FREEDOM OF ASSOCIATION: SENIOR MANAGERS: THE DANGERS AND LIMITS

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1. Introduction

In terms of Section 23 of the Constitution of the Republic of South Africa[1] every employer and every employee has a right to choose who one will associate with. The Labour Relations Act[2] (the LRA) guarantees the fundamental right of freedom of association.[3] Every employee has a right to take part in the formation of a trade union and to become a member thereof.[4] The word 'everyone' includes managers or executive members of the company. In the case of Kgosidialwa *v Unitrans Botswana (PTY) LTD,*[5] the court defined a 'manager' as a person who, directly or indirectly, controls, or has authority over, or is accountable for, the actions of subordinates, and is charged with the duty of formulating and overseeing the implementation of employer policies. The formal title or designation of an employee, while not irrelevant, need not be decisive or even important in defining the status of the employee. The fact that a person is given the title of a manager or is referred to as an executive does not necessarily mean he holds a place high in the hierarchy of employees, that he acts in a supervisory capacity, or that he has important decision-making or policy-formulating functions. The size and nature of the business will also be of relevance. It is evident that managerial or executive employees can cover a spectrum of employees from the managing director of a company to a low-level manager who is in charge of a small section of the work force or business. This, together with the fact that the court's decisions often do not analyse the functions and responsibilities of the employees concerned (thereby not indicating roughly where they fall within the spectrum), makes it difficult to analyse them and to provide a detailed picture of its approach to these types of employees.[6]

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1 Act 108 of 1996.

2 Act 66 of 1995 (hereinafter referred to as 'LRA').

3 In terms of Section 4 of the LRA.

4 JV du Plessis et al '*A Practical guide to labour law*' 8th ed, p 226. See also Robert E Allen '*Contemporary Labour Relations'* 2nd ed p 172.

5 2006 (1) BLR 340 (IC).

6 In *SA Society of Bank Officials v Standard Bank of SA Ltd* (1994) 15 ILJ 332 (IC), the court found

On the other hand every employer is equally allowed to form and become a member of employers' association. This right is guaranteed both nationally and internationally. In terms of the International labour organization (ILO) conventions no: 87 of 1948 and convention no: 98 of 1949,[7] these conventions are regarded to as the cornerstone of the freedom of association.[8] These enabling rights make it possible to promote and realize decent conditions at work.[9] This right in some other countries include to right not to associate.[10] It should also be understood that the right to join a union does not mean that an employee has an automatic right to join any union.[11] Such an employee must

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that the definition of 'employee' in the Labour Relations Act does include 'branch manager' and in ascertaining what the characteristics of a branch manager are, Pienaar S.M. said the following at p 339: 'The respondent submitted a document reflecting the job description of a branch manager. The branch manager would be responsible for, inter alia, planning, human resource management, business development and maintenance, sales, service standards, communication, control of budgets, marketing and sales plans etc, credit and credit control. In *Keshwar v SANCA* (1991) 12 ILJ 816 (IC) De Kock SM (at 818H) described a manager as an "individual who, in a given situation, wields the power to define policy, o make rules and to enforce the policy and rules through commands to subordinates". He concluded that "[i]t is therefore generally accepted that those employees who are to be regarded as part of 'management' start at the level of supervisor and foreman (see Kahn-Freund's Labour and the Law 3 ed at 15 and Poolman *Principles of Unfair Labour Practice* at 96)." In Simplex Industries 243 NLRB No 13 the United States National Labour Relations Board reiterated the legal standard for determining managerial status as follows: "The Supreme Court and the Board, in determining managerial status, weigh the facts elicited to determine whether or not the persons at issue are involved in the formation, determination, and effectuation of management policies by expressing and making operative the decisions of their employer, and whether they have discretion in the performance of their job duties independent of their employer's established policies." The final determination is usually the product of the particular facts of each case. Factors such as the nature of the organisation, the manner in which it is organised [sic], a person's position in the structure, the extent of a person's authority over other employees, the amount of non-managerial work performed by a person are all taken into account in determining whether managerial exercised. Undoubtedly much more can be said regarding the essence of management. It appears to me, however, that the criterion applied in the Simplex Industries case adequately covers the characteristics one would normally associate with management, e.g. an independent discretion, authority over subordinates and participation in the formulation and implementation of management policies.

7 International Labour Office Geneva '*ILO Law on Freedom of Association: Standard and Procedures*' p13.

8 ILO convention no: 87 of 1948 guarantees to everyone the right to freedom of association whereas on the other hand Convention no: 98 of 1949 deals with the right to organise and collective bargaining. See also Lord Wedderburn *'Labour Law and Freedom: Further Essay in Labour law'* 1st ed p 208.

9 ILO Declaration on Social Justice for a Fair Globalization, adopted in 2008, noted that freedom of association and the effective recognition of the right to collective bargaining are particularly important to the attainment of all ILO strategic objectives.

10 In the case of *Veldspun v Amalgamated Clothing & Textiles Workers Union of SA* (1991) 12 (ILJ) 62 (SE) at 68C it was stated that the right to associate or not to associate means nothing more or less than a mere freedom of choice on the part of an employee whether or not to join a union.

11 Hugh Collins et al 'Labour Law Text and Material' 2nd ed p 287. See also Norman Selwyn 'Selwyn's Law of employment' 15th ed p 530. See also Tom Harrison ' Employment Law' 1st ed p

first comply with the requirements of such a union in the workplace as set out in its constitution.[12] According to Alexander L,[13] Freedom of association refers to the liberty a person possesses to enter into relationships with others for any and all purposes, for a momentary or long-term duration, by contract, consent, or acquiescence. It likewise refers to the liberty to refuse to enter into such relationships, or to terminate them when not otherwise compelled anyone's voluntary assumption of an obligation to maintain the relationship. Thus, freedom of association is a quite capacious liberty. Freedom of association, as the author understand it, refers to the liberty a person possesses to enter into relationships with others for any and all purposes, for a momentary or long-term duration, by contract, consent, or acquiescence. It likewise refers to the liberty to refuse to enter into such relationships, or to terminate them when not otherwise compelled by one's voluntary assumption of an obligation to maintain the relationship. Thus, freedom of association is a quite capacious liberty. On the other hand Garry G Galles[14] argued that in some, unions' freedom of association means one-way freedom for unions to force workers and employers to associate with them, denying the latter their own freedom of association.

A fundamental or inalienable human right must be one that everyone possesses. If one party's exercise of a right prevents a second party's exercise of the same right, it is only a right for the first party, not a human right. If the second party is required to accept the first party's offer of association on the terms the first party offers, the second party is not free to choose his associations. Freedom of association would be a right of the first party; it would be denied to the second party. The upshot is that a fundamental right to freedom of association only means freedom to associate with those who also choose to associate with us voluntary association on both sides[15] and that requires people's freedom to refuse association with others against their will.[16] There is a freedom or right

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12 Perrins B 'Trade Union Law' p 164.

13 Alexander L 'What is freedom of association, and what is its denial' 2008 Social Philosophy & Policy Foundation at p 8.

14 Galles G 'Unions: *Freedom of Coercive Association? The Freeman: FEE.org/Freeman* | January/february 2013 at 26.

15 Freedom of association and procedures for determining conditions of employment in the public service,
International Labour Conference, 63rd Session 1977

16 Report VII (1) (Geneva, ILO, 1976);Freedom of association and collective bargaining,

of association with other persons for the purpose of achieving some lawful goal. This is said to be the positive right or freedom and on the other hand the negative right is the right of non-association.[17] Strong and independent workers' and employers' organizations, and the effective recognition of their right to engage in collective bargaining, are major tools for labour market governance. Freedom of association is therefore limited by the trade union security arrangements.[18]

Collective bargaining is a way of attaining beneficial and productive solutions to potentially conflictual relations between workers and employers. It provides a means of building trust between the parties through negotiation and the articulation and satisfaction of the different interests of the negotiating partners. Collective bargaining plays this role by promoting peaceful, inclusive and democratic participation of representative workers' and employers' organizations.[19] On the other hand workers who agree to associate with each other for some purpose by necessary implication decline to associate with other persons.[20] Likewise section 4(2) of the LRA gives trade union members a right to stand for election and to be eligible for appointment as an office-bearer or official and, if elected or appointed, to hold office of that trade union. Further that, section 5(1) of the LRA in turn provides that "no person may discriminate against an employee for exercising any rights conferred by this Act". The above section[21] also prohibits an employer from preventing an employee from becoming a member of a trade union and precludes an employer from acting to the detriment of an employee "because of past, present or anticipated membership of a trade union" or participation in its

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General Survey of the Committee of Experts on the Application of Conventions and Recommendations (Geneva, ILO, 1994)

17 Landman AA *'Freedom of Association in South African Labour law'* (1990) Acta Juridica at 99.

18 Van Jaarsveld and Van Eck '*Principles of Labour Law'* 2nd ed p 268.

19 Sonia Bendix *'Labour Relations in Practice: An outcomes based approach'* 1st ed p 78.

20 Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 4th (revised) ed. (ILO, Geneva, 1996); G. Casale, Guide to International Labour Standards on Industrial Relations(Geneva, ILO, 1998); Labour relations in industrialized market economy countries - An introduction (ILO, Geneva); Bartolomei de la Cruz, von Potobsky and Swepston, The International Labor Organization - The international standards system and basic human rights, (Westview, Colorado, United States, 1996); Swepston, "Human rights law and freedom of association: Development through ILO supervision" in International Labour Review, Vol. 137 (1998), No. 2, p. 169; Pankert,"Freedom of association", in Blanpain (ed.) Comparative labour law and industrial relations in industrialized market economies, 3rd Ed., (Kluwer, 1987); Lawyers Committee for Human Rights,

21 S 5 (1).

activities. In terms of section 23 of the Constitution everyone has a right to join a trade union of his choice as well as become an office bearer of such union.

2. Case laws

Employers have some difficulties in accepting the provisions that guarantees the right to freedom of association to everyone. As a result, managers holding union offices are frequently being pressed to make a choice between their union allegiance and their managerial responsibilities. In the case of *Food & Allied Workers Union & another v The Cold Chain,*[22] the employee, a shop-steward and union office-bearer had been offered a higher grade position as an alternative to retrenchment. The company made it clear to him that if he accepted such a position it would place him in a managerial position and therefore he would have to relinquish his union position as a shop-steward, in order to avoid conflict of interest. The following was stated in the company letter; “you will accordingly be required to step down from your duties as a senior shop-steward for the Cape Town distribution centre and you will be required to relinquish your FAWU office-bearer duties and responsibilities, immediately upon assuming your new responsibilities with effect from 1 May 2006." After accepting the higher position the employee refused to resign as a shop-steward. As a result the company then proceeded with retrenching him for not complying with the condition to resign as a shop-steward. The employee then lodged his claim with the Labour Court contending that his dismissal was automatically unfair.

In considering the matter, the Judge referred to another matter of *IMATU & others v Rustenburg Transitional Council*[23] This case dealt with the question of Senior Managers holding membership or holding office in a trade union. In this particular matter, the employer adopted a resolution prohibiting senior managerial employees from serving in the executive positions in trade unions and prohibiting them from participating in trade union activities. After an objection by some of its management, the employer withdrew the requirement that they were not allowed to be involved in union

[22] 2010 (1) BLLR 49.
[23] 1999 12 BLLR 1299 (LC.

activities, but refused to withdraw the prohibition on senior management serving in executive positions in trade unions. The employees based their argument on the fact that the amended resolution contravened the provisions of the LRA[24] and the Constitution.[25] The employer maintained that their senior managers could not remain loyal to the employer, and at the same time remain loyal to the trade union as office bearers of their union.

The employer also maintained that if a senior manager was a member or office bearer of a trade union, he could not also at the same time remain loyal to those responsible for disciplining staff in the employment organization. The employer maintained that any person joining a trade union, including its senior managers, automatically became committed to that body. The union was committed to maximise the benefits of its members as derived from employment. The employer maintained that senior managers could not remain loyal to that type of commitment and at the same time remain loyal to the employer. The court stated that whilst there was no direct evidence to show that senior managers would commit a breach of the duty to the employer by accepting a position on the executive of a trade union, or by becoming a member of a trade union, it was logical to assume that such a breach of duty to the employer would easily occur. It cannot be denied that a conflict between capital and labour always has been there and will continue to be there. Therefore, by committing themselves to a trade union, employees “go over to the opposition”. Employers are entitled to expect a greater loyalty from senior managers, and a senior employee who took up a leadership role in a trade union was automatically placed in a position of struggle against the employer. The court held that had the applicant relinquished his position as a shop steward and accepted the position, the organisational rights afforded to the applicant in terms of sections 4 and 5 of the LRA are absolute, that such a contractual term would have been unlawful on the basis of it being contrary to public policy. Therefore, in terms of common law it could be said that a senior employee should not be permitted to join a trade union. However, in terms of the Constitution, every employee has the right to join and hold office in a union and to participate in its activities. The opinion of the court was that if it was the

[24] Section 4 and 5.
[25] Section 23.

intention of the lawmakers to make a distinction between ordinary employees and senior employees with regard to membership of trade unions, then it would have done so in the LRA and in the Constitution. However, no such distinction has been made. The court felt that despite these legal rights, employees who joined trade unions are still obliged to perform the work for which they were engaged and this would include loyalty to the employer. In conclusion the court found that the employer breached the employee's (manager's) rights in terms of the LRA and that it acted unlawfully in demanding that the manager abandon his rights to participate in lawful union activities. As the dismissal of the employee (manager) was solely premised on compliance with the unlawful demand it was found that the dismissal was unlawful and unfair and that it discriminated against the employee on the grounds of his union affiliation. Accordingly the dismissal was automatically unfair and in breach of the LRA. The employer was ordered to pay the employee the equivalent of nine months' remuneration and was also ordered to pay the employee's costs of suit. The court in passing its judgement indicated that there is no reference to any contrary view to that expressed by Brassey AJ in the Rustenburg Transitional Council matter.

In fact, it appears to have been fully endorsed by labour law commentators.[26] The court further held that a senior manager, who is a member of a trade union or an office bearer of a trade union, would bring about a serious conflict of interest. Senior employees who are considering membership of a trade union must therefore exercise great caution in making this decision. It would therefore seem that whilst an employer cannot prohibit a senior employee from joining a trade union or from holding office in the trade union, the loyalty of that employee to the employer would be seriously brought into question.[27] Senior employees who do not perform the duties for which they were engaged as a

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[26] Grogan J: "Double Cross Manager's right to hold union office" Employment Law Journal (December 1999).

[27] *Johnson v Jockey Club of South Africa* 1910 WLD 136. S 4 (1) (b) now compels a trade union to accepts applicants for membership who are eligible to join. However, reasonable membership requirements, eg, that an employee must be employed in a specific industry, are undoubtedly permited and enforceable.

result of trade union membership, could be charged with misconduct and face disciplinary action.[28]

3. The dangers

- Being fired for dereliction of duty,
- Being fired for espionage,
- Being fired for dishonesty,
- Expelled from the union for selling out, and
- Trade union independence is likely to be compromised and run the risk of being deregistered, etc.

4. The limits

- A person cannot represent the interests of both an employee and employer in one company. Conflict of interest,
- Should he commit misconduct who will charge/discipline him? Either from the union side or company side,
- Senior manager should choose either to retain the managerial position or union position,
- The interests of either group will be compromised big time,
- Employees will be risking to be sliced by a double edged sword. Not being trusted by the employer and the union, respectively, and
- Betraying employers when taking employees' side, etc.

[28] The council's argument was illustrated by another case which was heard a month before by Stelzner AJ
(Rustenburg Transitional Local Council v Siele NO (Labour Court case no. J1401, dated 18 August 1999)) in which the council had had to seek condonation for the late filing of a review application against the CCMA. Among the reasons given by the council, all of which were unacceptable to the Stelzner AJ, was that the council had been unable to obtain legal advice from its own officials (including, presumably, the second applicant in the IMATU case) because of their connection with the union. The council had accordingly to instruct attorney's to furnish the advice. This had caused the delay.

5. Conclusion

An employer may not compel his senior managers not to join a trade union by virtue of their positions within the organisation and to do otherwise will be a contravention of the provisions of the LRA[29] and the Constitution let alone ILO provisions. Generally, the immediate reaction is that, such a manager cannot be trusted from both sides. Of immediate concern would be that the manager would have access to confidential company information, that they would find it difficult to initiate or conduct disciplinary hearings or take decisions against employees, and that their loyalty to the union would prevent them from fulfilling the essential tasks required of them. In terms of ILO provisions member States may also limit the right to organize of senior managerial and executive staff in the private and public sectors.[30] Limitations are justified, however, only to the extent that these workers occupy senior managerial positions, and provided that they are permitted to establish and join their own specific organizations. As expressed by Brassey AJ "a senior employee is expected to stand by the employer in [his or] her battles with the union and [is] frequently asked to help keep production going when a strike occurs. By joining the union he [or she] visibly betrays these expectations and deprives the employer of his support.

The betrayal is all the more acute when, as in this case, the member of management takes up a leadership role in the union. As an ordinary member he can say that his submission to the union' s decision is merely nominal, but the argument is no longer open to him once he accepts a leadership position in the union, as the second and third applicants have done. His status in the union places him in the vanguard of the struggle his colours are firmly pinned to the union mast." The court went on further applying this reasoning to senior employees who decide to make them available for union office, the Court issued this warning: "The senior employee who becomes a union leader must, in consequence, tread carefully, especially in his handling of confidential information. It is not enough simply to keep the information secret; he must recuse himself from every discussion within the union to which such information might be relevant either directly or

[29] See s 5 (2) (a) (i), (iii), 5 (4)
[30] General Survey, para. 57 and 66

indirectly lest he convey, merely by his conduct or simply by silence, facts which the employer would prefer the union not to know. He can, I believe, participate in discussions on strategy to which information given to him in confidence is irrelevant, since this is implicit in his right to participate in union activities, but he must guard himself even from [sic] exercising a judgment on the basis of such information. The delicacy of the discretion which this entails makes his position an unenviable one, but the Act gives him the right to enter this minefield if he wishes." For purposes of collective bargaining a line must be drawn between management, on the one hand, and "workers", on the other. To treat all employees as an undifferentiated mass when it comes to union-management relations would potentially leave corporate employers with nobody to negotiate on their behalf or represent them in other dealings with unions. It seems to me that the above courts decisions have taken away this constitutional guaranteed right by setting conditions for exercising this right. The courts concurred with the applicants in both instances that they have the right to join a trade union. However, ultimately these courts further indicated that when senior managers decides to exercise this right and they must be careful because they might be dismissed for incapacity due to failure to do their employment obligations as well as disclosing employer's confidential information. The law is clear regarding the rights of senior managers to join a trade union otherwise a refusal shall be a violation of ILO Conventions Nos. 87 and 98 on freedom of association and collective bargaining. It is my considered view that the above court decisions have impliedly warned senior managers to decide where they want to be since wearing two caps at the same time might prove to be career suicidal.