Big Kids on the Block Dominating Minority Trade Unions: Reflections on Thresholds, Democracy and ILO Conventions

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1. Introduction

On 27 April 2015 South Africa celebrated 21 years of democracy. The adoption of a modern and highly acclaimed modern Constitution[1] was preceded by the release from prison of Nelson Mandela and his fellow political prisoners and a process of negotiation a new political order. The dominant parties were the former oppressive National Party and the liberating African National Congress (ANC). The trade union movement, with the Congress of South African Trade Unions (COSATU) at its lead, played a central role in bolstering the ANC's liberation struggle and it was unavoidable that workers' rights would be enshrined in the future constitutional dispensation. However, the negotiating parties realized that inclusivity and the recognition of minority parties was the only way of establishing the new dispensation for the country. The multi-party model set the scene for the type of democratic model that would later be adopted in the Constitution.

Shortly after the adoption of Constitution, a new set of labour laws were implemented.[2] Aided by the ILO and represented by eminent scholars like Prof Sir Bob Hepple, Prof Manfred Weiss and Prof Adiogun, and under the leadership of Halton Cheadle, the LRA established a then "new" collective bargaining framework for the country.[3] Central to the main stated purposes of the new labour dispensation, which include the advancement of economic development and social justice, are the goals to promote "labour peace and the democratisation of the workplace."[4]

Giving effect to a number of extensive constitutional labour rights, a completely new collective bargaining structural model was established by the Labour Relations Act of

[1] Constitution of South Africa,1996.
[2] Labour Relations Act 66 of 1995 (LRA), Basic Conditions of Employment Act 75 of 1997, Employment Equity Act 55 of 1998.
[3] Memorandum *ILJ* (1995) 280.
[4] S 1 of the LRA.

1995 (LRA of 1995).[5] Gone was the enforceable duty to engage in collective bargaining which existed under the "unfair labour practice" jurisdiction of the former Industrial Court.[6] In its place came a carefully crafted set of organizational rights which unashamedly gave priority to trade unions which represent the majority of workers at workplaces and disadvantages trade unions which are unable to meet the threshold agreed upon.[7]

This paper consists of three parts. The first part provides a summary of the current South African collective labour law structure. Central to this part of the discussion is section 18 of the LRA of 1995 which empowers an employer and a majority trade union to conclude a collective agreement which establishes a threshold of representivity for the enjoyment of organisational rights. In the second part, the fundamental labour rights contained in the South African Constitution and the particular model of multiparty democracy which it establishes are analysed. The third part considers International Labour Organisation (ILO) principles in relation to the rights to freedom to association, to organise and to participate in collective bargaining. The question that is ultimately explored in this contribution is whether collective agreements in terms of the LRA which contain thresholds in favour of majority trade unions, are conducive to the goals of promoting workplace democracy and whether such agreements are in line with South Africa's constitutional values and those espoused by the ILO.

2. The Rights to Associate and to Bargain in terms of the LRA

2.1 Setting the scene

[5] LRA 66 of 1995.

[6] S 1 of the LRA of 1956. See also NUM v ERGO (1991) 12 *ILJ* 1221 (A) 1240. The AD held that the concept unfair labour prior to the 1988 amendments of the Act was "conduct which may have had the effect that the relationship between employer and employee is or may be detrimentally effected thereby." See also *UWUSA of SA v SA Stevedores (Pty) Ltd* (1994) 15 *ILJ* 1090 (IC) 1092-1093. Here, the Industrial Court explained correctly that the granting of stop order facilities did not mean that the trade union granted such is to be recognised for purposes of collective bargaining. Acquisition of organisational is not to be seen as confirmation that thresholds have been met for purposes of collective bargaining.

[7] Brassey *et al* (2006) A3-21. See also Hepple *et al* (2015) 88. The principle of voluntarism came into the LRA as a replacement of the duty to bargain to have parties to collective bargaining left to themselves to decide to follow, adapt or reject the statutory framework as they choose."

As succinctly pointed out by Rycroft, "more and more cases suggest that violence directed against property and persons during strikes is now normative in South Africa".[8] The killing of 34 people at Marikana (Marikana massacre) on 16 August 2012, happened within the context of an unresolved dispute on wages and the recognition by Lonmin[9] of a former minority trade union Association of Mineworkers and Construction Union.[10] The admission into the collective bargaining setting and the recognition of a trade union that was formerly a minority trade union denotes the shedding of the majority status of the dominant trade union. How this state of affairs developed can be traced from the regulatory framework for the rights to freedom of association and collective bargaining in terms of the Labour Relations Act (LRA).[11]

Du Toit *et al*[12] suggest that the granting of trade union rights may have the impact of mitigating trade union rivalry in the workplace. This idea is worthy of support if organisational rights coupled with the right to strike are to be seen as a tool to empower trade union parties to the collective bargaining process to be able to effectively bargain

[8] A Rycroft "Strikes and the Amendments to the LRA" (2015) *ILJ* 1 at 3; and Tokiso Digest (2014) 6. *NUM v Lonmin* (2013) 10 BLLR 1029 (LC) In this case NUM which was losing members to AMCU and was to be derecognized as a majority trade union at Lonmin. NUM cited violence and intimidation as the reason for loss of membership with AMCU also stating that they are also subjected to violence and intimidation by NUM. See also Rycroft *ILJ* (2015) 3. Rycroft states that there are other cases that suggest violence towards property and persons is the norm within the context of collective bargaining and strikes.

[8] See Lonmin Plc homepage available at www.lonmin.com (accessed June 2015). Lonmin is British company operating in South Africa involved in the discovery, extraction, refining and marketing of platinum group metals.

[9] See Lonmin Plc homepage available at www.lonmin.com (accessed June 2015). Lonmin is British company operating in South Africa involved in the discovery, extraction, refining and marketing of platinum group metals.

[10] See *National Union of Mineworkers v Lonmin Platinum Comprising Eastern Platinum Ltd and Western Platinum Ltd and another* [2013] 10 BLLR 1029 (LC). The circumstances under which the de-recognition of NUM in Lonmin took place are ventilated in this case. The majority union for years has been the National Union of Mineworkers (NUM), an affiliate of the Congress of South African Trade Unions and an ally of the African National Congress, the ruling party in South Africa. See also UCT Institute Report (2014) 6-8. The context of the "Marikana massacre" given in the paper is the issue of "threshold of representativity" which were set through various collective agreements with representative trade union unions between July 1997 and August 2012.

[11] Labour Relations Act 66 of 1995.

[12] Du Toit *et al* (2015) 259. Du Toit *et al* regard an "increase in trade union rivalry" as a consideration or justification for granting a trade union organisational rights despite their minority status.

from a position of equal strength with employers.[13] Such trade unions would find no need to embark on strikes to secure organisational rights especially with strikes being marred by violence as a norm.[14]

2.2 Freedom of Association in terms of the LRA

Under the heading "Employees right to freedom of association" section 4 of the LRA provides that:

> "Employees' right to freedom of association
> (1) Every employee has the right-
> (a) to participate in forming a trade union or federation of trade unions; and
> (b) to join a trade union, subject to its constitution.
> (2) Every member of a trade union has the right, subject to the constitution of that trade union-
> (a) to participate in its lawful activities;
> (b) to participate in the election of any of its office-bearers, officials or trade union representatives;"

Freedom of association involves coming together to achieve a common goal and the right to form and join a trade union is an aspect of freedom of association.[15] The purpose of this association is to give workers enough power that will enable them to balance that of the employer for the ultimate purpose of collective bargaining.[16]

Section 4 of the LRA does not prescribe threshold requirements as a prerequisite for the enjoyment of the right to freedom of association. The enjoyment of the organisational rights that are meant to be enjoyed by trade unions engaged in collective bargaining are, however, subject to section 18 of the LRA. Section 18 provides:

> "An employer and a registered trade union, whose members are a majority of the employees employed by that employer in a workplace, or the parties to a bargaining council, may conclude a collective agreement establishing a

[13] Explanatory Memorandum *ILJ* (1995) 292. The Task Team established to draft a new Labour Relations Act was not supportive of the "duty to bargain" and made provision rather for a right to strike and a set of organisational rights. See also fn 15 *infra*.
[14] Rycroft *ILJ* (2015) 3.
[15] Tregaskis *HLR* 84 (1985) 84.
[16] *Ibid.*

threshold of representativeness required in respect of one or more of the organisational rights."

The level of representativeness of the trade union determines which trade unions qualify to enjoy the statutory organisational rights in a "workplace."[17] The majority trade union enjoys all organisational rights,[18] the sufficiently representative trade union enjoys some,[19] whilst the minority trade unions enjoy no statutory organisational rights at all.[20]

2.3 Organisational Rights in the LRA

Van Niekerk *et al*[21] confirm that the right to freedom of association is the cornerstone of collective bargaining and a precondition for the realisation of the rights to engage in collective bargaining and to strike.[22] Surely, without freedom of association the exercise of organisational rights would be impossible as it will inhibit the ability to recruit and organise. Trade unions therefore require an ability for the workers to freely associate with each other with the ultimate purpose of having the trade unions organizing until recognition by their employer.

Chapter III of Part A of the LRA encompasses organisational rights in sections 12 (access), 13 (union subscriptions), 14 (election of union representatives), 15 (leave for union activity) and 16 (right to disclosure of information). Organisational rights in

[17] S 213 of the LRA provides for the definition of "workplace" within two contexts. In the context of the public service it is the "registered scope of the Public Service Coordinating Bargaining Council and all the public service sectoral bargaining councils," whilst in the context of the private sector it "refers to the place or places where the employees of an employer work." See also *Chamber of Mines of SA v AMCU* (2014) 3 BLLR 258 (LC) 271 paras 39-42.The Labour Court held that various mine operations that do not grant organisational rights centrally but have a central system of operation and centralized collective bargaining system are a single workplace.

[18] This includes the rights that are exclusively enjoyed by the majority trade union, namely, the right to elect representatives (s 14) and the right to disclosure (s 16).

[19] See ss 11, 12, 13, 14, 15 and 16 of the LRA. Ss 14 and 16 are rights that are enjoyable by a majority trade union whilst the remaining are enjoyed by representative trade unions.

[20] Fergus and Godfrey (2015) 6 fn 39. The principle of majoritarianism is meant to promote workplace democracy but it has been criticised for "suppressing the rights of minority unions (and their constituencies) at times." The effect of the threshold agreement entered in terms of section 18 of the LRA is to foster majoritarianism. See also Kruger and Tshoose *PELJ* (2013) 295, how the provisions of ss 18, 25 and 26 of the LRA impact negatively on minority trade unions.

[21] Van Niekerk *et al* (2015) 366.

[22] Godfrey et al (2010) 90. Organisational rights and the right to strike have been introduced for the purpose of promoting the ability of trade unions to induce the employer to bargain with them.

sections 14 (election of union representatives) and 16 (right to disclosure of information) of the LRA are exclusively enjoyed by majority trade unions, whilst sections 12 (right of access), 13 (stop order facilities) and 15 (leave for union representatives) may be enjoyed by sufficiently representative trade unions.[23]

A majority union is a registered trade union that has as members a total of 50% plus one in the workplace or one whether on their own or jointly with one or more unions have got a similar percentage.[24] The LRA does not provide definitions of majority and sufficiently representative trade unions. Sufficiently representative trade unions are however those that do not have as their members the majority of employees in the workplace of the employer, and may need to act together to constitute the level of sufficient representativity.[25] A union having just under 50% membership may be unable to enjoy sections 12 (access), 13 (union subscriptions) and 15 (leave for union representatives) organisational rights because of the threshold for the enjoyment thereof set in terms of section 18 of the LRA.[26] The minority union is not defined in the LRA, but for purposes of this chapter refers to trade unions that are obviously not a majority, and have a membership that does not even constitute a sufficiently representative trade union.

[23] Section 19 of the LRA makes it possible for trade union members of the bargaining council for the automatic enjoyment of two basic organisational rights, namely, the right to access to employer premises and the right to stop order facilities.
[24] Van Niekerk *et al* (2015) 377.
[25] *Ibid* 359. S 11 of the LRA of 1995 provides that sufficient representative "means a registered trade union, two or more registered trade unions acting, jointly that are sufficiently representative."
[26] See *SACTWU v Marley (SA) (Pty) Ltd t/a Marley Flooring (Mobeni)* (2000) 21 *ILJ* 425 (CCMA) 429 paras G - H. The Commissioner refused to grant the applicant the rights in ss 13 (stop order facilities) and 14 (union representatives) to a trade union with 42.3% membership in the workplace. At 428 para C one of the reasons cited is that the refusal of organisational rights "avoids fragmentation of the workforce and that workers speak with one voice." In *OCGAWU v Volkswagen* (2002) 23 *ILJ* 220 (CCMA), the threshold agreement was set at 40% from the previous 30% for the acquisition of ss 12, 13 and 15 rights. At 231 para H - I the Commissioner refused to grant these rights and agreed with the position of the respondent that s 18 "permits employers and majority unions … to keep potential rival unions out of the workplace." See also *POPCRU v Ledwaba NO and others* 2013 [BLLR] 1137 (LC) 1150 para 31. The Labour Court held that organisational rights previously enjoyed by a minority trade union through an organisational rights agreement could be taken away by agreement between the employer and a majority trade union. This was consistent with the novation principle confirmed in *South African Post Office Ltd v Commissioner Nowosenetz NO and others* [2013] 2 BLLR 216 (LC) 222 paras 30–32 wherein the existing collective agreement with a lower threshold was said to have been replaced by the new collective agreement.

Section 21(8) of the LRA provides for the procedure that broadly lists the basket of factors that are to be taken into account when determining a dispute about the representativeness of a trade union. These are, *inter alia*, the proof of representativeness of the trade union in that workplace, the facts relied upon to demonstrate that it is a representative trade union and the rights it seeks to exercise.[27] The LRA also provides for the consideration of the need to "minimize the proliferation of trade unions" and "the burden to the employer."[28]

2.4 Effect of Amendments to the Organisational Rights Dispensation

Section 21(8) provides as follows:

> "(A) Subject to the provisions of subsection (8), a commissioner may in an arbitration conducted in terms of subsection (7) grant a registered trade union that does not have as members the majority of employees employed by an employer in a workplace-
> (a) the rights referred to in section 14.
> (b) the rights referred to in section 16.[29]

Section 21(8C) also provides that a commissioner also has power to grant trade unions that do not meet the thresholds of representativeness in terms of a collective agreement entered in terms of section 18 of the LRA.[30]

The amendments introduced by the Labour Relations Amendment Act 6 of 2014 (LRAA) are commendable from a minority trade union perspective in that the amendments have

[27] See s 21(8)(b) and (c) of the LRA of 1995. The first part of s 21 of the LRA remains as it is even after the amendments in terms of the LRAA. The amendments have occasioned the addition of ss 21(8A), (8B) and (8C). See Du Toit *et al* (2015) 259, wherein these basket of factors were regarded as those that will have the effect of lowering the threshold.

[28] S 21(8)(a) of the LRA. The 2014 amendments have not affected the two provisions of the LRA requiring the commissioner in a dispute on representativeness to seek "to minimize the proliferation of trade unions in the workplace and to minimize the financial and administrative burden to the employer." See *SACTWU v Sheraton Textiles (1997) 5 BLLR 662 (CCMA) 671.*The commissioner stated that such facilities would be no trouble for a large organisation with a sophisticated financial system. See also Du Toit *et al* (2015) 259. According to Du Toit *et al* the consideration of the proliferation of trade unions and the administrative/ financial burden to the employer are factors that can lead to the setting of a higher threshold.

[29] S 21(8) of the LRA provides the conditions that are to be met are that the trade unions is already entitled to the rights in ss 12, 13 and 15.

[30] The conditions that are to be met in terms of s 21(8C) (a) and (b) of the LRA, are that all parties are provided with an opportunity to be part of the proceedings and the applicant trade union "represents a significant interest or represents a substantial number of employee in the workplace."

been hailed as limiting section 18 of the LRA.[31] However, they will certainly usher a new species of disputes and put collective bargaining on a collision course with the powers of the commissioner.

Brassey *et al* argue that the consequence of section 18 of the LRA, which is an expression of "workplace majoritarianism", is that the majority trade unions tend "to connive with employers to raise or lower the drawbridge as considerations of expediency dictate."[32] Du Toit *et al*[33] state it somewhat more accurately in so far as the effect of section 18 of the LRA may be to prevent minority trade unions from "getting a foothold in a workplace" through unreasonable thresholds and this makes them susceptible to attack as they may be found to violate the basic rights of employees and trade unions.[34]

The amendments therefore provide commissioners with powers to disregard such thresholds. Inasmuch as these amendments seem to negate the power reserved for employers and majority trade unions (or bargaining councils) to enter into agreements setting thresholds for the enjoyment of organisational rights, these may be seen to undermine collective bargaining in relation to the regulation of organisational rights.[35]

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[31] Van Niekerk *et al* (2015) 376. Van Niekerk et al state that the amendments may enable minority trade unions to acquire rights that were previously enjoyed exclusively by majority trade unions including enjoying organisational rights despite not meeting the thresholds of representativeness. Du Toit *et al* (2015) 259. According to Du Toit *et al*, thresholds that are unreasonable by reason of the fact that they may violate the right to freedom of association of trade unions, they may be disregarded by the Arbitrator when considering granting organisational rights in terms of s 21(8C) of the LRA.

[32] Brassey *et al* (2006) A3-23.

[33] Du Toit *et al* (2015) 261. See also Van Niekerk *et al* (2015) 376. According to Van Niekerk et al section 21(8) amendments were made in order "to discourage employers and majority trade unions from fixing thresholds that effectively deny" minority trade unions from enjoying organisational rights.

[34] See s 23(2) of Constitution of South Africa, 1996, ss 4 and 8 of the LRA.

[35] See *POCRU v Ledwaba NO and others* 2013 11 (BLLR) 1137 (LC) 1158 para 46. The Labour Court in its regard of the LRA's "overriding goal" as majoritarianism said that employers and majority trade unions are entitled to prevent minority trade unions from organizing. *Transnet Soc Ltd v National Transport Movement and others* [2014] 1 BLLR 98 (LC) 104 also importantly held that a collective agreement can limit the organisational rights of a minority trade union hence leading to the need to strike to attain same by the minority trade union. See also Grogan *EL* (2014) 14 and Le Roux *CLL* (2014) 69. The discussion of these authors revolves around the latest judgments (*POCRU v Ledwaba NO and others* 2013 11 (BLLR) 1137 (LC) and *Transnet Soc Ltd v National Transport Movement and others* [2014] 1 BLLR 98 (LC) on the conflict between the interests of the majority trade unions and those of minority trade unions. The two decisions in principle provide that a collective agreement as contemplated in section 18 of the LRA may have the effect of denying minority trade unions organisational rights.

The apparent negation comes from section 21(8)(C) of the LRA amendments.[36] Notwithstanding the threshold agreement that could be entered into by the employer and a majority trade union, the commissioner has the discretion to grant trade unions excluded by this agreement the rights provided in section 12 (access), 13 (subscriptions and levies) and 15 (leave) of the LRA.

Van Niekerk *et al*[37] state that the section 21(8) amendments were made in order "to discourage employers and majority trade unions from fixing thresholds that effectively deny" minority trade unions from enjoying organisational rights. This is important in that it confirms that the effect of section 18 allows majority trade unions and employers to set thresholds to exclude minority trade unions from the enjoyment of organisational rights in a workplace, which is what the principle of majoritarianism entails.

Section 21(8C) puts the discretion of the commissioner at loggerheads with the effect of a collective agreement setting thresholds for the enjoyment of organisational in terms of section 18 of the LRA.[38] In the exercise of his authority under section 21(8C) of the LRA, it remains to be seen how commissioners are going to go about balancing the rights that emanate from section 18 collective agreements and the amendments providing for the acquisition of organisational rights by trade unions that do not meet the thresholds.

[36] Ss 21(8A) and (8B) of the LRA does not have a negative effect on s 18 *per se* as the rights in 12, 13 and 15 are not affected the LRA where there is no majority trade union in existence.
[37] Van Niekerk *et al* (2015) 376.
[38] See *SACTWU v Marley (SA) (Pty) Ltd t/a Marley Flooring (Mobeni)* (2000) 21 *ILJ* 425 (CCMA) 429 paras G - H. The Commissioner refused to grant the applicant the rights in ss 13 (stop order facilities) and 14 (union representatives) to a trade union with 42.3% membership in the workplace. At 428 para C one of the reasons cited is that the refusal of organisational rights "avoids fragmentation of the workforce and that workers speak with one voice." In *OCGAWU v Volkswagen* (2002) 23 *ILJ* 220 (CCMA), the threshold agreement was set at 40% from the previous 30% for the acquisition of ss 12, 13 and 15 rights. At 231 para H - I the Commissioner refused to grant these rights and agreed with the position of the respondent that s 18 "permits employers and majority unions … to keep potential rival unions out of the workplace." See also *POPCRU v Ledwaba NO and others* 2013 [BLLR] 1137 (LC) 1150 para 31. The Labour Court held that organisational rights previously enjoyed by a minority trade union through an organisational rights agreement could be taken away by agreement between the employer and a majority trade union. This was consistent with the novation principle confirmed in *South African Post Office Ltd v Commissioner Nowosenetz NO and others* [2013] 2 BLLR 216 (LC) 222 paras 30 – 32 wherein the existing collective agreement with a lower threshold was said to have been replaced by the new collective agreement.

The fact that section 18 of the LRA is left intact begs the question whether the LRA on the enjoyment of organisational rights still promotes the principle of majoritarianism, if the commissioner has discretionary powers to override its effect. A situation is foreseeable where a majority trade union demands a section 18 collective agreement contrary to the determination of a commissioner in terms of section 21(8C).[39] It is therefore submitted that the amendments do not go far enough in resolving the problem created by section 18 of the LRA as the majority trade unions my still insist to enforce the rights that emanate from section 18 of the LRA setting thresholds denying organisational rights to trade unions not satisfying it.[40] Surely, there is nothing that prevents trade unions a majority trade union going into a strike in order to persuade an employer to enter into a threshold agreement setting out which trade unions are to enjoy organisational rights in terms of section 18 of the LRA.

The LRA amendments can arguably be said to water down the ability of the majority trade union and the employer to set thresholds of representativity unhindered, by granting the commissioners power to override collective agreements where either of the conditions in section 8(C)(a) and (b) are met. These conditions of "significant interest" or "substantial number of employees" are unclear, and it would be interesting to see what the considerations are going to be in determining the content of these two. As long as minority trade unions are able to prove one of the factors they would apparently be able to secure organisational rights.

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[39] S 21(8)(C)(a) and (b) of the LRA provides commissioners with the power to override collective agreements where certain conditions are met. These conditions of "significant interest" or "substantial number of employees" are unclear, and it would be interesting to see what the considerations are going to be in determining these factors. As long as minority trade unions are able to prove one of the factors would they apparently be able to secure organisational rights. See also Van Niekerk *et a*l (2015) 377. Surely, there can be nothing preventing a majority trade union going into a strike in order to effect a threshold agreement on the regulation of organisational rights in terms of s 18, or the exclusion of trade unions not meeting a threshold agreement.

[40] Kruger and Tshoose *PELJ* (2013) 289-290. The authors opined that section 18 of the LRA by promoting majoritarianism in the enjoyment of organisational rights is tantamount to unequal treatment and thus an infringement of even the constitutional right to equality. Further, the ability of majority trade unions to set thresholds at high levels effectively causes organisational rights to be out of reach for minority trade unions and for them not to be recognised by the employer. See also *Public Servants Association and the Safety and Security Sectoral Bargaining Council and others (*2007) 28 *ILJ* 1300 (LC) 1307. The total membership of the minority trade union was 13 748 out of the total workforce of 178 157 (SAPU and POPCRU represented 90% of workers) and based on the principle of majoritarianism the Labour Court ruled that the Bargaining Council was sufficiently representative without the PSA which did not meet the threshold of 30 000.

2.5 Thresholds in the Public Sector

2.5.1 Collective Bargaining Thresholds

The Public Service Co-ordinating Bargaining Council[41] (PSCBC) sets the threshold for admission as a party to the Bargaining Council at 50 000, and a union unable to meet this threshold will not be able to participate in its activities either individually having or jointly.[42]

The Constitution of the General Public Service Sectoral Bargaining Council (GPSSBC)[43] provides that only a trade union that meets the threshold of 30 000 either singly or jointly may apply for admission to the GPSSBC.

2.5.2 Thresholds for Representation in Disciplinary Hearings

For the general public service sector excluding the educators, correctional services and the police services the applicable disciplinary code and procedures is Public Service Sectoral Bargaining Council Resolution (PSCBC) Resolution 1 of 2003.[44] The part on

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[41] The PSCBC is established in terms of section 36 read with section 213 of the LRA of 1995. See Constitution of the PSCBC paras 4(a)-(o). The powers and duties of the PSCBC are, *inter alia*, to negotiate transverse matters and conclude collective agreements and to resolve disputes through dispute resolution mechanisms. It is interesting to note that para 4(c) recognises the power of the PSCBC to resolve disputes of non- parties if they fall within its registered scope.

[42] See Constitution of the PSCBC which provides that:

> "7.1 Any single trade union party may apply for admission to the Council if it –
> (a) meets the threshold requirement of 50 000 members; and
> (b) is admitted to a Sectoral Council."

The Constitution of the PSCBC paras 7.2 and 8 also recognises acting together arrangements between trade unions, whether admitted or not admitted in the Council in order to satisfy this threshold. The trade union wishing to be a party in the PSCBC also needs to be admitted to the sectoral council before being admitted to the PSCBC. There are four sectoral councils in the public service, namely, the General Public Service Sectoral Bargaining Council, the Safety and Security Sectoral Bargaining Council, Public Health and Social Development Public Service Sectoral Bargaining Council and the Education Labour Relations Council.

[43] Constitution of the GPSSBC paras 6.2(a) and (b).

[44] The part on "definitions" of PSCBC Resolution 1 of 2003 relating to disciplinary processes defines "recognised trade union" as "all unions admitted to the PSBC as well as any trade union that enjoys organisational rights from a particular department (the latter union is recognised for the particular department only)." The right of appearance in disputes under the auspices of the PSCBC would therefore

"definitions" of PSCBC Resolution 1 of 2003 relating to disciplinary processes defines "recognised trade union" as "all unions admitted to the PSCBC as well as any trade union that enjoys organisational rights from a particular department (the latter union is recognised for the particular department only)." The right of appearance in disciplinary hearings is afforded to trade unions admitted to the General Public Service Sectoral Bargaining Council (GPSSBC).

The Department of Correctional Services Department has its own disciplinary code and procedures, namely, GPSSBC Resolution 1 of 2006. Minority trade unions by virtue of their inability to meet the set thresholds are excluded from enjoying the right of appearance.[45] The Labour Court in *POPCRU v Ledwaba NO and others*[46] held that a collective agreement between an employer and a majority trade union is capable of excluding a minority trade union in the enjoyment of organisational rights. Non enjoyment of organisational rights translates in an inability represent members even in disciplinary and grievance processes.

The agreement applicable in the Safety Security Sectoral Bargaining Council (SSSBC) also provides that the employee subjected to a disciplinary hearing may be represented by "fellow employee or the representative of a recognised trade union."[47] This provision also excludes minority trade unions not admitted to the SSSBC from representing its members.

3. The Constitution, Labour Rights and Democracy

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be afforded to trade unions admitted to the PSCBC as well as those that already enjoy organisational rights in any particular department.

[45] The "definitions" in GPSSBC Resolution 1 of 2006 defines "recognised trade union as the trade union that is admitted to the Departmental Bargaining Chamber of the Department of Correctional Services."

[46] *POPCRU v Ledwaba NO and others* 2013 [BLLR] 1137 (LC) 1149 para 31. In this case the employer and the majority trade union POPCRU agreed to a new collective agreement setting new thresholds. The employer had already entered into an agreement setting lower thresholds with a minority trade union; the court held that the effect of the new agreement was that it has replaced the earlier agreement entered into with a minority trade union to enjoy some organisational rights.

[47] See SSSBC Collective Agreement 1 of 2012 para 4(j). In the "definitions" recognised trade union refers to unions that are admitted to the SSSBC the trade union representative will be from the admitted trade unions.

3.1 Introduction

The Constitution of South Africa[48] and its Bill of Rights are products of negotiations mainly between the African National Congress (ANC) and the National Party (NP) as major players in the process of bringing about a new democratic dispensation after the demise of apartheid. The popularity of the ANC with the NP as representatives of government of that day led them to confidently continue with negotiations despite the withdrawal of Inkatha Freedom Party, which technically could be said to be a minority party.[49] This situation was a signal to the preparedness on dominant entities to ignore and disregard a minority entities and this arguably could be seen as having set the tone of the negotiations framework.

South Africa is a diverse country and the recognition of this diversity finds legislative expression in, *inter alia*, the Employment Equity Act[50] (EEA) and the Promotion of Equality and Prevention of Unfair Discrimination Act PEPUDA) where differences in society are used as a basis of unfair discrimination.[51] These differences as recognised by the Constitution include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.[52]

Inasmuch as the Constitution expressly caters for minority interests,[53] the principle of majoritarianism is still prevalent where there is unwillingness to provide for the recognition of minority trade unions which might be inclined towards the listed categories protected by the Constitution.[54]

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[48] Constitution of South Africa of 1996.
[49] Woolman and Swanepoel (2013) 2:37. According to Woolman and Bishop the ANC and the NP were able to agree in negotiations to compromise on their individual demands through the 34 Principles on which the Constitution would be based. Constitutional Principle XIV of the Interim Constitution 200 of 1993 provided for the "participation of minority political parties in legislative process in a manner consistent with democracy."
[50] Employment Equity Act 55 of 1998.
[51] Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.
[52] S 9 of Constitution of South Africa, 1996.
[53] See discussion *infra* in para 3.3 "Multi-Party Democracy and Minority Participation in the Constitution"
[54] See ss 14 (right to elect union representatives), 16 (right to information) and 18 (right to establish thresholds) including ss 25 (agency shop agreements) and 26 (closed shop agreements) of the LRA to

3.2 Fundamental Labour Rights and the Limitation Clause

3.2.1 Freedom of Association in terms of Constitution

Section 18 of the Constitution provides that "everyone" has the right to freedom of association. The Constitutional Court in *SANDU v Minister of Defence* said that:

> "these rights taken together protect the right of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions."[55]

The Constitutional Court held that nothing can take away the need for soldiers to be able to speak out and put distinctive voices in their own interest on issues related to their service.[56] Sachs J held that "the freedom of association that everyone has in terms of section 18 of the Constitution and the right to fair labour practices in terms of section 23(1)) clearly entitle soldiers to set up a body like SANDU union to look after their employment interests." The pronouncement by the Constitutional Court that "everyone" within the South African state has the right to freedom of association protected in terms of section 18 of the Constitution.[57]

This certainly should hold true for minority trade unions in that as a distinct voice they can be able to speak out in their own interests and those of their members. There is therefore nothing that prevents a minority trade union or any other trade union that may

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see how far the LRA goes in order to promote the principle of majoritarianism. It is to be noted that the discussion paper will not address the agency shop and closed shop agreements. In addition to these sections that bolster the principle of majoritarianism, there are cases that bolster same. In this regard see *Public Servants Association and the Safety and Security Sectoral Bargaining Council and others (*2007) 28 *ILJ* 1300 (LC) *POCRU v Ledwaba NO and others* 2013 11 (BLLR) 1137 (LC) and *Transnet Soc Ltd v National Transport Movement and others* [2014] 1 BLLR 98 (LC). These are all discussed above under paras 2.3 and 2.4. See also *Chamber of Mines of SA v AMCU* (2014) 3 BLLR 258 (LC) 264 para 17. In this case the Labour Court reflected on the legal effect of section 23(1) of LRA in being able to bind non-parties to the agreement and even preventing non-parties from going on strike.

[55] *SANDU v Minister of Defence and Another* 1999 (6) BCLR 615 (CC) 635 para 48. *Ibid* 622 para 8. Sachs J held that "the freedom of association that everyone has (section 18) and the right to fair labour [practices (section 23(1)) clearly entitle soldiers to set up a body like SANDU union to look after their employment interests."

[56] *Ibid.* S 2 of the LRA excludes soldiers as members of the South African National Defence Force from its application. Chapter III of the LRA also does not provide for the enjoyment of organisational rights for minority trade unions.

[57] *Ibid.*

be excluded from the enjoyment of organisational right by reason of the threshold requirement in terms of the LRA to advance its seeking organisational rights by reason of the fact that their freedom of association in terms of section 18 of the Constitution is inhibited by such denial. Without organisational rights the rights to freedom of association cannot be realised by minority trade unions.

Sections 23(2), (3) and (4) of the LRA provide that "workers" and "employers" have the right to form, join, organise, determine and participate the activities of their organisations. These rights appear unrestricted, however, a collective agreement in terms of section 18 of the LRA may have the effect of preventing minority trade unions the right to organisational rights which practically serve as the life blood of their right to, *inter alia*, exist and organise as a trade union. In such a case the enforcement of the right to freedom of association in terms of section 18 of the Constitution which recognises this right for everyone.

3.2.2 The Right to Engage in Collective Bargaining

Section 23(5) of the Constitution provides that "every trade union, employer's organisation and employer has the right to engage in collective bargaining." The Constitution makes no reference to the fact that the right to engage in collective bargaining belongs exclusively to trade unions that meet a particular threshold. The issue of thresholds only emanates from the LRA which purports to give effect to section 23 of the Constitution.

At inception of any trade union, the focus is recruitment of employees and organizing them, as members. It is only after growing into a position of strength in numbers will it contest for recognition in the workplace and ultimately collective bargaining.[58] It is argued that this is the point where the organisational rights dispensation within the collective bargaining framework besides replacing the duty to bargain in its purpose also

[58] S 21 of the LRA emphasizes proof of representativeness for the enjoyment of organisational rights in the workplace.

becomes the life-blood for trade unions to grow and to vibrantly compete for membership in a workplace. I concur with Mischke when reflecting on the importance of organisational rights as:

> "Organisational rights provide trade unions with the essential instruments for not only securing an organisation a foothold in the employer's business, but also laying the foundations for a future collective bargaining relationship with the employer.[59]

3.2.3 Proportionality

The labour rights in the Constitution if they are to be limited, two principles are to be borne in mind, firstly, the recognition that rights are not absolute and secondly, they may be limited taking into account the factors listed in section 36(1)(a-e).[60] The inclusion of the elements of proportionality in section 36 clearly indicated that proportionality was to play a role in applying the general standard.[61]

According to the Constitutional Court the principle of proportionality entails the following:

> "Different rights have different implications for democracy, and in the case of our Constitution, for an 'open and democratic society based on freedom and equality,' means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests."[62]

The requirement for the limitation of a constitutional right is therefore that the limitation must be "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom." Currie and De Waal in simplifying this provision state that the law must be reasonable in the sense that it should not invade rights any further than it needs to in order to achieve its purpose and that there is sufficient proportionality

[59] Mischke *CLL* (2004) 60.
[60] Rautenbach *PELJ* (2014) 2248.
[61] *Ibid* 2249.
[62] *S v Makwanyane* 1995 (3) 391 (CC) 436 para 104.

between the harm done by the law and the benefits to be achieved.[63] This is the test that section 18 of the LRA is to undergo. Section 18 as an expression of majoritarianism means that the majority trade union may enter into a collective agreement excluding any other trade union from enjoying same. The majority trade union would in effect then be the only active trade union in the workplace representing employees in individual matters and in collective bargaining to the exclusion of all trade unions not meeting the thresholds of representativeness.[64] The link between section 18 of the LRA and seeking to prevent the proliferation of trade unions in the workplace[65] and the Labour Court has confirmed such a link.[66]

According to Du Toit *et al* unreasonable thresholds are susceptible to being found to violate the basic rights of employees and trade unions.[67] Organisational rights in serving as the life-blood of trade unions and the exercise of the freedom to associate by the members in general may have organisational rights to trade unions worthy of protection where they are denied to minority trade unions.

This is where the conflict between different positional interests becomes apparent because what is reasonable and justifiable to one person is not necessarily reasonable and justifiable to another. According to Cheadle *et al*[68] the determination of reasonableness and justifiability with reference to the context of an open and democratic society based on human dignity, equality and freedom and juxtaposing such reference to all relevant circumstances constitutes what is referred to as proportionality.

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[63] See Currie and De Waal (2013) 162. See also Woolman *et al* (2013) 34:67-68. The authors state that the phrase "reasonable and justifiable in an open, democratic society based on human dignity, equality and freedom" is fraught with interpretive difficulties in that not only is it couched in the broadest possible terms, but it replicates all of the tensions between democracy and rights which it is supposed to resolve. The guidance on how to resolve these conflicts is to be found in other constitutional democracies.
[64] Digest of decisions (2006) 320.
[65] Du Toit *et al* (2015) 259.
[66] *POPCRU v Ledwaba NO and others* 2013 [BLLR] 1137 (LC) 1149 para 31 and 1158 para 46. See also *Transnet Soc Ltd v National Transport Movement and others* [2014] 1 BLLR 98 (LC) 104.
[67] See s 23(2) of Constitution of South Africa, 1996, ss 4 and 8 of the LRA.
[68] Cheadle *et al* (2013) 30:9.

The rationale behind the amendments in terms of section 21(8)(A), (B) and (C) of the LRA as suggested arguably goes against unreasonably denying minority trade unions the enjoyment of organisational rights, which section 18 in its current form legally provides for and accommodates.[69] Applying the proportionality test to the set of circumstances that led to the amendments provides an exposition of the effect of section 18 of the LRA on the constitutional labour rights to freedom of association, to organise and to engage in collective bargaining.

3.3 Multi-Party Democracy and Minority Participation in the Constitution

The Constitution qualifies the concept of "democracy through four adjectives, namely, "representative," "participatory," "constitutional" and "multi-party."[70] Section 1 of the Constitution provides that South Africa is founded on the values of "human dignity, the achievement of equality and the advancement of human rights and freedom, supremacy of the Constitution, regular elections and a multiparty system of democratic government."[71]

The multi-party nature of democracy envisaged in the Constitution is what enhances and ensures that minority political parties are given a voice in the established political party space.[72] This has not been evidenced by a proliferation of political parties but rather political parties sustain their existence and relevance through the vote by members or

[69] Brassey *et al* (2006) A3-23. See also *UASA v BHP Billiton Energy Coal SA Ltd & another* (2013) 34 *ILJ* 2118 (LC) 2127 paras 47 and 48. Steenkamp J Steenkamp J stated that the principle of majoritarianism underlies the South Africa's collective bargaining framework and pointed towards South Africa having made majoritarianism a legislative policy choice.

[70] See also Roux in Woolman *et al* (2014) 10:2.

[71] S 7 of the Constitution in the same vein as s 1 provides that the Bill of Rights is the cornerstone of democracy that enshrines rights of all people and affirms the values of human dignity, equality and freedom. The Constitution does not provide a clear definition of democracy, but rather provides adjectives to describe the type of democracy envisaged by the Constitution. It is from these adjectives that the content of democracy can be deciphered. Ss 199(8) and 236 specifically provide for a democracy that is multi-party in nature in the business of government or political activity.

[72] See ss 57(2), 116(2), 105 and 157 of the Constitution of South Africa of 1996. The Interim Constitution Act 200 of 1993 already had Principle XIV which provided "Provisions shall be made available for participation of minority political parties in the legislative process in a manner consistent to democracy." See also Hopper (2008) 1. According to Hopper the Interim Constitution established a multi-party system and enabled minority parties with 5% of the national vote a position in the cabinet and introduced proportional representation.

supporters. Drawing an analogy to the labour relations framework with that of political party space it can argued that proliferation of trade unions would not necessarily result from allowing a diversity of trade unions in the workplace. What may be seen rather is an assertion of multiparty democracy which fosters the vibrancy of trade union activity in the workplace for the common advancement of worker interests. It is submitted therefore that the principle emanating from the Constitution is one that can equally have minority trade union inclusion in workplace democracy justifiably recognised.[73]

The context of the South African model of democracy as espoused by the Constitution is the inclination towards the promotion of minority political parties and interest. It is this context that needs to be borne in mind when an analysis of the collective bargaining framework is done.

4. The ILO and the Right to Freedom of Association and Collective Bargaining

4.1 Introduction

South Africa is bound to follow the International Labour Organisation (ILO) principles. Section 39(1) of the Constitution provides that:

> "(a) When interpreting the Bill of Rights a court or tribunal must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.
> (b) must consider international law; and
> (c) may consider foreign law."[74]

ILO standards being characterised by two features, namely, universality and flexibility signify that all states irrespective of their level of development and different legal systems would be in a position to ensure adaptability to the most diverse of countries.[75]

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[73] As signified by the principle of minority political participations in government this willingness to compromise and accommodate minority political parties is the fervour and spirit in which the Constitution was borne out of. In the political space evidence of a proliferation of political parties has not been realised.
[74] S 39(1) of the Constitution of South Africa, 1996.
[75] See Trebilcock (2010) 553. The author argues that the standards are flexible because they are universal and would have considerable latitude to accommodate specific contexts.

This approach in implementing international standards is arguably most appropriate for South Africa with a Constitution that promotes democratic principles and minority interests within its dispensation.[76]

This part therefore provides the sections relevant to promotion of freedom of association and collective bargaining and how the Committee on Freedom of Association (CFA) and the Committee of Experts on the Application of Conventions and Recommendations (CEACR) address the complaints on the infringements of trade unions rights that are referred to the ILO.[77]

4.2 The Committees of the ILO (CFA and CEACR) on Convention 87 of 1948

Article 2 of Convention 87 of 1948 provides that:

> "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."

Article 3 of Convention 87 of 1948 provides that:

> "Workers' and employers' organisations 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 programmes. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof."

Article 11 provides that:

[76] Standards: A Global Approach (2001) 3. See also ss 57(2), 116(2), 105 and 157 of the Constitution of South Africa of 1996. These provisions provide for the protection and promotion of minority political parties. This protection is arguably a protection that could pervade institutions of society including labour relations. A constitutional democracy that recognises minority interests and promotes minority political parties as opposed to a majoritarian system is what is espoused by the Constitution.

[77] See General Survey (1994) 8 para 20. The nature of the function of the CEACR and the CFA is to apply the same universal principle although their composition differs because when a case is referred they may draw each other's attention to it.

> "Each Member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise.

The CFA in interpreting the "organisations of their own choosing" in Article 2 stated correctly that it meant that individual employees are allowed to associate with trade unions of their own choice for various reasons without giving preference to either a "unified trade union movement " or "trade union pluralism."[78] The CEACR similarly held that the fact that the multiplication of trade unions might not be desirable should not lead to the direct or indirect interference through legislation by the State.[79] The terms "without distinction whatsoever" was considered a more suitable way to express the universal scope of the principle of freedom of association and to emphasise that it was to be guaranteed without distinction or discrimination of any kind.[80] The concept of "full freedom" in Article 3 denotes an unfettered freedom to elect representatives without limitation.

4.3 The Committees and Convention No 98 of 1949

Article 4 of Convention 98 of 1949 provides:

> "Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation

[78] Digest of Decisions (2006) 66 para 318. See also cases 332nd Report, Case No 2046 para 453 where the inclusion of the words "organisations of their own choosing" in Article 2 of Convention no 87 of 1948 allowance was to make allowance for trade unions based on their diverse interest, based on occupational denominational or political reasons. Although it stated that to establish trade unions for these reasons preference for either a unified trade unions movement or trade union pluralism was not pronounced by the CEACR. In 334th Report, Case No 2258, para 448, the CEACR reiterated the same sentiments about allowance of establishing for whatever reasons as being consonant with the words "organisations of their own choosing" in Article 2.

[79] Digest of Decisions (2006) 67 para 319. The CEACR fully aware of the implications of having small, weak multiple trade unions which compromise the unity of the workforce emphasized the right of the employees to freely exercise their right to freedom of association without interference. See also 338th Report Case No 2348 para 995. According to the CEACR, the proliferation of trade unions albeit not desirable was not to be achieved through a monopoly system imposed by law as it was contrary to the principle of freedom of association; diversity still needed to be maintained. See also Digest of Decisions (2006) 67 para 320.

[80] General Survey of the CEACR (1994) 25 para 45 ad 97. The right to organise in Article 2 of Convention no 87 is emphasised by the CEACR concurrently with the right to freedom of association. It is noted that the CEACR also harboured concerns on the proliferation of trade unions when it is excessive. Where it is not, it is arguable that that would be tantamount to pluralism conforming to trade union diversity.

> of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements."

The Committee on Freedom of Association (CFA) holds the position that where the law of a country draws a distinction between the most representative trade union and other trade unions, such system should not prevent minority trade unions from representing members in cases of individual grievances *and disciplinary hearings.*(own emphasis)[81] The CFA importantly holds the position that a collective agreement having a provision stipulating that negotiations are to be entered into by a trade union representing an absolute majority of the workers in an enterprise, does not promote collective bargaining in the sense of article 4 of Convention No 98 of 1949.[82]

There is no specific provision in Convention No 87 of 1948 that deals with trade union pluralism. The aim of the ILO when formulating Convention No 87 of 1948 is said to be to safeguard the right of workers to create and belong to the trade union of their choice and not to promote pluralism and fragmentation, although it required at the very least that this diversity remain in all areas.[83]

The fact that workers and employers generally find it in their interests to avoid a multiplication of the number of competing organisations does not, in fact, appear sufficient to justify direct or indirect intervention by the State by means of legislation.[84] This confirms the notion that governments are discouraged by the ILO in creating an environment, whether directly or indirectly that will bring about one unified trade union instead of multiple trade unions. The CEACR holds the position that legislation that establishes a percentage to determine the threshold of representativeness would not

[81] Digest of Decisions (1996) 194.
[82] *Ibid* 195.
[83] *Ibid* 19.
[84] *Ibid* 154. See also General Survey (1983) 43.

face challenges if the criteria are objective, precise and pre-established to avoid abuse and bias.[85]

The CEACR has held that it is desirable to seek to encourage trade unions to join together voluntarily to form strong and united organisations than to impose upon them by legislation a compulsory unification which deprives the workers of the free exercise of their right to freedom of association.[86] Less or no interference as far as trade union organisation is concerned is the path favoured by the CEACR instead of the compulsion of workers to unify even if it for their own benefit.

5. CONCLUSION

Section 18 of the LRA is one of the provisions which promote the principle of majoritarianism in the LRA. It is located in the collective bargaining framework of the LRA. The section has enabled parties to collective agreements of the LRA to have these collective agreements having the effect of denying non majority trade unions the enjoyment of organisational rights. This is done by way of setting thresholds of representativeness that may be seen to be unreasonably high and with the aim of ensuring that any other trade union organizing in the workplace is unable to establish itself for recognition either in representing individual members and collectively bargaining on behalf of members.

The International Labour Organisation and its committees, the CFA and the CEACR without imposing it on member states prefer the existence of a system where a unified workforce is in place to engage in collective bargaining whilst maintaining a reasonable level of pluralism to ensure that freedom of association thrives. Unreasonably high thresholds of representativeness for the enjoyment of organisational rights prevents

[85] Case No 2352 para 166. Labour legislation of Algeria provided that a trade union in a single workplace shall be recognised as representative if it has 20% membership of all workers. See also Digest of Decisions (2006) 75 para 356.
[86] *Ibid* 157. See also Digest of Decisions (2006) 67 para 321. The CEACR is opposed to the imposition of a "monopoly situation" just to avoid the "proliferation of union organisations.'

trade unions especially minority trade unions from being able to organise and establish themselves in the workplace.

The amendments to section 21 of the LRA inasmuch as they enable commissioners to disregard the section 18 thresholds find themselves in a collision course in that majority trade unions would enjoin to enforce the collective agreements that they enter with employers. Whilst section 18 is still intact the enforcement of these collective agreements remains possible. The effect of collection agreements in terms of section 23(1) still remains and has the effect that whatever collective agreements are entered into in terms of section of 18 of the LRA these would bind minority trade unions despite the amendments that have been made.

Placing the principle of voluntarism at the forefront, South African policy makers have decided not to legislate the percentage requirement for determining a representative trade union and left it to the parties in the collective bargaining process. This begs the question whether this will still be the case when the commissioners are also granted powers to oust that which is left between the free will of parties to collective bargaining. The principle of the ILO that sets thresholds would pose a challenge unless if the criteria are objective, precise and pre-established to avoid abuse and bias. Section 18 of the LRA does not provide such criteria and may thus not conform to this principle of the ILO.

The South African situation with a Constitution that is supreme encourages the participation of minority political parties in political discourse. It is argued that this constitutional dispensation should on the same premise be the basis to consider allowing minority trade unions to enjoy organisational rights. This will enable them to "get a foothold in the workplace" or "get their foot at the door" as suggested by commentators[87] and ultimately enable minority trade unions to recruit and organise to reach the threshold level required for collective bargaining. Inasmuch as organisational

[87] Du Toit *et al* (2015) Du Toit has stated that the majority trade unions use section 18 of the LRA to block other unions from getting the foot hold in the workplace. Mischke (2004) 60. According to Mischke organisational rights "provide trade unions with the essential instruments not only to secure an organisational foothold in the business but also laying the foundations for a future collective bargaining relationship with the employer.

rights and the right to strike were meant to serve as a compromise and replace the duty to bargain within the context of voluntarism, the consequence of section 18 of the LRA may be to cause freedom of association and the right to engage in collective bargaining to be sacrificial lambs at the altar of majoritarianism. Further, section 18 does not distinguish between the enjoyment of organisational rights in for the benefit of individual member interests in disciplinary hearings or grievance proceedings as opposed to collective bargaining where the question of numbers is a primary consideration.

It may therefore not be correct to have the status of a trade union as a majority, sufficiently representative and minority trade union being the in terms of thresholds being the determiner for the enjoyment of some or all organisational rights. Organisational rights serves as the lifeblood of all trade unions irrespective of numerical strength and should not be seen as only serving collective bargaining, but also to be seen as being a manifestation of the right to freedom of association which is negatively impacted upon by the denial of organisational rights to minority trade unions in terms of section 18 of the LRA. The present organisational rights framework clearly does not see these rights as "serving to get the foot at the door" but rather as rights enjoyed by the trade unions when they are already inside the house. The majority trade union in terms of section 18 of the LRA is therefore able to dominate the block and prevent any minority trade union from being a threat to its dominance in any given block. The consequences of this dominance and the resistance thereto may have compromised labour peace as demonstrated by the "Marikana massacre" and general violence in the recruitment arena.[88] Within the context of South Africa and its accommodation within the ILO framework this effect of section 18 of the ILO might not be seen to be justifiable.

[88] *National Union of Mineworkers v Lonmin Platinum Comprising Eastern Platinum Ltd and Western Platinum Ltd and another* [2013] 10 BLLR 1029 (LC) 1033 and 1034. The two trade union NUM and AMCU have had a go at each in their quest to become the majority trade union. On getting majority status the majority trade union enters into a collective agreement with the employer to prevent the minority trade union form enjoying organisational rights.