rights. If the provision is not only capable of a construction that avoids limiting rights in the Bill of Rights but also bears a meaning that promotes those rights, the court is obliged to prefer the latter meaning.' [32]

36. The first step is to determine whether the legislative provision implicates rights in the Bill of Rights. If it does, then the approach stipulated in section 39(2) must be followed.

37. The hierarchy of the Constitution, as the supreme law, dictates that when there are two conflicting but reasonable interpretations of a particular provision in a statute then the Court should give effect to the interpretation which best protects the values underlying the Constitution. The court therefore must read the legislation in a way which gives effect to the fundamental values of the Constitution.[33]

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[31] ***POPCRU v SACOSWU and Others*** 2019 (1) SA 73 (CC) paragraph 84.
[32] *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) paragraph 89.
[33] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) paragraph 91. *Investigating Directorate – Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd & Others* 2001 (1) SA 545 (CC) paragraph 22.

38. This court has stressed that any legislation must be viewed through the prism of the Constitution. For it is the Constitution and not the legislation that provides the principles and values and sets the standards to be applied.[34]

39. Section 18 of the Constitution states:

> 'Everyone has the right to freedom of association.'

40. 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.

[34] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) [26]

(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).'

41. Section 4(1)(b) of the LRA is designed to give effect to sections 18 and 23 of the Bill of Rights.

42. As stated by this Court in *POPCRU*:

'[87] The right to engage in collective bargaining lies at the heart of industrial relations. This right is conferred on trade unions and employers. This is the only right which may be exercised simultaneously by protagonists in a labour dispute. This is so because the bargaining takes place between the trade union and the employer. Participation of each side in the collective bargaining constitutes the exercise of the right. Absent the right, the objects of the LRA such as labour peace, social justice and the advancement of economic development may not be achieved.

> [88] Notably, on the workers' side, the right is conferred on a trade union. This makes membership of a trade union the gateway to collective bargaining for workers. Therefore, the right of every worker to form and join a trade union is critically linked to the right to engage in collective bargaining.
>
> [89] The right to form and join a trade union guarantees freedom of association for workers. Its importance is acknowledged not only in the Constitution but also in international law…."[35]

43. In construing section 4(1)b) of the LRA a meaning that limits the rights encapsulated in sections 18 and 23 of the Constitution must be eschewed. If the section is reasonably capable of a meaning that promotes the rights concerned, it must be preferred above other meanings. Section 23 of the Constitution informs section 4(1)(b) of the LRA, not the other way.

44. This Court has stated the following in *SATAWU*:

> '(C)onstitutional rights conferred without express limitation should not be cut down by reading implicit limitations into them, and when legislative provisions limit or intrude upon those rights they should be interpreted in a manner least restrictive of the right, if the text is reasonably capable of bearing that meaning.'[36]

45. Sections 18 and 23 of the Constitution are rights stated without express

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[35] *POPCRU* note 31 above paragraphs 84 to 89.
[36] *SATAWU and Others v Moloto and Another NNO* 2012 (6) SA 249 (CC) paragraph 44.

limitation. Accordingly, section 4(1)(b) of the LRA requires an interpretation that is least restrictive of those rights if the text is reasonably capable of bearing that meaning.

INTERNATIONAL LAW

46. 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.[37]

47. The 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) are relevant. South Africa is a member of the ILO and has ratified both these conventions.

48. With regard to international law on freedom of association at the workplace, this court observed in *Bader Bop*:

> 'An important principle of freedom of association is enshrined in art 2 of the Convention on Freedom of Association and Protection of the Right to Organise which states:
>
> > "Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation

[37] *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC) at paragraph 25.

concerned, to join organisations of their own choosing without previous authorisation.

Both committees have considered this provision to capture an important aspect of freedom of association in that it affords workers and employers an option to choose the particular organisation they wish to join. Although both committees have accepted that this does not mean that trade union pluralism is mandatory, they have held that a majoritarian system will not be incompatible with freedom of association, as long as minority unions are allowed to exist, to organise members, to represent members in relation to individual grievances and to seek to challenge majority unions from time to time.'[38]

49. This Court in *Bader Bop* stated further:

'Of importance to this case in the ILO jurisprudence described is firstly the principle that 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; and, secondly, the principle that unions should have the right to strike to enforce collective bargaining demands. The first principle is closely related to the principle of freedom of association entrenched in s 18 of our Constitution, which is given specific content in the right to form and join a trade union entrenched in s 23(2)(a), and the right of trade unions to organise in s 23(4)(b). These rights will be impaired where workers are not permitted to have their union represent them in workplace disciplinary and grievance matters, but are required to be represented by a rival union that they have chosen not to join.'[39]

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[38] ***National Union of Metal Workers of South Africa and Others v Bader Bop (Pty) Ltd and another*** 2003 (3) SA 513 (CC) at paragraph 31.
[39] *Bader Bop* note 38 above at paragraph 34.

INTERPRETATION OF THE PHRASE "SUBJECT TO ITS CONSTITUTION"

50. What then is the meaning to be given to the phrase "subject to its constitution" in section 4(1)(b).

51. Lufil contends that the proviso in Section 4 limits the unions to which an employee may apply.[40] Accordingly, it argues that it is open to the employer to object to membership of a particular union where the union's scope does not cover that particular area of employment.[41]

52. Such an interpretation limits the right to freedom of association and the right of every worker to form and join a trade union, both of which are unrestricted rights.

53. It is further submitted that the argument is at odds with a rational common-sense interpretation of section 4 which would give effect to the rights enshrined in sections 18 and 23 of the Constitution.

54. It is submitted that the correct interpretation of section 4(1) (b) is that it regulates the relationship between the union and its member. In that context then the member may join if he/she satisfies the applicable rules

[40] Record: Vol 5: Judgment of the Labour Appeal Court page 448 - 449 paragraphs 13 – 15.
[41] Record: Vol 5: Judgment of the Labour Appeal Court page 449 - 450 paragraph 16.

of the union. This is the common-sense meaning of the affected proviso to the LRA, "*subject to its constitution".*

55. The proviso to the LRA section 4(1)(b) simply confirms that the freedom of association includes the right to exclude those who are not prepared to conform to the group's requirements. It includes the right to require those who join an association to conform to its principles and its rules.[42]

56. This allows the union (not the employer) to restrict members at its behest or for that matter to exclude a particular member if the member does not observe the rules of the union. It does not lie for the employer to raise an objection. The relationship is between union and member and it is a contractual relationship. As such the parties to the contract may choose to ignore a provision or may treat a so-called rule as prescriptive not proscribed.[43]

57. In the National Industrial Court of Nigeria in the matter of *Nesoil Plc v National Union of Petroleum and Natural Gas Workers*[44] the Court states [with reference to the ILO]:

'From these statements of principles, we hold that the claimant has no *locus*

[42] *Wittmann v Deutscher Schulverein Pretoria & Others* 1999 (1) BCLR 92 (T) paragraph 117.
[43] *Aussenkehr Farms (Pty) Ltd v Trio Transport CC* 2002 (4) SA 483 (SCA) paragraph 25.
[44] **Suit No: NIC/LA/08/2010**.

standi, and so is a busy body, regarding the question whether the defendant is the appropriate union to unionize its staff. The locus is with either the staff themselves or some other rival union that lays claim to jurisdictional mandate. The interest of the claimant regarding this question is passive and does not entitle it to come to court. Only two categories of persons have the locus to challenge the defendant in this regard. They are: a rival union challenging the jurisdictional mandate of the defendant over the staff of the claimant or the staff of the claimant indicating individually and in writing that they are opting out and so check-off dues should no longer be deducted.'

58. Our courts have also considered the question of whether an employer has a right to interfere with the relationship between the trade union and its members.

59. In *City of Johannesburg v SA Municipal Workers Union & Others*[45] the Court found that an employer even with the best of intentions could not gain *locus standi* to interfere in the internal workings of a trade union. The Court held that an employer is not a party to the trade union constitution that only regulates the relationship between the union, its members, and officials.

60. It has likewise been held that the rights enshrined by the LRA and by the Constitution should not be limited by reading in a provision that workers may not strike in demand of organisational rights for a union that is

[45] (2017) 38 ILJ 1342 (LC) paragraph 19.

restricted in its scope by its own Constitution.[46]

61. Dealing specifically with the restriction in section 4(1)(b), Steenkamp J in the *Mabote*[47] decision stated the following:

> '[26] What, then, to make of the restriction in s 4(1)(b) of the LRA that an employee may join a trade union 'subject to its constitution'?
> [27] That restriction appears to me to regulate the relationship between the trade union and its members inter se. 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. It could not have been the intention of the legislature unduly to restrict the right to representation by a trade union to the extent that it is up to a third party — such as an employers' organization — to deny a worker that right, based on the trade union's constitution.'

62. That view was endorsed by the LAC in *MacDonald's Transport Upington (Pty) Ltd v Association of Mineworkers & Construction Union & others*[48]. 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 relationships, 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. In relation to the dictum

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[46] *Bidvest Food Services (Pty) Ltd v National Union of Metalworkers of SA &* Others (2015) 36 ILJ 1292 (LC) paragraph 23.
[47] *National Union of Metalworkers obo Mabote v CCMA & Others* (2013) 34 ILJ 3296 (LC). This decision was confirmed on appeal in *Kalahari Country Club v National Union of Mineworkers & another* (2015) 36 ILJ 1210 (LAC) albeit on factual grounds and not on the grounds referred to herein.
[48] **(2016) 37 ILJ 2593 (LAC)** paragraphs 41 - 44.

in *Mabote* quoted above, Sutherland JA stated:

> 'I concur wholly with the view that 'it is not for an employer to interfere with the internal decisions of a trade union as to whom to allow to become a member' and such dictum is equally applicable to the circumstances of this case.'[49]

63. It seems clear that any sufficiently representative trade union and even those that merely claim to be sufficiently representative may seek to enforce the organisational rights they claim the LRA confers upon them through an adjudication process (through mediation or arbitration).[50]

64. In the *Bader Bop* matter Ngcobo JA, agreeing with the majority was moved to add:

> '[62] In my view, part A does not preclude an unrepresentative union from obtaining organisational rights if this part is properly construed in light of Section 23 of the Constitution, Section 4 of the LRA and the ILO conventions. Neither does the LRA. On the contrary, part A and in particular Section 20 supports the conclusion that the intention of part A is not to deny organisational rights to unrepresentative unions by expressly conferring such rights on representative unions.'

65. In this case both the employees and the union accept their relationship and they seek to bargain collectively with the employer. The employer

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[49] *MacDonald Transport* note 48 above paragraph 45.
[50] *Bader Bop* note 38 above at paragraph 25. See also *POPCRU* note 31 above where this Court held that minority unions are entitled to engage in collective bargaining.

cannot invoke their contract to avoid its obligations under the LRA.

66. The words “subject to its constitution” must be read to mean that the union and its members are entitled to regulate their relationship. Thus, if a union’s constitution disqualifies membership of certain employees, it is entitled to deny such membership. It is not however bound to deny such membership.

67. Lufil’s interpretation is at variance with the constitutional canon of construction. It is also dissonant with international law and in conflict with section 3 of the LRA which expressly demands that the provisions of the Act be construed in compliance with the Constitution and public international law. It is accordingly submitted that Lufil’s interpretation must be rejected.

68. It bears mention that the effect of the LAC judgement is to end the Lufil employees’ membership of the union. That ensues even though the individual employees, whose particular human rights are directly impinged, were not in person party to the proceedings.

CONTRACTUAL INTERPRETATION

69. Lufil submits that because the LRA leaves it to the trade union themselves to prescribe qualifications for admission to membership in

their constitutions, and because NUMSA's constitution does not refer to the paper and packaging industry, Lufil's employees are not eligible for membership of NUMSA.[51]

70. 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.'

71. 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.

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[51] Record: Vol 5: Judgment of the Labour Appeal Court page 450 paragraph 17. Record: Vol 6: Answering affidavit in Application for leave to appeal to the Constitutional Court pages 502 – 503 paragraphs 20 - 23.

72. 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 …' [52]

73. 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.[53]

74. The purpose of a trade union's constitution is to regularise the relationship between the union and its members. It is submitted that just as the provisions of the LRA are to be interpreted so as to give effect to the rights enshrined in the Bill of Rights, so too must a union's constitution. This is part of the unitary exercise of interpretation.

75. In *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* the Court stated the following in regard to the interpretation of contracts:**[54]**

> '…Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their

[52] Record: Vol 5: NUMSA's Constitution page 403.
[53] Record: Vol 5: NUMSA's Constitution pages 438 – 442.
[54] 2014 (2) SA 494 (SCA) paragraph 12.

> contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'. Accordingly it is no longer helpful to refer to the earlier approach.'

76. There is nothing in the wording of NUMSA's constitution to suggest that only workers in the metal and related industries are eligible for membership. The scope as set out in annexure B is likewise not restrictive.

77. Chapter 2.2 would read "Only 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…" if it were to be given the restrictive interpretation contended for by Lufil. Annexure B to NUMSA's constitution would likewise have to read "the Union shall be open only to all workers employed in any of the following industries".

78. There is accordingly nothing in the wording which limits members to the industries referred to.

79. Moreover, the scope appears as an annexure to the Constitution. The

scope may be amended by the central committee from time to time.[55] There are no formal requirements for an amendment of the scope and that in itself shows that the scope is far from immutable.

80. The Minister of Labour has issued guidelines in terms of section 95(8) of the LRA that are to be applied by the Registrar of Labour Relations in determining whether an applicant for registration is a genuine trade union (or a genuine employer's organisation).[56] Paragraph 8 of the guidelines under the heading 'Qualification for membership of a trade union' reads:

> 'In terms of section 95(5)(b) of the LRA, the constitution of a trade union must prescribe the qualifications for membership. There is no requirement in the LRA that a trade union confine its membership to employees in a particular sector or sectors of the economy or a particular geographical region. However, the failure to place appropriate qualifications on membership may indicate, together with other factors, that the trade union is not a genuine trade union.'

81. It cannot be suggested that NUMSA is not a genuine trade union, but what is informative is the acknowledgement that the LRA does not require that a trade union confine its membership to employees in a particular sector or sectors. This is not a requirement for the registration of a trade union.

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[55] Record: Vol 5, page 416, paragraph 2(d)(xiv).
[56] Government Gazette No. 42121, 19 December 2018.

82. The International Labour Office has published a compilation of decisions of the Committee on Freedom of Association.[57] Chapter 6 deals with the rights of organizations to draw up their constitutions and rules. Item 564 reads:

> 'In the Committee's opinion, the mere existence of legislation concerning trade unions in itself does not constitute a violation of trade union rights, since the State may legitimately take measures to ensure that the constitutions and rules of trade unions are drawn up in accordance with the law. On the other hand, any legislation adopted in this area should not undermine the rights of workers as defined by the principles of freedom of association. Overly detailed or restrictive legal provisions in this area may in practice hinder the creation and development of trade union organizations.'[58]

83. In not requiring a closed list of the sectors which the union represents, the legislation in regard to the registration of trade unions is in keeping with what is stated above. NUMSA's constitution itself must also be read so as to uphold the principles of freedom of association and the right to fair labour practices.

84. In the exercise of a unitary interpretation of NUMSA's constitution it is submitted that the right to freedom of association and fair labour practices, is the most important informative tool as to the ambit of such constitution. It is accordingly submitted that NUMSA's constitution does

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[57] Freedom of Association: Compilation of decisions of the Committee on Freedom of Association; sixth edition, 2018.
[58] The 2006 Digest, para 370 is referenced.

not prohibit membership of workers not explicitly stated in the constitution.

VAN WYK AND TAYLOR V DANDO AND VAN WYK PRINT (PTY) LTD

85. The LAC relied on *Van Wyk and Taylor v Dando and Van Wyk Print (Pty) Ltd*[59] 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.

86. The doctrine of *stare decisis* obliges the LAC in this matter to follow the approach in *MacDonald's Transport*[60] and not that in *Van Wyk*.

87. Lufil avers that *MacDonald's Transport* supports Lufil's case. It relies on paragraphs 35 and 42 of that judgment in support of this submission and concludes:

> 'The Court's endorsement of the view that "it is not for the employer to interfere with the internal decisions of a trade union as to whom to allow to become a member" therefore has no application in the present type of case.

[59] [1997] 7 BLLR 906 (LC).
[60] *MacDonald's Transport* note 48 above.

> The Court was not concerned with an ultra vires argument, as in the present case.'[61]

88. This submission is simply incorrect. The court in *MacDonald's Transport* endorsed the view stated above in relation to *Mabote's* case which dealt specifically with the restriction in section 4(1)(b).[62]

89. In any event the Labour Courts have consistently held that it is not for an employer to interfere with the relationship between a trade union and its members.[63]

90. The facts in *Van Wyk* are entirely distinguishable as the members concerned were accepted as members for an ulterior purpose - a purpose contrary to section 3 of the LRA.

THE COLLATERAL CHALLENGE ANALOGY

91. The LAC held the following in regard to the collateral challenge analogy:

> 'In applying to the CCMA to be granted organisational rights NUMSA sought to invoke the coercive power of the State. The CCMA cannot impose upon Lufil its coercive power, in granting NUMSA the organisational rights it seeks

[61] Record: Volume 6: Answering affidavit in application for leave to appeal to the Constitutional Court pages 503. – 505 paragraphs 25 – 29.
[62] *MacDonald's Transport* note 48 above at paragraph 45. *Mabote* at note 47 above.
[63] See *City of Johannesburg* note 45 above and *Bidvest Food Services* note 46 above.

if the basis for seeking this rights (the employees' purported membership) is not legally valid (because the union acts ultra vires its own constitution in allowing these employees to be its members.)[64]

92. It is accepted that a CCMA award is administrative action.[65]

93. The Court in *Oudekraal*[66] stated the following:

'[26] For those reasons it is clear, in our view, that the Administrator's permission was unlawful and invalid at the outset. Whether he thereafter also exceeded his powers in granting extensions for the lodgement of the general plan thus takes the matter no further. But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view, it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.

…

[31] Thus the proper enquiry in each case - at least at first - is not whether

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[64] Record: Volume 5: Judgement of the Labour Appeal Court page 457 paragraph 36.
[65] *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) paragraph 110.
[66] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA).

the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts. If the validity of consequent acts is dependent on no more than the factual existence of the initial act then the consequent act will have legal effect for so long as the initial act is not set aside by a competent court.

[32] But just as some consequences might be dependent for validity upon the mere factual existence of the contested administrative act so there might be consequences that will depend for their legal force upon the substantive validity of the act in question. When construed against the background of principles underlying the rule of law a statute will generally not be interpreted to mean that a subject is compelled to perform or refrain from performing an act in the absence of a lawful basis for that compulsion. It is in those cases - where the subject is sought to be coerced by a public authority into compliance with an unlawful administrative act - that the subject may be entitled to ignore the unlawful act with impunity and justify his conduct by raising what has come to be known as a 'defensive' or a 'collateral' challenge to the validity of the administrative act. Such a challenge was allowed, for example, in Boddington v British Transport Police, in which the defendant was charged with smoking a cigarette in a railway carriage in contravention of a prohibitory notice posted in the carriage pursuant to a byelaw. The House of Lords held that the defendant was entitled to seek to raise the defence that the decision to post the notice (which activated the prohibition in the byelaw) was invalid because the validity of the decision was essential to the existence of the offence….'

94. In an attempt at analogous reasoning it is submitted that the following is the correct approach.

94.1. The third respondent's ruling and award stand until they are set aside on review which is precisely what Lufil had done.

94.2. It is not open to Lufil to simply ignore the ruling and award but in the event that it were to do so and it did not comply with the award and NUMSA then decided to compel it to comply with the award, then Lufil could raise a 'collateral challenge' stating that the award given was unlawful.

95. In any event it is difficult to fathom why the acceptance by NUMSA of the Lufil employees as members would constitute an administrative act. That is precisely what Lufil regards as unlawful.

96. In the context of CCMA hearings and the binding effect of a Commissioner's award the Lufil analogy is untenable.

LEAVE TO APPEAL

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

98. 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 as fully canvassed above. This court's jurisdiction is thus engaged.

99. 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.

100. It is accordingly submitted that in light of the constitutional issues at stake and its importance in the greater scheme of things, it is in the interests of justice that leave to appeal be granted.[67]

COSTS

101. The general rule for an award of costs in constitutional litigation between a private party and the State is that if the private party is successful, it

[67] ***Myathaza v Johannesburg Metro Bus Services (SOC) Ltd and others*** 2018 (1) SA 38 (CC) paragraph 17. ***SACCAWU & Others v Woolworths (Pty) Ltd*** 2019 (3) SA 362 (CC) paragraph 20.

should have its costs paid by the State, and if unsuccessful, each party should pay its own costs[68] is not applicable in this case.

102. It is submitted that Lufil's stance in this ligation indicates a desire to avoid the collective bargaining provisions of the LRA. This it is not entitled to do.

103. Whilst the parties had initially adopted the principles of *Zungu*[69] in the Labour Court NUMSA was entitled to claim the costs of opposing the LAC appeal. Having failed in the Labour Court it is uncertain why Lufil claimed the costs of the appeal or why the LAC deviated from *Zung*u.

104. It is accordingly submitted that the Applicant is entitled to costs in this appeal including the costs of the application for leave to appeal both including that of two Counsel.

105. The order in the LAC should be set aside. The appeal therein ought to have been dismissed with Lufil to pay the applicant's costs.

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[68] *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC) paragraph 43.
[69] **Zungu v Premier of the Provinces of KwaZulu-Natal & Others** (2018) 39 ILJ 523 (CC).
[69] **Zungu v Premier of the Provinces of KwaZulu-Natal & Others** (2018) 39 ILJ 523 (CC).

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