IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT Case No: CCT172/19

LAC Case No: DAB/2018

Labour Court Case No: D722/2015 & D459/2016

In the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA (KZN) **Applicant**

and

LUFIL PACKAGING (ISITHEBE) [A DIVISION OF BIDVEST PAPERPLUS (PTY) LTD] **First Respondent**

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

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

FIRST RESPONDENT'S WRITTEN SUBMISSIONS

I INTRODUCTION

1. If a union wants to obtain organisational rights in a workplace from an employer, it has two options. It can convince the employer through dialogue or industrial action to grant it those rights. Or, if it is "*sufficiently representative*"[1] of the employees in that workplace, it can pursue a claim for organisational rights under Part A of Chapter III of the Labour Relations Act 66 of 1995 (**LRA**).

2. The question in this case is simple. If a union follows the second path, can it claim as members employees who are not entitled, under the union's own constitution, to join that union? Put differently, when a union claims organisational rights against an employer under the LRA, is the employer precluded from resisting the claim on the basis that its employees cannot lawfully be members of the union?

3. The Applicant (**NUMSA**) says the answer to both questions is Yes. It argues that unions are free to disregard their constitutions and to admit as members whomsoever they please, regardless of any provisions in their constitutions governing eligibility for membership. Admission to membership, it contends, is a purely internal issue. Even if the union admits as a member an employee not eligible under its constitution to be admitted, the employer has no right to question the validity of such membership.

[1] LRA s 11.

4. The First Respondent (**Lufil**) says the answer to the questions is No. It argues that, when a union asserts a claim before the CCMA for organisational rights under the LRA, it seeks to enlist the coercive power of the state. To do so it must establish that it is "sufficiently representative" of the employees in the workplace; and to do this, it needs to show that the employees in the workplace that it claims as its members have validly been admitted as members. This will not be the case where the union's constitution precludes the employees from being admitted as members.

5. Lufil's answer does not limit the constitutional rights of unions or of employees. NUMSA remains free to amend its constitution, expand its scope, and enable it lawfully to admit Lufil's employees. And Lufil's employees are free to join any union whose constitution does not preclude them from becoming a member.

6. In truth, holding unions to their constitutions, particularly when it comes to expanding the scope of the union, promotes – rather than limits – their associational rights. When a union purports to admit members contrary to its founding document, it limits the rights of all its existing members to associate on the terms they agreed: the union's constitution.

7. These heads of argument are structured as follows:

   7.1. **Part II** briefly summarises the relevant facts and litigation history;

   7.2. **Part III** sets out how union membership is regulated under the common law and the LRA;

   7.3. **Part IV** demonstrates that Lufil's employees fall outside the scope of

NUMSA's constitution;

7.4. **Part V** addresses the relevant case law and shows why NUMSA's argument is unpersuasive;

7.5. **Part VI** establishes that the Constitution support's the LAC's interpretation; and

7.6. **Part VII** deals with international and compartive law.

II FACTS AND LITIGATION HISTORY

8. Lufil operates in the paper and packaging industry.[2]

9. In 2015, NUMSA requested organisational rights from Lufil, claiming that 70% of Lufil's employees were its members.[3]

10. Lufil demurred. It pointed out that, in terms of NUMSA's constitution, it could not admit as members employees working in the paper and packaging industry.[4] While NUMSA can, under its constitution, admit employees in a wide range of industries, from industrial chemicals to the IT industry, it has consciously chosen in its constitution not to extend its scope to paper and packaging.[5]

11. NUMSA referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) a claim for organisational rights under the LRA.[6] Lufil objected, on the basis that NUMSA was not entitled to organisational rights in a

[2] Founding Affidavit at para 8: Record Vol 1, p 5.
[3] Founding Affidavit at para 11: Record Vol 1, p 6. The letter appears as **PB1**: Record Vol 1, p 10.
[4] Founding Affidavit at para 12: Record Vol 1, p 6. The letter appears as **PB2**: Record Vol 1, p 11.
[5] See **Part IV** below.
[6] Founding Affidavit in Review of Ruling at para 17: Record Vol 3, p 263.

workplace that fell outside its permitted constitutional scope. It also asserted that its employees were not eligible to be members of NUMSA and that in admitting them NUMSA had acted *ultra vires* its own constitution.[7]

12. In June 2015, the Third Respondent (**the Arbitrator**) sided with NUMSA on the preliminary point.[8] Lufil approached the Labour Court to review the Arbitrator's preliminary ruling (**Review of Ruling**).[9]

13. In March 2016, on the basis of the original ruling, the Arbitrator granted NUMSA organisational rights in terms of ss 12 to 16 of the LRA.[10] Lufil took that decision on review in the Labour Court as well (**Review of Award**).[11]

14. The two reviews were consolidated before the Labour Court. The Labour Court, on 20 April 2018, upheld the Arbitrator's rulings.[12] Its reasoning can be captured in this statement: "*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.*"[13] It also held that the rights at issue were rights of the employees, not rights of the union.[14]

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[7] Record Vol 1 pp 7-8, FA para's 12.6, 14, 16u and 17.1. This was denied in NUMSA's answering affidavit – Record vol 1pp 23-24, AA para's 6.8 and 8.4.
[8] Ruling on Preliminary Issue: Record Vol 2, p 49. The Arbitrator held (correctly, with respect – at para 33) that the employer's point was not jurisdictional, but nonetheless raised a "preliminary" issue, which should be decided in the interests of expeditious dispute resolution. His ruling was that "NUMSA is entitled to claim organizational rights from the Employer Party". This was understood by all concerned (including the Arbitrator himself, as his subsequent award demonstrates) as disposing of the argument that NUMSA could not rely on members admitted by it in breach of its constitution to establish that it was "sufficiently representative".
[9] Notice of Motion: Record Vol 3, p 254.
[10] Arbitration Ruling: Record Vol 3, p 246.
[11] Notice of Motion: Record Vol 4, p 282.
[12] Labour Court Judgment: Record Vol 5, p 371.
[13] Labour Court Judgment at para 29: Record Vol 5, p 379.
[14] Ibid.

15. Lufil appealed to the Labour Appeal Court.[15] The LAC (Musi JA and Murphy and Savage AJJA) upheld the appeal. It held that s 4(1)(b) of the LRA necessarily implies that the right to join a trade union is "*circumscribed by the membership eligibility criteria in the trade union's constitution*".[16] Accordingly, if a trade union purports to admit a member contrary to its constitution, "*[s]uch a decision is ultra vires and invalid and, as such, susceptible to challenge by the employer from whom organisational rights – based on the membership concerned – is sought.*"[17] It summarized its reasoning as follows:

> "*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.*"[18]

It also held that:

> "*The requirement that eligibility to join a trade union be determined by the provisions of its constitution, as adopted by its own decision-making body and registered by the Registrar, gives effect to the legitimate government policy of orderly collective bargaining at sectoral level. The means of implementation, involving supervision of the scope of union activity by the Registrar, are minimally restrictive and are carefully tailored to the purpose of achieving the policy. Section 4(1)(b) of the LRA is accordingly consistent with the Constitution.*"[19]

16. NUMSA now seeks leave to appeal to this Court.

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[15] Statement of Grounds for Appeal: Record Vol 5, p 381.
[16] LAC Judgment at para 30: Record Vol 5, p 454.
[17] LAC Judgment at para 33: Record Vol 5, p 455.
[18] LAC Judgment at para 37: Record Vol 5, p 457.
[19] LAC Judgment at para 32: Record Vol 5, p 455.

III THE COMMON LAW AND THE LRA

17. This Part sets out the regulation of union membership under common law and under the LRA. It demonstrates that NUMSA's approach is alien to our law.

COMMON LAW

18. The position under the common law is simple: an association only has the powers granted to it by its founding document. As the Court put it in *Abrahamse*:

> "*A corporation is commonly styled a 'legal person', but the appellation 'person' is applicable to it only by analogy; and the analogy fails when it is thus clearly stated that this legal person is wanting in much that belongs to a natural person — that its course of existence is marked out from its birth; that it has been called into being for certain special purposes; that it has all the powers and capacities, and only those, which are expressly given it, or are absolutely requisite for the due carrying out of those purposes; and that all the obligations it affects to assume which do not arise from or out of the pursuit of such purposes, are null and void.*"[20]

19. A union is, in law, a voluntary association. It exists, ultimately by virtue of a contractual relationship, where "[*t]he contract among its members and between the members and the trade union is embodied in the constitution*".[21] The

[20] *Abrahamse v Connock's Pension Fund* 1963 (2) SA 76 (W) at 79, quoting Street on the *Doctrine of Ultra Vires* 4, quoted with approval in *ABSA Bank Ltd v South African Commercial Catering and Allied Workers Union National Provident Fund (Under Curatorship)* 2012 (3) SA 585 (SCA) at para 31.

[21] *National Union of Metal Workers of South Africa and Others v Congress of South African Trade Unions and Others* [2014] ZAGPJHC 59 at para 34, citing *Ex parte United Party Club* 1930 WLD 277; *Turner v Jockey Club of SA* 1974 (3) SA 633 (AD); *Natal Rugby Union v Gould* [1998] ZASCA 62; 1999 (1) SA 432 (SCA) at 440.

constitution of a union therefore "*determines the nature and scope of the union's existence and activities, while also prescribing and demarcating the powers of its various functionaries.*"[22]

20. As a matter of common law, if a person is precluded by a union's constitution from becoming a member, the union – and anyone purporting to act on its behalf – has no power to admit her as a member and she is incapable as a matter of law of becoming one. Any purported admission of such employees as members is *ultra vires* the union's constitution and invalid.[23]

21. This Court has endorsed that position in the context of one of the most important forms of voluntary associations – political parties. In *Ramakatsa*, Yacoob J wrote:

> "*I do not think that the Constitution could have contemplated political parties could act unlawfully. On a broad purposive construction, I would hold that the right to participate in the activities of a political party confers on every political party the duty to act lawfully and in accordance with its own constitution. This means that our Constitution gives every member of every political party the right to exact compliance with the constitution of a political party by the leadership of that party.*"[24]

22. This Court rightly recognized that adherence to an association's constitution is a necessary condition for the right to participate in that association. As we

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[22] *NUMSA v COSATU* (n 21) at para 37.

[23] *Van Wyk and Taylor v Dando and Van Wyk Print (Pty) Ltd* (1997) 7 BLLR 906 (LC), particularly at 910 F-G; *South African Local Government Association v Independent Municipal Allied Workers Union and others* [2014] 6 BLLR 569 (LAC), particularly at para's 30-32; *Gründling v Beyers and others* 1967(2) SA 131 (W), particularly at 139H - 140B, 1490-F and 151C; *Sorenson v Execitive Committee, Teamway and Omnibus Workers Union (Cape)* 1974 (2) SA 545 (C), particularly at 551C-552F; E Fergus & S Godfrey 'Organising and Bargaining Across Sectors in South Africa: Recent developments and Potential Problems' (2016) 37 *ILJ* 2211 at 2227; Lord Wedderburn *The Worker and the Law* (3rd ed.) (Sweet and Maxwell) 748-9; *Martin v Scottish TGWU* [1952] AU ER 691 (HL) (union has no capacity to admit in breach of its constitution and decision to admit therefore null and void); and *Yorkshire Miners Association v Howden* (1905) AC 256 (HL).

[24] *Ramakatsa and Others v Magashule and Others* [2012] ZACC 31; 2013 (2) BCLR 202 (CC) at para 16.

explain in more detail in Part VI, the same must be true of unions.

THE LRA

23. The LRA reinforces and reflects the same approach.

24. Before referring to the provisions most directly in point, we point out that s 3(a) of the LRA requires that any person applying the LRA must interpret its provisions to give effect to its primary objects. In terms of s 1, its "*primary objects*" include "*to give effect to and regulate*" the fundamental rights conferred by the Constitution; "*to provide a framework*" within which employees and their trade unions and employers' organisations can collectively bargain; and to promote "*orderly collective bargaining*" and "*collective bargaining at sectoral level*".

25. To advance these objects, amongst others, detailed provision is made in the LRA regarding the registration of trade unions, employers' organisations and bargaining councils and for the conferral of certain organisational rights on a trade union that is sufficiently representative.

26. Chapter II of the LRA is entitled "Freedom of Association and General Protections". Section 4 is its first provision. Section 4(1)(b) provides: "*Every employee has the right … to join a trade union, subject to its constitution.*"

27. That means that an employee cannot demand to join a trade union if she is not eligible for membership of the union concerned in terms of its constitution. But,

as we demonstrate, it also means that a union cannot assert organizational rights against an employer under the LRA based on the purported admission of employees ineligible for membership in terms of its constitution.

28. The relevant provisions that give the context to s 4(1)(b) concern registration of trade unions, and the granting of organisational rights.

Registration

29. Sections 95 and 96 deal with the requirements for registration of a trade union. In terms of s 96(1)(b), *"[a]ny trade union ... may apply for registration by submitting to the registrar*", amongst other information, "*a copy of its constitution*".

30. The LRA clearly specifies what a trade union's constitution "*must*" contain in order to be registered. In terms of s 95(5)(b), the constitution must "*prescribe qualifications for, and admission to, membership*". Section 95(5) also requires the constitution to deal, in detail, with loss of membership.[25]

31. If the Registrar is satisfied that the trade union meets the requirements for registration – including having a constitution that prescribes qualifications for membership – she must register the trade union.[26]

32. The LRA also provides a simple procedure for trade unions to register amendments to their constitutions. Section 101(1) recognizes the right of trade unions to amend or replace their constitutions. The trade union must "*send the*

[25] LRA ss 95(5)(c) to (e).
[26] LRA s 96(3).

registrar a copy of the resolution and a certificate signed by its secretary stating that the resolution complies with its constitution."[27] The Registrar checks that the amendment "*meets the requirements for registration*".[28] She is then obliged to register the amendment and send the trade union a certificate. The amendment takes effect from the date of the certificate.[29]

33. Registration under the LRA has been said to impose "*a measure of accountability*"[30] on a trade union. As Landman put it, registration "*permits the state and employers to know with whom they are dealing, to have access to the constitution of the trade union as a public document, to contribute towards the maintenance of the principles of democracy in the union, to secure protection for union members, also as regards the financial circumstances of the union and to enable society to measure the progress and development of trade unions.*"[31]

34. In terms of s 100(a) of the LRA, registered trade unions are required to submit a statement on the number of members they have to the registrar on an annual basis. The form they are required to complete requires them to report on the number of employees *by sector*.[32] As Fergus and Godfrey point out, registration as to sector plays an important role in determining a union's ability to join a bargaining council, and that council's ability to extend collective agreements.

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[27] LRA s 101(2).
[28] LRA s 101(3).
[29] LRA s 101(4).
[30] Fergus & Godfrey (n 23) at 2217.
[31] A Landman 'The Registration of Trade Unions – The Divide Narrows' (1997) 18 *ILJ* 1183 at 1188
[32] Regulations to the LRA in GNR 1016 CG 38317 (19 December 2014), reg 10.

Allowing unions to admit outside their registered scope creates "*the possibility of confusion*" as "*the validity of any statistics relied upon to determine a union's representativeness may be doubted.*"[33]

35. Fergus points out that the ability of an employer to know with whom it is dealing, and value to society and state of being able to track the progress of unions, will be undermined if trade unions can organize outside their constitutional scope.[34] In addition, an unbounded entitlement for a union to claim members with total disregard to its constitution undermines core constitutional values of accountability, transparency and democracy:

> *"[T]he purposes of the statutory requirements for the registration of trade unions … extend beyond the simple regulation of relationships between unions and their members to include promoting accountability, transparency and democracy in unions' internal processes and procedures. Allowing unions to recruit or organise workers on an ad hoc basis without regard for their constitutions subverts these purposes to the potential detriment of their members and the public at large.*"[35]

36. The above all supports the following conclusions expressed by the LAC in respect of the present matter:

> "*The ultra vires rule is of both practical and policy value. There is a direct relationship between the conception of the trade union as a distinct legal entity and the rule that it may not legally carry out any activity which is not authorised by the LRA and the powers and capacities provided in its constitution. The LRA grants trade unions specific powers and capacities to act within a particular scope and does so in furtherance of a contemplated constitutional and policy framework. The principle of*

[33] Fergus & Godfrey (n 30) at 2231.
[34] E Fergus 'The Disorganisation of Organisational Rights – Recent Case Law and Outstanding Questions' (2019) 40 *ILJ* 685 at 709.
[35] Fergus & Godfrey (n 2330) at 2230-1.

> *legality requires observance of that framework and its purposes may not be arbitrarily dissipated. NUMSA is accordingly not permitted in terms of the common law or the LRA to allow workers to join the union where such workers are not eligible for admission in terms of the union's own constitution.*"[36]

Organisational Rights

37. The LRA does not require trade unions to register. However, certain rights can only be claimed by registered trade unions. That includes the organisational rights NUMSA seeks in this matter. This is clear from the definitions in ss 11,[37] 14(1)[38] and 16(1)[39] of the LRA.

38. The organisational rights a registered union can claim include: access to the workplace;[40] the deduction of union dues;[41] the recognition of union representatives;[42] leave for union activities;[43] and disclosure of information.[44]

39. A union does not have to rely on the LRA to secure these organisational rights. If it can convince an employer to afford it those rights without reliance on the LRA, it is free to do so. The LRA, however, imposes the coercive power of the state to *compel* an employer to grant a qualifying union organisational rights,

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[36] LAC Judgment at para 34: Record Vol 5, p 456.
[37] LRA s 11 reads: "*In this Part, unless otherwise stated, **'representative trade union'** means a registered trade union, or two or more registered trade unions acting jointly, that are sufficiently representative of the employees employed by an employer in a workplace.*"
[38] LRA s 14(1) reads: "*In this section, **'representative trade union'** means a registered trade union, or two or more registered trade unions acting jointly, that have as members the majority of the employees employed by an employer in a workplace*."
[39] LRA s 16(1) reads: "*In this section, **'representative trade union'** means a registered trade union, or two or more registered trade unions acting jointly, that have as members the majority of the employees employed by an employer in a workplace.*"
[40] LRA s 12.
[41] LRA s 13.
[42] LRA s 14
[43] LRA s 15.
[44] LRA s 16.

whether it wants to or not. Put differently, the LRA grants a union organisational rights even if it cannot secure them through negotiation or industrial action, provided the union meets certain conditions.

40. The key requirement for the rights NUMSA claims is that the union is "*sufficiently representative of the employees employed by an employer in a workplace*".[45] That is a direct concern about the *membership* of the union. There must be sufficient employees in the workplace who are members of the union to justify granting the organisational rights.

41. The process for asserting the rights is simple. The union writes to the employer to notify it that it seeks to exercise the rights.[46] If the union and the employer cannot conclude a collective agreement, either party can refer the dispute to the CCMA. It first attempts to resolve the dispute through conciliation. If that fails, the matter may be referred to arbitration. Ultimately, the CCMA can compel the employer to grant organisational rights to a union.

42. The rights that can be claimed under the LRA are rights *of the union*, not of its members. The union must satisfy the CCMA that it meets the conditions to be afforded those rights.

NUMSA's Interpretation of s 4(1)(b)

43. NUMSA appears to argue that the case turns on the interpretation to be given to s 4(1)(b) of the LRA. Lufil accepts the provision is of some relevance but the

[45] LRA ss 11. For organisational rights under ss 14 and 16, the union must represent a majority of the employees.
[46] LRA s 21(1).

fundamental question is *not* how to interpret s 4(1)(b). The fundamental question is whether a trade union is entitled to rely on employees ineligible to be admitted as members, but purportedly admitted by it, when asserting a claim under the LRA for organisational rights. The provisions requiring interpretation are the word "r*epresentative*" in the phrase "*sufficiently representative*" in s 11 and the word "*members*" (in the phrase "*have as members"*) in ss 14(1) and 16(1).

44. In each instance this turns on whether employees admitted by a union in breach of its constitution are to be considered *members*, for the purpose of these provisions. Lufil's contention is, as made clear above, that on the application of the *ultra vires* doctrine (reinforced by several provisions of the LRA) they are not. Nonetheless, to cover the contingency that this is thought to be of importance, we turn to address NUMSA's argument as to the proper interpretation to be given to s 4(1)(b)

45. NUMSA argues that the words "*subject to its constitution*" in s 4(1)(b) should be interpreted only to regulate the relationship between trade union and its members[47]; and not to permit an employer to object to membership when a the union admits a member not falling within the union's "scope".[48] Section 4(1)(b) does not, so NUMSA argues, preclude the union and employee from "*choosing to ignore*" such a provision;[49] and if its constitution "*disqualifies membership of*

[47] Applicant's Written Submissions at para 54.
[48] Applicant's Written Submissions at paras 51 and 56.
[49] Applicant's Written Submissions at para 56.

certain employees", the union is "*not … bound to deny such membership*".[50]

46. NUMSA's argument that the union and employee are entitled to ignore a provision in the union's constitution that renders the employee ineligible to be admitted as a member is not legally tenable:

46.1. First and foremost, it renders nugatory s 95(5)(b) of the LRA, which obliges a trade union, as a condition for registration, to "*prescribe*" in its constitution "*qualifications for, and admission to, membership*". On NUMSA's interpretation, this is rendered pointless, as the union is at liberty simply to ignore whatever its constitution provides on the issue.

46.2. Secondly, if the union (or some or other representative thereof) is at liberty to ignore them, this also divests the relevant provisions of the union's constitution of any meaningful purpose or effect.

46.3. Thirdly, had the lawgiver intended such a radical departure from well-established common-law principles, it would doubtless have made this clear. That it did not do so speaks volumes.

46.4. Fourthly, s 4(1)(b) confirms what would in any event have been apparent, namely that an employee has no right to join a union which, by its constitution, has rendered her ineligible to become a member. It in no way supports the argument that a union is free to ignore its constitution at will, far less that, if it does so, this is a matter which cannot be raised against it if it seeks a right contingent on proof of its membership.

[50] Applicant's Submissions at para 66.

47. The only coherent interpretation of the relevant provisions *read together* is that a union seeking organisational rights must, if this is disputed, establish that its claimed members are members in terms of its constitution.

The Collateral Challenge Analogy

48. The analogy drawn by the LAC to a collateral challenge is entirely appropriate.[51] The analogy is simple.[52] When an organ of state seeks to use coercive power against a subject, the subject is entitled to resist this by raising a collateral attack on the validity of the underlying administrative act sought to be enforced. The ordinary procedural rules for when a challenge should be brought do not apply – the challenge can be raised at any time.[53] As the SCA has put it:

> *"The right to challenge the validity of an administrative act collaterally arises because the validity of the administrative act constitutes the essential prerequisite for the legal force of the action that follows and ex hypothesi the subject may not then be precluded from challenging its validity.*"[54]

49. Similarly, when a union relies on the statutory (coercive) power of the CCMA under the LRA to compel an employer to grant it organisational rights, the employer cannot be precluded from questioning whether the basis for the exercise of that coercive state power – that a sufficient number of its employees are lawful members of the union – is present.

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[51] LAC Judgment at para 35: Record Vol 5, pp 456-7.
[52] NUMSA's attack on the analogy - Applicant's Written Submissions at para's 94 and 95 - reveals that it does not understand the point made by the Court and supported by Lufil. It thinks it applies only to the enforcement of the Commissioner's ruling and overlooks the fact that the point relates to the validity of the admission of the member by the union. Lufil does not claim that NUMSA's acceptance of Lufil's employees as members constitutes administrative action. That is why the collateral challenge jurisprudence is arguably not directly applicable and only analogous.
[53] *Oudekraal Estate (Pty) Ltd v City of Cape Town and others* [2004] 3 All SA 1 (SCA) para 32 et seq.
[54] Ibid at para 36 (our emphasis).

50. The classic statement justifying collateral challenges is in *Boddington*:

> "*It would be a fundamental departure from the rule of law if an individual were liable to conviction for contravention of some rule which is itself liable to be set aside by a court as unlawful. Suppose an individual is charged before one court with breach of a byelaw and the next day another court quashes that byelaw – for example, because it was promulgated by a public body which did not take account of a relevant consideration. Any system of law under which the individual was convicted and made subject to a criminal penalty for breach of an unlawful byelaw would be inconsistent with the rule of law*."[55]

51. So too here. NUMSA does not claim that its constitution cannot be enforced. It presumably accepts that any of its members could approach a court tomorrow to question whether Lufil's employees are valid members. But it seeks to deny that right to Lufil, against whom it seeks to enforce coercive state power on the basis of the (alleged) membership of Lufil's employees. The state cannot coerce its citizens based on an illegality. Nor can NUMSA invoke state power if its right to do so rests on an unlawful and invalid act.

52. The analogy extends further. A collateral challenge is available if "*the right remedy is sought by the right person in the right proceedings and circumstances.*"[56] As we set in **Part V**, it may be the case that an employer is not always entitled to question an employee's union membership. But it must be able to do so in these circumstances where a union demands organisational rights.

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[55] *Boddington v British Transport Police* [1999] 2 AC 143 (Lord Irvine of Lairg LC), cited with approval in *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* [2009] ZASCA 87; [2010] 1 All SA 1 (SCA); 2010 (3) SA 589 (SCA) at para 14 and *Oudekraal* (n 53) at para 32; and *Merafong City Local Municipality v AngloGold Ashanti Limited* [2016] ZACC 35; 2017 (2) BCLR 182 (CC); 2017 (2) SA 211 (CC) at fn 38.

[56] *Oudekraal* (n 53) at para 28. See also *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* [2012] ZACC 28; 2013 (3) BCLR 251 (CC) at para 34; *Areva NP Incorporated in France v Eskom Holdings Soc Limited and Others* [2016] ZACC 51; 2017 (6) BCLR 675 (CC); 2017 (6) SA 621 (CC) at paras 40 and 53.

IV NUMSA MEMBERSHIP

53. Before the LAC, NUMSA accepted that Lufil's employees fell outside its scope.[57] In this Court, it now advances an argument that its constitution permits it to admit any employee, in any sector. The argument must fail.

54. Eligibility for membership of NUMSA is clearly defined in its constitution.

55. Clause 1(2) defines the "scope" of NUMSA as follows: "*The scope of the Union is the metal industry. See Annexure 'B' for details.*" Annexure B provides that : "*The Union* ***shall be open to***[58] *all workers employed in any of the following industries"(*emphasis added), after which a series of industries[59]are listed and defined.

56. Annexure B reaches far and wide to include transport, security, mining, health services renewable energy and the IT industry.[60] But there is nothing that could be interpreted to include the paper or packaging industry in which Lufil operates.

57. Eligibility for membership of NUMSA is directly tied to its scope, not only by the introduction to annexure B, quoted above, but also by clause 2(2), which reads: "*All workers* ***who are or were working in*** *the metal and related*

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[57] See, for example, LAC Judgment at para 21, third sentence: Record Vol 5, p 451.
[58] The obvious corollary is that the Union shall **not** "be open to" workers employed in other industries.
[59] Initially collectively defined, by clause 22 of annexure B, as "*THE METAL AND RELATED INDUSTRIES".* An amendment to the constitution changed this so that the collection of industries came to be referred to as *"The scope of the union".*
[60] Record Vol 5 pp 438-442.

*industries are **eligible** for membership of the Union subject to the discretion of the relevant Shop Stewards Council.*"[61]

58. NUMSA's constitution also distinguishes between active, associate and continuation membership.[62] Active membership "*is available for workers **currently employed in** the metal or related industry.*"[63] Associate and continuation membership are for people who used to have active membership, but who are no longer employed in the metal or related industries.

59. The centrality of NUSMA's constitutional scope in determining the bounds of membership is reinforced by the provisions for loss of membership. Clause 2(3)(b)(i) provides: "*A member automatically loses membership 13 weeks after **becoming unemployed in the industry** unless*" certain conditions are met, including if "*that member is re-employed in the metal and related industries*".[64]

60. In short, NUMSA can only lawfully accept as members workers who are employed in the industries listed in the industries listed in Annexure B to its Constitution. The paper and packaging industry does not appear in Annexure B. Therefore, NUMSA cannot lawfully admit Lufil's employees as its members.

61. NUMSA's argument to the contrary is untenable. It contends that because clause 2(2) begins "*All workers*" instead of "*Only workers*", it should not be interpreted "restrictively" to limit NUMSA's membership to those captured by Annexure B. The effect of that interpretation is that there is no limitation on

[61] Record Vol 5, p 403
[62] NUMSA constitution cl 2(2), Record Vol 5, p 403.
[63] Record Vol 5, p 404.
[64] Record Vol 5, p 405.

membership at all. That would render clause 1(2), 2(2) and the whole of Annexure B nugatory. (It would also be inconsistent with NUMSA's recent amendment of Annexure B to expand its scope; if its Constitution already permitted it to admit any employee as a member, it is difficult to understand why it bothered to amend Annexure B.)

62. NUMSA itself contends that the LRA imposes no limits on the scope a union may choose to organize in; it may even regulate membership without regard to scope.[65] That may be correct but NUMSA has made its choice and elected to limit its scope – to which it explicitly ties eligibility for membership – to the industries listed in Annexure B.

63. Of course, as NUMSA is forced to concede,[66] there is an easy solution to this problem: it can amend Annexure B to expand its scope. Ordinarily, NUMSA can only amend its constitution at a National Congress where: (a) general secretaries receive 90 days' notice of the proposed amendments; and (b) two thirds of the National Congress support the amendment.[67]

64. However, NUMSA's constitution contemplates a far easier process for altering NUMSA's scope. In terms of s 1(2): "*The Central Committee may amend the scope from time to time.*" All that would be required for NUMSA to validly admit employees of Lufil would be an appropriate resolution of the Central Committee, communicated in the required manner to the Registrar and

[65] Applicant's Written Submissions at paras 79-81.
[66] Applicant's Written Submissions at para 79.
[67] NUMSA constitution cl 14(1): Record Vol 5, p 435.

registered by her. NUMSA has not explained why it has chosen not to amend its scope, and instead seeks to admit members outside its constitutional scope.

65. NUMSA seems to contend that the ease with which it could amend schedule B is a point in its favour. NUMSA's constitution is so easy to amend, it argues, so why bother enforcing it? But the opposite is true. As we detail below, the ability to easily amend its Constitution means that there is no limitation of NUMSA's (or its members) rights to association, or to join a trade union, and therefore no reason not to follow the LAC's interpretation of the LRA.

V CASE LAW

66. There is no case law that supports NUMSA's position. The case law all either:

    66.1. Support's the LAC's interpretation; or

    66.2. Deals with the exercise of distinguishable rights accorded by the LRA to individual employees.

67. Until the Labour Court's decision in this case, our courts have <u>never</u> held that a union can assert organisational rights against an employer without establishing that the employees it claims as members have been lawfully admitted.

68. We first deal with the supporting case law, and then with the distinguishable case law upholding certain individual employees' rights.

<u>SUPPORTING CASE LAW</u>

69. <u>First</u>, as long ago as 1997, the Labour Court held that the purported admission

as a member of a union contrary to its constitution is ultra vires and that such a person is not a member. In *Van Wyk and Taylor v Dando and Van Wyk Print (Pty) Ltd*[68] Landman J held: "*A trade union … is constituted in terms of its written constitution and has no powers save for those which are found in its constitution.*"[69]

70. Second, in *Afgri Operations Ltd v MacGregor NO & Others*,[70] the Labour Court reached the same conclusion as the LAC in this matter. The issue, like this one, involved organisational rights in a workplace (although in *Afgri Operations* the dispute concerned the withdrawl of organisational rights). The union's constitutional scope included a range of services; but not food or farming services in which the employer operated.

71. Although the court characterised the case as one concerning *locus standi*,[71] the issue was the same – could a union assert organisational rights when its supposed members were outside its constitutional scope? Moshoana AJ held it could not:

> *"In terms of s 95(5)(b) of the Act, a constitution must prescribe qualifications for and admission to membership. Therefore, if the fourth respondent's contention is to be upheld, this peremptory provision is rendered meaningless and useless. If a union can admit any worker, why would it be necessary for its constitution to prescribe requirements for admission?"*[72]

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[68] [1997] 7 BLLR 906 (LC); (1997) 18 ILJ 1059 (LC), particularly at 1063
[69] Ibid at 910.
[70] (2013) 34 IL] 2847 (LC).
[71] The issue in this case was also initially framed as one of standing. Lufil conceded before the LAC that it was not truly an issue of standing, but of the merits of the claim. LAC Judgment at para 23. But the incorrect framing of the issue in *Afgri Operations* does not affect the substance of the judgment.
[72] Ibid at para 26.

72. The Court also expressly rejected the argument that requiring trade unions to adhere to their constitutions was unconstitutional[73] – a point we return to below.

73. Third, this approach has been followed in a string of rulings by the CCMA in circumstances substantially identical to the present:

73.1. In *HOTELICCA and Grand West Casino*[74] the applicant union applied to the CCMA for organisational rights in the respondent's workplace. The employer operated in the gaming industry. The CCMA refused the application because the union's registered scope was for the hotel industry, not the gaming industry.

73.2. Similarly, in *CEPPWAWU and Pop Snacks*,[75] the union sought organisational rights. The commissioner held that a union may operate only in sectors defined in its constitution. Importantly, the Commissioner held (with reference to s 4(1)(b) of the LRA) that denying the union the organisational rights did not limit the employees' right to freedom of association. The employees were free to join any one of the many unions operating in the sector.

73.3. In *SATAWU v Telekleen & Another*,[76] the CCMA again dismissed an application by a union seeking organisational rights in a workplace outside its scope.

[73] Ibid at para 28.
[74] [2002] 11 CCMA 4. 7.2 (WE4893-02).
[75] (2009) 11 BALR 1156 (CCMA).
[76] [2010] JOL 25818 (CCMA).

73.4. In *NUM & Others v MTO Forestry (Pty) Ltd t/a Cape Pine*,[77] the commissioner once more refused to grant a union organisational rights in a workplace beyond its registered constitutional scope.[78]

74. The only CCMA decision we are aware of that granted organisational rights in these circumstances is *South African Industrial, Commercial and Allied Workers Union and Denny Mushmoms a Division of Libstar Operations (Pty) Ltd*.[79] The employer operated in the agricultural sector, while the union was registered to operate in the food sector. The CCMA concluded that the employer fell within the union's scope because the union's constitution also covered "*vulnerable workers*" generally. Agricultural workers, she reasoned, where vulnerable. Importantly, the commissioner accepted that "*had the union's registered scope not covered the employees in question, it could not have approached the CCMA for organisational rights.*"[80]

75. Fourth, NUMSA refers to the decision in *City of Johannesburg v South African Municipal Workers' Union* for the proposition that "*an employer even with the best of intentions could not gain locus standi to interfere in the internal workings of a trade union*".[81] That submission is misdirected and irrelevant:

75.1. The facts are entirely distinguishable. The City approached the Labour Court for clarity about which of two warring factions of the union was

[77] [2014] CCMA Case number: WEGE2048-13
[78] The commissioner in *MTO Forestry* expressly considered and distinguished *Mabote* which we discuss below.
[79] [2018] 5 BALR 543 (CCMA). Discussed in Fergus (n 34) at 704.
[80] Fergus (n 34) at 705 (emphasis added), referring to *Denny Mushrooms* at para 33.
[81] Applicants' Written Submissions at para 59.

legitimate. While holding the City lacked standing to do so, the Labour Court nonetheless resolved the dispute. That is a wholly unrelated situation. This case is not about standing, but about whether NUMSA has established the requirements to exercise a statutory right against Lufil.

75.2. While not expressly overturned on appeal, the LAC expressed clear disagreement with the Labour Court's conclusion with regard to standing. Savage AJA wrote: "*My own view is that there was no attempt by the City to interfere with the affairs of the union but that it sought certainty as to who it should deal with in the day to day business with the union.*"[82]

CASES ABOUT INDIVIDUAL RIGHTS

76. There are three cases – all relied upon by NUMSA – in which the courts have declined to entertain an argument by employers that the employees were not lawful members of the union concerned – *Mabote*, *Bidvest* and *MacDonald's Transport*. They are all distinguishable. None of them related to a claim by a union under the LRA for organisational rights. They related to individual employees and turned on the interpretation of different statutory provisions.

77. First, *Mabote*,[83] in which the Labour Court (per Steenkamp J) was concerned with whether an employee was entitled to be represented in a dismissal arbitration by his chosen union. The employer argued that the employee was not

[82] *Tshililo and Others v City of Johannesburg and Others* [2018] ZALAC 34; [2018] 12 BLLR 1180 (LAC) at para 7.
[83] *NUM obo Mabote v Commission for Conciliation Mediation and Arbitration and Others* [2013] ZALCCT 22; [2013] 10 BLLR 1020 (LC); (2013) 34 ILJ 3296 (LC).

a lawful member of the union as his work fell outside the union's constitutional scope. The argument failed, essentially on the basis of the Court's finding that the provisions in point – primarily CCMA rule 25(1)(b)(iii)[84], but also s 200(1)(b) of the LRA – "*on the face of it, grant an employee and his or her chosen trade union – such as the applicant in this case – an unfettered right for the union to represent the employee in arbitration proceedings"*.[85] The Court also held that "*it would place an unduly restrictive interpretation*" upon the above provisions to hold that the NUM was not entitled to represent the employee.[86]

78. It was in this context that the Court referred to the fact that s 4(1)(b) of the LRA provides that an employee may join a trade union "subject to its constitution"; and held that 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.*"[87]

79. *Mabote* is easily distinguishable:

79.1. It turned on different provisions, primarily rule 25(1)(b) of the CCMA's rule[88], which permits an employee to be represented by an official "*of that party's registered trade union*". This was interpreted as conferring a right

[84] Para 32 of the judgment makes it clear that the Court considered this provision to be the determinative provision.
[85] Ibid at para 24.
[86] Ibid at para 30.
[87] Ibid at para 27.
[88] And s 200(1)(b) of the LRA, which permits a union to act in a dispute on behalf of its members.

on the employee to be represented "*by his or her chosen trade union*".

79.2. The facts in *Mabote* are also instructive. The employee worked for the Kalahari Country Club. That Club was directly controlled by the Sishen Iron Ore Mine, which fell squarely in the scope of the union.[89] The dismissed employee had long been an admitted and dues-paying member of the NUM, which had been recognized by his employer. The employer attempted opportunistically to rely on an accident of legal personality, to directly prejudice a worker. That is plainly not the case here.

79.3. Importantly, the Labour Court's decision in *Mabote* must now be applied in the light of the LAC's decision in *MacDonald's Transport* which (as we set out below) expressly limits the finding to representation cases, and distinguishes this from applications for organisational rights.

80. Second, Steenkamp J again considered a distinguishable issue in *Bidvest Food Services (Pty) Ltd v NUMSA and Others*.[90] NUMSA had applied for organisational rights from an employer which operated in the food industry. The employer refused, and the issue was referred to conciliation. The employer complained that NUMSA lacked standing to refer the dispute for conciliation because the employer operated outside its registered scope. The Commissioner rejected the argument that NUMSA could not refer the dispute for conciliation. But she also held that "*if the union decides to refer this dispute to arbitration once conciliation fails, the union may fail to prove that it is entitled to the relief*

[89] *Mabote* (n 83) at paras 9-10.
[90] [2014] ZALCCT 58; (2015) 36 ILJ 1292 (LC).

it is seeking."[91] Conciliation failed, and the employees decided to strike in support of NUMSA's organisational rights claim. The question was whether their participation in the strike was or was not protected.

81. The Court held that it was protected because an employee has the right to strike if he/she has followed the relevant procedures in terms of the LRA, whether that employee belongs to a union or not. It held that it cannot be the case that, if the employee happens to belong to (or purport to belong to) a union, the employee may not strike, merely because the union's constitution does not allow the employee to be a member.[92]

82. But Steenkamp J also made it clear that the employees' right to strike was distinct from the union's statutory entitlement to organisational rights. As he put it: "*The union may not succeed in obtaining organisational rights at Bidvest. But the workers are not precluded from striking in pursuit of that demand.*"[93]

83. Third, NUMSA relies heavily on *MacDonald's Transport Upington (Pty) Ltd v Association of Mineworkers and Construction Union (AMCU) and Others*.[94] But the case supports the LAC judgment.

84. As in *Mabote*, the issue in *Macdonald's Transport* was whether the employees were entitled to be represented by their union of choice in unfair dismissal proceedings. The employer's argument was that their membership of their union had lapsed due to non-payment of dues. Its argument failed because, first, it was

[91] Ibid at para 6.
[92] Ibid at paras 16 and 23.
[93] Ibid at para 26, see also para 28.
[94] [2016] ZALAC 32; (2016) 37 (ILJ) 2593 (LAC); [2017] 2 BLLR 105 (LAC).

found that the members' membership had not in fact lapsed.

85. But the LAC also held that the employer was not entitled to question whether the employees' membership of a trade union had lapsed, for the purposes of representation in dismissal proceedings. The reason was that it was the employee's right to choose their representative that was at issue, not the trade union's right to be the representative. But in reaching that conclusion, the LAC (per Sutherland JA) took it for granted that an employer would be entitled to question membership when the issue was a claim by a union for organisational rights.

> *"Certainly, when a union demands organisational rights which accord to it a particular status as a collective bargaining agent vis à vis an employer, it asserts and must establish it, itself, has a right to speak for workers by proving they are its members; sections 11- 22 of the LRA regulate that right. But in dismissal proceedings (which, plainly, are not about collective bargaining) before the CCMA or a Bargaining Council forum, the union is not (usually) the party, but rather the worker is the party. … When an individual applicant wants a particular union to represent him in a dismissal proceeding, the only relevant question is that worker's right to choose that union."*[95]

Later, the Court reiterated the point: "*except as regards the need for a union to prove membership for collective bargaining purposes, the relationship between a union and its members is a private matter.*"[96]

CONCLUSION

86. In summary, the current case law does not allow an employer to question an

[95] Ibid at para 35.
[96] Ibid at para 42.

employee's membership of a union when that employee is asserting her individual rights to strike, or to be represented by the union of her choice. But this does not apply where, as in the present case, the union is demanding statutory organisational rights and needs to prove the membership on which it relies in order to qualify for the statutory right.

87. Fergus puts the point elegantly in these terms:

> *"organisational rights are first and foremost rights available to unions rather than to their employee members. Thus, where the union seeks organisational or bargaining rights, it must show that it enjoys the necessary capacity to acquire these rights of its own accord. Where the rights at stake in any given dispute belong to the union's members as employees, however, the emphasis on the union's capacity as a legal person falls away. In turn, employers have no business challenging it. The same principle and exception applies where third parties attempt to interfere in the internal affairs of trade unions: in collective bargaining matters (encompassing demands for organisational rights), the union would necessarily be required to prove that it has the members it purports to have, and that the memberships have been validly granted."*[97]

88. The issue in this case is a narrow one. It is not about employer interference in internal union affairs. It is about a union establishing the requirements for the exercise of a statutory right. Where a union asserts those rights, it must establish that it meets the statutory requirements.

VI THE CONSTITUTION SUPPORTS LUFIL

89. To escape the ordinary application of the LRA and the common law, the

[97] Ibid at 707-8.

Applicant calls in aid s 39(2) of the Constitution. It claims that the LRA must be interpreted to promote its rights to freedom of association and to fair labour practices. That interpretation, it claims, entitles it to organisational rights based on members who fall outside its constitutionally chosen scope.

90. The argument is bad on four levels:

90.1. It overstates the role of s 39(2);

90.2. The LAC's interpretation does not limit the right to freedom of association;

90.3. The LAC's interpretation does not limit the right to fair labour practices; and

90.4. If there is any limitation, the limitation would obviously be justifiable.

THE ROLE OF S 39(2)

91. Section 39(2) reads: "*When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.*" Section 39(2) requires a particular approach to interpretation, but it is not a licence for courts to ignore the text of statutes, or to advance some constitutional goals at the expense of others.

92. NUMSA cherry picks form this Court's jurisprudence to suggest that statutes cannot be interpreted to limit rights, even if that limitation is plainly justifiable. That approach is overly simplistic. Lufil submits that three considerations must

guide the Court's interpretation in terms of s 39(2).

93. First, "*judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section.*"[98] Overly expansive interpretations that do not pay sufficient heed to the words of a statute violate the principle of separation of powers.[99] As this Court recently held in *Moyo*:

> *"When attempting to interpret legislation by "reading-down" a section in order to bring it into conformity with the Constitution, care should be taken to stay within the boundaries of a reasonable and plausible construction that does not rewrite the text. To overstep this mark would be tantamount to the actual "reading-in" of words into the statute. To do so would be a clear breach of the separation of powers."*[100]

94. In addition, the principle of legality "*requires that the law must, on its face, be clear and ascertainable.*"[101] Interpretations that depart from the ordinary meaning of statutes threaten that principle and should be justified by strong substantive constitutional concerns.

95. Second, the Bill of Rights contemplates that the rights it protects may be limited. Section 36(1) permits the Legislature to pass laws of general application that limit rights, provided that the limitation is "*reasonable and justifiable in an open and democratic society based on human dignity, equality*

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[98] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC) at para 23 (emphasis added).
[99] Ibid at para 125.
[100] *Moyo and Another v Minister of Police and Others; Sonti and Another v Minister of Police and Others* [2019] ZACC 40 at para 57.
[101] *Abahlali Basemjondolo Movement SA and Another v Premier of the Province of Kwazulu-Natal and Others* [2009] ZACC 31; 2010 (2) BCLR 99 (CC) at para 124.

and freedom". The idea that rights are not absolute[102] and can be limited is therefore part of the "*spirit, purport and objects*" of the Bill of Rights. As this Court held in *Bader Bop*: "*This is not to say that where the legislature intends legislation to limit rights, and where that legislation does so clearly but justifiably, such an interpretation may not be preferred in order to give effect to the clear intention of the democratic will of Parliament.*"[103]

96. The logic of this approach is inescapable. A prohibition of child pornography limits the right to freedom of expression, but that limitation is justifiable.[104] If Parliament passes legislation that could be interpreted to either permit or prohibit the production or sale of child pornography, a court is not obliged to adopt the interpretation in favour of child pornography.

97. Third, courts must consider all the rights at stake.[105] When multiple rights are at stake, or where the rights of multiple parties are at stake, the different rights will often require contrary interpretations. Reliance on one right is impermissible.

98. In sum, Lufil submits that both the text and the constitutional rights at stake support the LAC's interpretation. But in selecting the correct interpretation courts must only choose interpretations that do not "*unduly strain*", must

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[102] See, for example, *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* [2004] ZACC 10; 2005 (3) SA 280 (CC) at para 23; *South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others* [2006] ZACC 15; 2007 (1) SA 523 (CC) at para 91 (Moseneke DCJ, dissenting); *Gaertner and Others v Minister of Finance and Others* [2013] ZACC 38; 2014 (1) SA 442 (CC) at para 49.

[103] *National Union of Metal Workers of South Africa and Others v Bader Bop (Pty) Ltd and Another* [2002] ZACC 30; 2003 (3) SA 513 (CC) at para 37.

[104] *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others* [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC).

[105] *Phumelela Gaming and Leisure Limited v Gründlingh and Others* [2006] ZACC 6; 2006 (8) BCLR 883 (CC) at para 37; *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* [2005] ZACC 7; 2006 (1) SA 144 (CC); 2005 (8) BCLR 743 (CC) at para 44.

consider all the rights at stake, and must allow Parliament to legitimately limit rights.

THE RIGHT TO JOIN A TRADE UNION

99. NUMSA asserts the LAC's interpretation of the LRA limits the right of workers "*to form and join a trade union*", but does not explain why. It is difficult to understand how that could be the case.

100. NUMSA does not allege that the LAC's interpretation limits the rights of trade unions in ss 24(2)(a) and (b) of the Constitution to "*determine its own administration, programmes and activities*", or "*to organize*". Nor does it allege that the LAC's interpretation of the LRA limits the right of trade unions to bargain collectively.[106] It must be accepted that limiting the statutory entitlement to orgnisational rights to registered trade unions with a sufficient number of validly admitted members is consistent with the union's constitutional rights.

101. The right in s 23(2)(a) to form and join a trade union is an individual right of workers. It is not a right of unions. There can only be a limitation of the right if workers are in fact prevented from joining a trade union.

102. Section 23(2)(a) does not, having regard to the purpose of the right, confer a right on a worker to join a trade union *contrary to that union's constitution*. The

[106] Constitution s 23(5).

right to join a trade union, like to right to freedom of association with which it is closely connected, can only be exercised respecting the correlative rights of others. If workers form a trade union and elect to provide in its constitution that it is only open to employees in a particular industry, this is not a limitation of the right of a worker not working in that industry to join a trade union.

103. An employee of Lufil could also not compel NUMSA to accept her as a member if NUMSA did not want to accept her. That would clearly be inconsistent with NUMSA's (and its members') right to freedom of association, and NUMSA's right to "*determine its own administration*". It would effectively deny a union the right to determine its own membership and deny its members the right to chooses with whom they wish to associate. The right in s 23(2)(a) is – like the right in s 4(1)(b) of the LRA – a right to join a union subject to that union's constitution.

104. That is consistent with this Court's finding in *Ramakatsa* that "*the right to participate in the activities of a political party confers on every political party the duty to act lawfully and in accordance with its own constitution.*"[107] The corollary of the right to join a union, is the duty of a union to obey its constitution. Without that duty, the right to join is meaningless. And that must mean that the right to join is subject to the union's constitution.

105. Fourth, the only effect of the LAC Judgment is to preclude a union from asserting a statutory right against an employer if its claim is founded on a

[107] *Ramakatsa* (n 24) at para 16.

breach of its own constitution. That does not limit the right of a worker to join a union, subject to the union's constitution.

106. Fifth, that places no meaningful hurdle in the way of NUMSA claiming organisational rights for its members:

106.1. NUMSA can, without much effort, amend its constitution to include the paper and packaging industry.

106.2. NUMSA remains free to seek to convince Lufil to grant it organisational rights. Its members are also – in terms of the case-law – entitled to strike to advance that claim.

107. Accordingly, there is no limitation of the right to join a trade union.

THE RIGHT TO FREEDOM OF ASSOCIATION

108. NUMSA asserts that the LAC's interpretation limits the right to freedom of association, without ever explaining why. It seems to assume that requiring a voluntary association to act consistently with its constitution limits free association.

109. In truth, there is no limitation at all. It **promotes** the right to freedom of association to hold voluntary organisations to their constitutions.

110. First, the ability to regulate membership is fundamental to the right to freedom of association. International law recognizes that "*[t]he right to freedom of association generally entitles those forming an association and those belonging*

to one to choose with whom they form it or whom to admit as members."[108]

111. Without the ability to regulate membership, the right to association is meaningless. Associations exist to promote a certain purpose. If they cannot limit their membership to people who share that purpose, they cannot achieve that goal. As Woolman explains:

> *"Without the capacity to police their membership and dismissal policies, as well as their internal affairs, associations would face two related threats. First, an association would be at risk of having its aims substantially altered. To the extent the original or the current raison d'étre of the association matters to the extant members of the association, the association must possess the ability to regulate the entrance, voice and exit of members. Without built-in limitations on the process of determining the ends of the association, new members, existing members and even outside parties could easily distort the purpose, the character and the function of the association. Second, and for similar reasons, an association's very existence could be at risk. Individuals, other groups or a state inimical to the values of a given association could use ease of entrance into and the exercise of voice in an association to put that same association out of business.*"[109]

112. In the union context, this risk is obvious. Imagine a union is established to advance the interests of paper workers. Its constitution limits membership to workers in that sector. It joins the bargaining council for that sector and establishes collective agreements with all the major employers. Workers in other industries see that the union is effective, and seek to join the union. Some shop stewards start admitting workers in other sectors, contrary to the union's constitution. Over time, paper workers become a minority in the union. The

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[108] Organization for Security and Co-operation in Europe *Joint Guidelines on Freedom of* Association (2015) at para 95. See also African Commission on Human and People's Rights *Guidelines on Freedom of Association and Assembly in Africa* (2017) at para 8 "*Those founding and belonging to an association may choose whom to admit as members.*"

[109] S Woolman 'Freedom of Association' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2 ed, 2003) at 44-14 to 44-15.

union's focus shifts to other sectors. Other unions gain majority representation in the paper workplaces previously represented by the union. The union decides it is no longer worth being a member of the paper bargaining council.

113. The outcome of not enforcing an association's membership is fatal:

> "*To fail to permit [an association] to govern its boundaries and its members in appropriate ways would make these arrangements impossible to maintain. It would, in some respects, be equivalent to saying that anyone and everyone owns these associations – which is, of course, tantamount to saying that no one owns them.*"[110]

114. Of course a union may choose – as NUMSA has previously done – to expand its scope. It has then changed its purpose and its new membership will be consistent with that purpose. But it must do so consistently with its founding documents that protect the rights of existing members. If it allows members to join contrary to its constitution it undermines the association rights of all its members.

115. Holding a union to its constitution therefore *promotes* the right to freedom of association. It ensures that the power to determine membership is determined in line with the original agreement between the members. Enforcing that agreement is foundational to free association. Indeed, it is arguably a requirement for the exercise of the right that the state is willing to enforce the boundaries of union membership.

116. Second, NUMSA has not been prevented by the LRA from admitting Lufil's employees as members. The only obstacle to it admitting them is its own

[110] Ibid at 44-15.

constitution. It remains free to amend its constitution, register that amendment, and then admit as many as Lufil's employees as may wish to join. The power is in its own hands. NUMSA does not explain why it has not amended its constitution to include the paper industry.

117. For that reason, it is not clear that NUMSA *as an organization* in fact wants to admit Lufil's employees as members. If it did, the only way for it to lawfully express that desire *as an organization* is to amend its constitution. Any other course does not be a decision of the union, but an *ultra vires* decision of certain officials within the union.

118. Third, Lufil too has a right to freedom of association. That includes a right to decide whether or not to conclude a collective agreement with a union granting it organisational rights. That freedom is justifiably limited by the LRA when it compels Lufil to grant organisational rights to a union that establishes that it is "*sufficiently representative*". As the ILO puts it: "*The voluntary negotiation of collective agreements, and therefore the autonomy of the bargaining partners, is a fundamental aspect of the principles of freedom of association.*"[111]

119. The limitation is justified because of the extent of the union's membership. The right of the employees to fair labour practices outweigh the right of the employer not to associate where the union is "*sufficiently representative*". But it is still a limitation on Lufil's s 18 right. If Lufil is prevented from questioning whether the union validly admitted its employees as members, that limitation is

[111] ILO *Freedom of Association: Compilation of decisions of the Committee on Freedom of Association* (6 ed, 2018) at para 1313.

difficult to justify. It will be compelled to associate, whether or not there is a justification for compelling it to do so.

120. Fourth, all that is at stake here is whether or not NUMSA can claim organisational rights. As emphasized earlier, Lufil is not seeking to interfere in NUMSA's internal affairs. It seeks only to ensure that the exercise of statutory power against it is lawful. That is not a limitation of the right to free association.

ANY LIMITATION IS JUSTIFIABLE

121. For the reasons given above, there is no limitation of the rights in either s 23(2)(a) or s 18. But if there is, that limitation is justifiable in terms of s 36(1) of the Constitution. The limitation would flow from the common law and the LRA and would therefore be a "*law of general application*" that can potentially limit rights. The following factors demonstrate that the limitation is justifiable.

122. First, any limitation is extremely minor. Workers remain free to join any union whose constitution permits them to join. Unions remain free to amend their constitutions to admit whatever category of workers they desire. In terms of existing case law, even if workers join unions contrary to the union's constitution, an employer cannot challenge the membership when the employer exercises her individual rights.

123. Second, there is a powerful purpose behind the limitation. It protects the associational rights of unions and members by compelling compliance with

their own internal documents. It protects the associational rights of employers by forcing them to recognize organisational rights only when a union has lawfully admitted its employees as members. It advances the public benefits of registration that allow the state, the public and employers to know who they are dealing with and to track the performance of unions. And it fits the LRA's preference for collective bargaining within sectors.

124. Third, the limitation is "*appropriately tailored*"[112] to achieve its purpose. It does not permit unwarranted employer interference in union affairs. It only allows an employer to question union membership when the union seeks to use coercive state power, and the employer's own associational rights are at stake.

125. Fourth, as we set out below, it is entirely consistent with international law and comparative practice.

126. For these reasons, assuming that there was a limitation of s 23 or s 18, that limitation is justifiable. Indeed that was the finding of both *Afgri Operations*[113] and the LAC.[114]

VII INTERNATIONAL AND COMPARATIVE LAW

[112] *Mlungwana and Others v S and Another* [2018] ZACC 45; 2019 (1) BCLR 88 (CC); 2019 (1) SACR 429 (CC) at para 101.

[113] *Afgri Operations* (n 70) at para 28 ("*In terms of the Constitution of the Republic of SA, s 23 thereof, every worker has a right to join a trade union. Therefore, a right to join a trade union is an individual right. However, in s 4(1)(b) of the LRA, that right has been limited within the contemplation of s 36 of the Constitution to its being subject to the constitution of the trade union. In other words, if a constitution does not allow a member to join he or she cannot join. If he or she does nonetheless, he or she will not be acting within the law. It cannot be said that this limitation is not justifiable in an open and democratic society.*") Of course, the limitation here is more confined. Workers and unions are held to the constitution only when they seek to interfere with an employer's right to free association by seeking to compel the grant of organisational rights. It too must be justifiable.

[114] LAC Judgment at para 31: Record Vol 5, pp 454-5.

INTERNATIONAL LAW

127. International law is relevant to interpreting the LRA – both because of s 1(b) of the LRA,[115] and because ss 233[116] and 39(1)(b)[117] of the Constitution demand a consideration of international law. Consideration must be given, in particular , to relevant ILO conventions and recommendations .[118] ILO instruments strongly *support* the reasoning of the LAC. At worst, they are neutral on this issue.

128. The most important instrument is the Convention on Freedom of Association and Protection of the Right to Organise No. 87 of 1948 (**ILO Association Convention**). It makes it plain that holding unions to their constitutions is not contrary to free association; it is constitutive of free association. The following provisions make that clear:

128.1. Article 2 reads: "*Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation*" (our emphasis).

128.2. In terms of art 3(1) employees "*shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their*

[115] LRA s 1(b) identifies one of the primary purposes of the Act as: "to give effect to obligations incurred by the *Republic* as a member state of the International Labour Organisation".
[116] Constitution s 233 reads: "*When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.*"
[117] Constitution s 39(1)(b) reads: "*When interpreting the Bill of Rights, a court, tribunal or forum - ... must consider international law*".
[118] *Bader Bop* (n 103) at para 28.

programmes." While art 3(2) prohibits public authorities from "*any interference which would restrict this right or impede the lawful exercise*" of that right, holding unions to their own constitutions hardly constitutes interference.

128.3. Article 8(1) requires that unions, "*like other persons or organised collectivities, shall respect the law of the land.*" Unions are not entitled to different or better treatment than what applies to other voluntary associations – provided those laws are themselves consistent with the Convention.

129. The ILO Commentary on the ILO Association Convention[119] makes it clear that it is perfectly permissible to: (a) require unions to register their constitutions; and (b) to hold them to their freely adopted constitutions.

129.1. The ILO Association Convention protects the "*freedom of choice with regard to membership of such organizations.*"[120] But freedom of membership must include the freedom of unions to exclude members. As noted above, the right to associate is meaningless without a right not to associate.

129.2. The right of employees to establish organizations of their own choosing implies the right to freely choose "*the structure and composition of organizations; the establishment of one or more organizations in any one*

[119] Bernard Gernigon, Alberto Odero & Horacio Guido 'Freedom Of Association' in *Fundamental Rights at Work and International Labour Standards*' (2003).
[120] Ibid at 13.

enterprise, occupation or branch of activity".[121] The LRA grants that right without restriction. It requires only that unions exercise that right in compliance with their founding document.

129.3. On the right of a union to establish its own rules, the commentary provides only that: (a) laws "*should only lay down formal requirements*"; and (b) "*the constitutions and rules should not be subject to prior approval at the discretion of the public authorities.*"[122] The LRA meets both those requirements.

130. Conspicuously, there is nothing in the commentaries that suggests that unions must have the right to admit members contrary to their own freely-adopted constitutions. Nor is there anything that suggests unions have a right to organisational rights

131. The same is true of the view of the ILO's Committee on Freedom of Association.[123] The Committee recognizes that all employees have the right "*to establish and join organizations of their own choosing.*"[124] But that right can be made subject to "*the duty of observing formalities concerning publicity or other similar formalities which may be prescribed by law*". Indeed, "*legislation concerning trade unions in itself does not constitute a violation of trade union*

[121] Ibid at 14.
[122] Ibid.
[123] In 1951 the ILO set up the Committee on Freedom of Association ("the Committee") for the purpose of examining complaints about violations of freedom of association, whether or not the country concerned had ratified the relevant conventions. Complaints may be brought against a member state by employers' and workers' organisations. The decisions of the Committee are captured in ILO *Compilation of Decisions of the Committee on Freedom of Association* (6th ed, 2018).
[124] Ibid at para 332.

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."[125] Accordingly, to protect the right of unions' "*to draw up their constitutions and rules in full freedom, national legislation should only lay down formal requirements*". That is what the LRA does. It dictates form, not content.

132. The only limit is that the formalities do not constitute a practical prohibition on operation.[126] That applies equally to regimes like the LRA which do not require registration, but confer benefits – the right to seek organisational rights – on unions that do register. The LRA clearly meets that test.

133. Again, nothing in the work of the Committee suggests – let alone requires – that workers have a right to join unions contrary to that union's constitution. And nothing suggests that employers cannot resist the imposition of statutorily created rights if the union has violated its own constitution in order to acquire that right.

134. Indeed, the most relevant statement holds that the state – in this context the CCMA – "*should, in all cases, have the power to proceed to an objective verification of any claim by a union that it represents the majority of the workers in an undertaking*".[127] The effect of NUMSA's approach is to deny not only the employer, but also the CCMA the ability to question whether,

[125] Ibid at para 564.
[126] Ibid at para 419.
[127] Compilation para 1366.

objectively, the union sufficiently represents employees in the workplace.

135. NUMSA cites this Court's judgment in *Bader Bop*, which held that ILO jurisprudence entailed 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.*"[128] This Court recently endorsed that holding in *POPCRU*.[129] Quite so. The LAC has not interfered with those rights. Under *MacDonald's Transport* and *Bidvest* employers cannot question membership in those contexts.

136. But neither *Bader Bop* nor the ILO grant union's an entitlement to demand organisational rights based on members who do not qualify for membership in terms of the union's constitution.

COMPARATIVE LAW

137. Comparative law is not particularly useful in this area as each country has a unique statutory framework. However, as NUMSA has sought to call comparative law in aid, we briefly address four cases.

138. First, NUMSA relies on a decision of the Nigerian Industrial Court in *Nestoil*

[128] *Bader Bop* (n 103) at para 34, quoted in Applicant's Written Submissions at para 49.

[129] *Police and Prisons Civil Rights Union v South African Correctional Services Workers' Union and Others* [2018] ZACC 24; [2018] 11 BLLR 1035 (CC); 2018 (11) BCLR 1411 (CC); (2018) 39 ILJ 2646 (CC); 2019 (1) SA 73 (CC) at para 90 ("*Any statutory provision that prevents a trade union from bargaining on behalf of its members or forbidding it from representing them in disciplinary and grievance proceedings would limit rights in the Bill of Rights. Forcing workers who belong to one trade union to be represented by a rival union at disciplinary hearings seriously undermines their right to freedom of association described earlier.*")

Plc v National Union of Petroleum and Natural Gas Workers.[130] It occurred in a very different statutory framework. In Nigeria, each industry has a single union to represent it. Once a union is recognized in that industry, all junior staff would automatically be considered members of that union unless they opt out, and all senior staff would not be considered members unless they opt in. As the Court put it: "*registration is deemed, recognition automatic and deduction of check-off dues compulsory, being based on mere eligibility to be a member of the union in question.*"[131] That is why the Court held that a rival union would have standing.[132]

139. However, the Nigerian Court's conclusion that an employer cannot question whether a union operates within a particular scope does not seem to follow from its premises. It rightly holds that an "*employer has no right or interest in asking an employee to either join a particular union or not to join a union*",[133] and that "*no employer is permitted to interfere, no matter how minutely it may be, in the internal running and management of a trade union*".[134] But that does not mean an employer is powerless when a union acts unlawfully. Insisting that a union complies with its constitution – or with its statutorily defined scope – if it wants to invoke statutory power does not interfere with its internal arrangements, and does not force an employee to join one union and not another; it simply upholds

[130] Suit No: NIC/LA/08/2010.
[131] Ibid at 27
[132] Ibid.
[133] Ibid.
[134] Ibid at 28.

the rule of law.

140. Second, the Supreme Court of Canada addressed precisely the same issue in *Alberta Board of Industrial Relations et al. v. Stedelbauer Chevrolet Oldsmobile Limited*.[135] A statutory board recognized a union as the "bargaining agent" for an employer – the equivalent of statutory rights under the LRA. The employer objected on the grounds that its employees fell outside the constitutional scope of that union. In a statutory framework far closer to the LRA than Nigeria's, the Supreme Court adopted the same approach as the LAC. It held that the Board had been wrong to certify the union when the employees could not join the union in terms of the union constitution.[136]

141. Third, so too the Industrial Court of Botswana. In *CASAWU v Turnstar Holdings Limited*[137] it upheld an employer's objection to recognizing a union because its employees fell outside the union's scope. As the Court put it: "*The [employer] is involved in property investment which is not one of the industries the [union] is concerned with in terms of Article 4 of its constitution.*"[138]

142. Fourth, the issue in *Botswana Railways v Botswana Railways Train Crew Union*[139] was slightly different. It concerned the meaning of s 48(1) of the Trade Unions and Employers' Organizations Act which read: "*If a trade union represents at least one third of the employees of an employer, that trade union*

[135] [1969] SCR 137.
[136] Ibid at 144-5.
[137] [2017] All Bots 80 (IC)
[138] Ibid at para 9.
[139] 2010 All Bots 44 (CA).

may apply for recognition under Section 32 of the Trade Disputes Act". Recognition is the equivalent of organisational rights. The union argued that, read in context, this referred to one third of the employees "*in the same trade*". The employer argued that it referred to one third of *all* employees.

143. The Court of Appeal agreed with the employer. But the important point for the purpose of this case is its treatment of the union's reliance on the same constitutional rights and ILO conventions as NUMSA. In particular, it argued that the employer's failure to recognize it violated the right to free association because it forced its members "*to join a union which the [employer] has chosen to recognize and not one which they want to join.*"[140] The Court of Appeal was unpersuaded. "*There is nothing in [the right to free association]*", the Court held, "*which … confers on every person in Botswana the rights and duties which come with recognition in terms of section 48 of the Act. [The right] is not concerned with the bargaining rights and duties of employers and trade unions in the field of labour relations.*"[141] It also dismissed reliance on the right to join a trade union for the same reason – it was not concerned with the grant of organisational rights.[142] On the ILO Conventions, the Court of Appeal again held that they had nothing to do with the grant of organisational rights.[143]

[140] Ibid at para 39.
[141] Ibid at para 42.
[142] Ibid at para 44.
[143] Ibid at para 49.

VIII CONCLUSION

144. NUMSA is a union for metalworkers and workers in other specified industries. It is not a union for workers in the paper and packaging industry. That is not a result of any "*interference*" by Lufil. That is the choice of NUMSA's members, expressed through their constitution. Unless and until NUMSA amends its constitution, it cannot use the power of the state to claim organisational rights in Lufil. To hold otherwise would be to endorse illegality and undermine constitutional rights.

145. On costs: The LAC granted costs precisely because both parties sought costs. In those circumstances, it was fair for the LAC to grant costs,[144] and there is no basis to interfere with its discretion.[145] Despite relying on *Zungu* to avoid costs in the LAC, NUMSA continues to seek costs in this Court. Lufil does the same.

146. The application for leave to appeal should be dismissed. Alternatively, if it is granted, the appeal should be dismissed. In either case, Lufil is entitled to its costs, including the costs of two counsel.

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MICHAEL BISHOP

[144] *Zungu v Premier of the Province of KwaZulu-Natal and Others* [2018] ZACC 1; (2018) 39 ILJ 523 (CC); [2018] 4 BLLR 323 (CC); 2018 (6) BCLR 686 (CC) at para 24.

[145] See, for example, *Limpopo Legal Solutions and Another v Eskom Holdings Soc Limited* [2017] ZACC 34; 2017 (12) BCLR 1497 (CC) at para 20.

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31 October 2019