

# Organisational rights for minority unions

## *Democratic rights and orderly collective bargaining*

by P.A.K. Le Roux

Does the Labour Relations Act, 66 of 1995 (LRA) adequately regulate the position where an employer is faced with the problem of two competing unions seeking organisational rights? This question was highlighted in two recent decisions of the Labour Court. Both decisions deal with the situation where the employer has already granted organisational rights to an existing union and a new union now seeks to obtain similar rights. These decisions will be discussed in this contribution.

To understand the implications of these decisions a brief overview of the relevant provisions of the LRA is necessary.

### The LRA provisions

These can be summarised as follows

- Section 19 provides that a union that is party to a bargaining council is entitled to require an employer that falls within the jurisdiction of the bargaining council to deduct union membership dues from the salaries of members of that union and to pay these dues

over to the union. Its officials are also entitled to access to the premises of an employer in order to recruit members, to communicate with members, or otherwise to serve the interests of its members if the employer's workplace falls within the jurisdiction of the bargaining council. These rights accrue automatically once the union becomes party to the council; they are not dependent on the union meeting any representivity requirement within any workplace.

- In terms of s20, organisational rights can be granted and regulated in a collective agreement. Once again, no representivity requirements need be met before an employer and a trade union are permitted to enter into such an agreement. Linked to this is the fact that, in terms of s 65(2)(a) of the LRA, trade unions may embark on a protected strike in order to force an employer to enter into such an agreement. It is possible that a union with relatively low levels of representivity which

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would not be entitled to claim organisational rights in terms of s 21 (see below) could still have sufficient power within the workplace to force an employer to grant these rights through strike action.

- If an employer refuses to grant one or more organisational rights, and a union does not want, or is unable, to exercise the strike option, the union may utilise the process set out in s 21 of the LRA. This involves referring a dispute to the CCMA and, if the dispute remains unresolved after conciliation, a CCMA commissioner issuing a binding arbitration award refusing or granting all or some of these rights. However, in order to qualify for these rights the union (or two or more unions acting jointly) must meet certain representivity requirements within the employer's workplace.
- If the union seeks the right to have trade union representatives, i.e shop stewards, recognised, or seeks to require the employer to disclose information, the union must represent the majority of the employees in the employer's workplace. No fixed representivity requirements are set for the granting of the other organisational rights – the union must simply be "sufficiently representative". What level of membership will be regarded as being representative is determined on a case-by-case basis by CCMA commissioners taking into account certain guidelines provided in the LRA itself.
- However, the discretion of the CCMA commissioners to determine representivity is limited in one important and currently controversial respect. Section 18 of the LRA permits an employer and a trade union whose members constitute a majority in the employer's workplace to enter into a collective agreement which sets thresholds of representivity for the acquisition of the organisational rights that do not require majority representivity. These are usually referred to as "threshold agreements".

### **POPCRU v Ledwaba NO Others (Unreported JR 636/2012 5/9/2014)**

In this case the Police and Prisons Civil Rights Union (POPCRU) sought to review and set aside a decision of a CCMA commissioner in terms of which another union, referred to in the judgment as SACOSWU, was granted certain organisational rights.

At the relevant time POPCRU had as its members a majority of the employees employed in the Department of Correctional Services (the Department) and had been recognised by the Department. SACOSWU was a small union which had some 1479 members out of a total workforce of some 40 000 employees.

The Department, as employer, is party to the collective bargaining structures that apply to the Public Sector. It appears that one of these structures is the Departmental Bargaining Council (DBC), which deals with issues specific to the Department and its employees. The Department, POPCRU and one other union are represented on the DBC. The DBC has entered into various collective agreements. One of these sets certain thresholds of representivity for the admission of trade unions to the DBC. Another regulates the granting of organisational rights and provides, inter alia, that a union will only be entitled to have trade union dues deducted from members' salaries if it is a member of the DBC.

During the course of 2009 SACOSWU approached the Department and requested that it be granted organisational rights. After an initial refusal and various interventions, the Department granted SACOSWU the right of access to its premises and the right to have trade union dues deducted from its members' salaries – despite SACOSWU not being a member of the DBC and not enjoying the degree of representivity set by the DBC. This was reflected in a collective agreement entered into between the parties.

POPCRU challenged the validity of this collective agreement. It did so on the basis that it contravened the collective agreements en-

tered into within the DBC. The Department argued that the agreement was valid because there was nothing in law preventing the Department and SACOSWU from entering into such an agreement, provided that it did not prevent POPCRU from exercising its rights. SACOSWU argued that the agreement that it had entered into with the Department was one as envisaged in s 20 of the LRA.

This dispute was referred to arbitration. The arbitrator found that the agreement was binding. In coming to this decision the arbitrator relied on the decision of the Constitutional Court in **National Union of Metalworkers of South Africa & Others v Bader Bop (Pty) Ltd & Another** (2003) 24 ILJ 305 (CC). The arbitrator found that this decision was authority for the view that the LRA should not be interpreted in such a manner as to preclude minority unions from obtaining organisational rights through collective bargaining and that the agreement reached was one that was contemplated in s 20 of the LRA. Furthermore, denying SACOSWU the right to enter into such a collective agreement would infringe s 23(5) of the Constitution, which provides for the right to engage in collective bargaining.

### Collective bargaining and strike action

It was this reasoning that was challenged on review in the Labour Court. Central to the Court's decision was its analysis of the relationship between collective bargaining, collective agreements as the outcome of the collective bargaining process and organisational rights. The Court accepted the overriding importance of collective bargaining and collective agreements.

*"[24] Organisational rights are not an end in itself but a means to an end. It is part and parcel of the process of collective bargaining. Similarly, the right to strike is not an end in itself but a means to an end also as part and parcel of the process of collective bargaining. There is a logical sequence to the collective bargaining proc-*

*ess, of which organisational rights, collective agreements and ultimately the right to strike plays its own part. At the start of a collective bargaining process, it is the organisational rights that enable the trade union to have a proper platform from which to engage the employer in collective bargaining. In the collective bargaining process itself, the objective is then to conclude a collective agreement and if concluded, these kinds of agreements are given special status and priority. If a collective agreement cannot be concluded, then the right to strike at the other end of the collective bargaining process spectrum is the sharp end of the spear to seek to compel the employer to conclude the collective agreement sought. All of these issues together form the makeup of the process of collective bargaining, as a whole."*

In support of the importance of collective agreements, the Court pointed out that a collective agreement can regulate or even preclude the right to strike, can amend certain basic conditions of employment found in the Basic Conditions of Employment Act, 75 of 1997, can contract out of the dispute resolution provisions of the LRA, in the case of closed shop agreements can compel an employee to belong to a specific union or unions and, in certain circumstances, can be extended to employees who are not members of the union or unions that entered into the agreement.

This led the Court to the conclusion that a collective agreement concluded with a majority union which regulates, or even excludes organisational rights being provided to a minority union, must take precedence over the rights of the minority union.

*"[28] I am, therefore, of the view that collective bargaining itself and its ultimate result, being the conclusion of a collective agreement, must always have preference, especially where it is concluded between an employer and a majority trade union. This means that as a matter of principle, a collective agreement concluded with a majority trade union that regulates or even ex-*

*cludes organisational rights of minority trade unions in the particular employer, must have preference over the organisational rights such minority union may be entitled to in terms of the Constitution or the LRA. Organisational rights must have a purpose and no such purpose can be achieved by affording organisational rights to a minority trade union where an employer and a majority trade union have already fully regulated all their affairs relating to their relationship, and the structure of collective bargaining, in a collective agreement made binding on all the employees in the employer. To simply afford organisational rights without a purpose or reason would make organisational rights an end in itself and not a means to an end,*

The Court then considered whether the Constitutional Court's decision in **Bader Bop** was relevant. It argued that the **Bader Bop** decision did not deal with the question whether a minority union could be deprived of organisational rights by means of a collective agreement entered into with a majority union. It dealt with the question whether a minority union could strike in order to obtain these rights in the situation where it would not be entitled to these rights (by reason of lack of representivity) in terms of s 21.

It then pointed out that, in this case, no such strike could take place because it was prohibited by virtue of the provisions of s 65(3)(a) of the LRA, which provides that a person may not embark on a protected strike if that person is bound by a collective agreement which regulates the issue in dispute. In this case the collective agreements entered into within the DBC regulated the granting of organisational rights and SACOSWU and its members were bound by them. The granting of these rights would lead to the Department breaching the agreement.

Without the right to strike accruing to SACOSWU on the issue of organisational rights "there was no point" to collective bargaining on the issue and it was therefore not entitled to bargain on the issue for as long as the DBC collective agreements remained in place. This

conclusion was supported by two further arguments, namely –

- Collective bargaining and strike action should be for a legitimate purpose. Here the legitimacy of the collective agreement entered into between the Department and SACOSWU "was dispelled" by the fact that SACOSWU was bound by the DBC agreement.
- The demand by SACOSWU for organisational rights was unlawful because it would require the Department to breach the DBC collective agreements. According to the Court, the reliance on the **Bader Bop** decision by the arbitrator constituted a material error of law and rendered the award reviewable.

## The applicability of s 20

Finally, the Court dealt with SACOSWU's argument that it was entitled to enter into the collective agreement because of the provisions of s 20 of the LRA. Its arguments in this regards can be summarised as follows –

- Whilst it is clear that a minority union is entitled to seek to bargain collectively and to enter into a collective agreement on the issue of organisational rights there is nothing special or unique about such a collective agreement. It remains a collective agreement subject to the provisions of the LRA.
- There were two sets of collective agreements entered into by the Department in terms of s 20. One was entered into with a majority union, the other with a minority union.
- In these circumstance the agreement entered into with SACOSWU was incompatible with those entered into with POPCRU within the DBC.
- The first reason for this was that the relevant DBC agreement was a threshold agreement as envisaged in s 18 of the LRA setting certain representivity requirements that had to be met before SACOSWU was

entitled to organisational rights. SACOSWU was bound by this agreement and did not meet these requirements.

- The DBC agreements entered into with POPCRU were entered into prior to the SACOSWU agreement. These agreements created an “existing dispensation” which the SACOSWU agreement sought to infringe. This could not be done.

*“ [56]... What already exists and continues to exist, as a general proposition, must be upheld.”*

- The DBC agreements entered into with POPCRU had been extended in terms of s 23(1)(d) of the LRA and were binding on SACOSWU and its members. (Section 23(1)(d) permits an employer and a union to extend a collective agreement they have entered into to employees who are not members of that union, provided that the union has as members the majority of the employees in the workplace.)
- The DBC agreements were, because they were entered into with a majority union, higher in the hierarchy than an agreement with a minority union and must have preference over the latter.

These views are summarised in the following excerpt -

*My conclusion thus is that because of the existence of POPCRU as a recognised and majority representative trade union in the Department and because of the existence of already concluded collective agreements with POPCRU determining thresholds of representativeness and organisational rights, and which have been made applicable and binding on non parties, the Department and SACOSWU were not entitled to conclude a collective agreement on organisational rights. Even if I am not correct in this conclusion, and the Department and SACOSWU were as a matter of general principle entitled to conclude the SACOSWU collective agreement, this agreement would still be invalid and unenforceable for these very same reasons. To apply this agreement would negate and breach the POPCRU collective agreements. It would also fly in the*

*face of Sections 18(1) and 23(1)(d) of the LRA in terms of which SACOSWU and/or its individual members are bound by such POPCRU collective agreements.*

*Added to this is the fact that POPCRU is a majority, representative union. These issues must therefore taint the SACOSWU collective agreement even if competently concluded, with invalidity.”*

Snyman AJ therefore set aside the arbitrator’s award and substituted it with an order to the effect that the SACOSWU agreement was declared to be invalid and that SACOSWU was not entitled to exercise organisational rights unless it met the degree of representivity set by the DBC agreements while these agreements remained in force.”

### **Transnet SOC Ltd v National Transport Movement & Others (Unreported J2301/13 21/10/2013)**

In this case it was an employer that sought to uphold an existing collective agreement with regard to the acquisition of organisational rights; this in the context where a minority union sought to acquire these rights through strike action.

During the course of 2009 Transnet entered into a recognition agreement with a number of unions representing its employees. This agreement set out certain thresholds of membership required for the acquisition of organisational rights. In 2012 the National Transport Movement (NTM), a breakaway union from one of the unions that were party to the recognition agreement, requested Transnet to grant it organisational rights. Transnet refused to grant these rights because the union membership fell far below the membership set in the recognition agreement.

The NTM then referred a dispute to the CCMA in this regard. At the conciliation proceedings Transnet still opposed the granting of organisational rights on the basis that it was bound by the recognition agreement entered into with the other unions and that to grant these rights would lead to a breach of this agreement. The NTM

NTM gave notice of its intention to resume the strike. Transnet then approached the Labour Court for an order interdicting the strike. It argued that the strike was unprotected because it sought to compel Transnet to perform an unlawful act, ie to breach the collective agreement with the other unions.

Once again, the **Bader Bop** decision came to the fore. Transnet argued, however, that the decision did not apply in this case because there was a binding collective agreement in place that regulated when organisational rights would be granted and that this precluded a protected strike.

Judge van Niekerk accepted that the effect of the **Bader Bop** decision was that a minority union may seek to acquire organisational rights through collective bargaining and ultimately through strike action. However, he also accepted that this right could be limited by a collective agreement. Whether this was the case would depend on the terms of the agreement and the provisions of s 65 of the LRA.

As indicated above, s 65 provides, *inter alia*, that employees are prohibited from striking if they are bound by a collective agreement that regulates the matter in respect of which they want to strike. The Court found that the NTM was not a party to the recognition agreement and was therefore not bound by the agreement and that there was no evidence to show that the agreement had been extended in terms of s 23(1)(d). The employees were therefore not precluded from striking on this issue.

Transnet also argued that the recognition agreement constituted a threshold agreement as envisaged in s 18 of the LRA, this, it was argued was binding on the the NTM. The Court also rejected this argument on the basis that it did not meet the requirements of s18. This envisages that such an agreement can only be entered into by a single majority union. In this case the agreement had been entered into by four unions. However, and importantly, it then went on to say that -

*“[18] Secondly, even if s 18 were to permit agreements between an employer and two or more minority unions acting jointly to bind non-party unions and fix thresholds that they are required to meet to gain the organisational rights referred to in sections 12, 13 and 15, there is no express limitation in s 64 or s 65 which would preclude a minority union demanding those rights from seeking to bargain collectively to acquire them, or from exercising its right to strike should the employer resist the demand.”*

### Comment

It seems that the arguments made in the **POP-CRU** decision were not referred to in argument by the parties in the **Transnet** decision. It is perhaps true to state that the issues in the two cases differed. However, what is common to both decisions is a consideration of the question whether a collective agreement that sets thresholds for the acquisition of organisational rights can bind unions (and their members) that were not a party to the agreement.

In so far as reliance on s 23(1)(d) is concerned Syman AJ found this provision prevented the employees from striking. Judge van Niekerk did not have to consider the effect of this section. In so far as reliance was placed on s 18, Snyman AJ found that it had the effect of binding the minority union. The view of van Niekerk J is less clear. The effect of the decision seems to be that although such an agreement does not prevent a minority union from striking, it will be relevant if a commissioner is called to arbitrate a dispute in terms of s 21 of the LRA.

Also of importance, is Snyman AJ’s unequivocal endorsement, with reference to decided cases, of the principle of majoritarianism, especially in the situation where at least aspects of this principle are being challenged. ■

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# The payment of severance benefits

## *When entitlement is disputed*

by P.A.K. Le Roux

Two interesting decisions dealing with the payment of severance benefits are dealt with in this contribution. The first deals with what constitutes a reasonable offer of alternative employment? The second deals with the question whether an employee can be required to repay a severance package paid to him if he is subsequently reinstated after successfully claiming unfair dismissal.

The first decision deals with s 41(2) of the Basic Conditions of Employment Act, 75 of 1997 (BCEA), which provides that an employee who is dismissed for reasons based on an employer's operational requirements is entitled to a severance package of at least one week's remuneration for every completed year of continuous service with that employer. This general principle is qualified in two ways by other provisions of the BCEA.

The first is s 84 which provides that, for the purposes of determining a person's length of employment for the purposes of applying any provision of the BCEA, any previous period of employment with the same employer must be taken into account if the break in service is less than one year. However, any payment made during a previous period of employment must be taken into account in determining the employee's entitlement to payment.

The second, which is of importance to this contribution, is that s 41(4) provides that an employee who unreasonably refuses to accept an offer of alternative employment with that employer or any other employer is not entitled to severance pay in terms of s 41(2).

The facts of the case in the decision of the LAC in **Astrapak Manufacturing Holdings (Pty) Ltd t/a East Rand Plastics v Chemical Energy Paper Printing Wood & Allied Workers Union** (2014) 35 ILJ 140 (LAC) illustrate how complex and difficult restructuring exercises that lead to retrenchments can

be and how difficult it can be to deal with the substantive fairness of such retrenchments. For this reason alone the decision of the LAC and that of the Court *a quo* is interesting. For our purposes, however, the importance of the decision lies in how the LAC dealt with the question of what constitutes an unreasonable refusal by an employee to accept alternative employment.

The employees in this matter challenged the fairness of their retrenchments in the Labour Court. The dismissals were found to be fair but the Court, acting in terms of s 41(10) of the BCEA (which gives it the power to inquire into and determine the amount of severance pay to which an employee is entitled) considered whether the employer had been correct in refusing to pay the employees a severance package on the ground that it had offered them alternative employment in the restructured business and that they had unreasonably refused to accept this offer. The Labour Court found that they had not acted unreasonably in refusing to accept alternative employment.

The employer appealed against this aspect of the decision to the LAC. It argued that:

- although some employees would receive a lower salary package if they accepted alternative employment, others would receive higher packages;
- the alternative jobs entailed them working on fewer days per week, and that they thus incurred less travelling expenses;
- many of the employees would have earned higher salaries than those they previously received because wage increases prescribed by a collective agreement entered into by the Metal and Engineering Industries Bargaining Council would have come into force a few days after the restructuring

came into effect; and

- the fact that the new shift system implemented as part of the restructuring would lead to employees working less overtime and therefore earning less overtime pay was irrelevant because the employees had no right to work overtime.

The Court referred to its earlier decision in **Irvin & Johnson Ltd v CCMA & Others** (2006) 27 ILJ 935 (LAC) where the underlying rationale for s 41(2) was discussed. The Court confirmed that the purposes of this section were:

- to discourage employees from unreasonably rejecting an alternative offer of employment simply in order to have “cash in their pockets”; and
- the BCEA sought to incentivise employment and therefore also sought to incentivise the employer to take the necessary steps to seek to provide alternative employment for employees.

These reasons were regarded as “dispositive” of the issue. The LAC came to the conclusion that those employees who were offered an increased package, or at least one “approximately similar”, acted unreasonably by not accepting the offer of alternative employment. The wage increases that came into effect by virtue of the new collective agreement should be taken into account when making this comparison. Overtime payments that were lost as a result of the new shift system should not be taken into account when making the comparison – this was because the employees did not have an entitlement to work overtime. As far as the employees who would not have received a wage increase were concerned, the Court had the following to say –

*“[25] Although it is difficult to demarcate precisely when the offer can be refused by an employee without the danger of s 41(4) of the BCEA being invoked against him or her, in my view, once an employee is faced with a wage decrease, it cannot be said that he or she should not have the choice of refusing the offer and seeking employment elsewhere, notwithstanding the extremely difficult conditions which pertain to employment in general within the South African economy.”*

In **Coca Cola (Pty Ltd v Ngwane NO & Others** (2013) 34 ILJ 3155 (LC) the employee concerned

had been retrenched and paid a severance package substantially higher than that he was entitled to in terms of s 41(2). Despite this, he claimed that he had been unfairly dismissed and persuaded a CCMA commissioner that this was the case. The commissioner ordered the retrospective reinstatement of the employee on the basis that he was entitled to back pay for the full period of retrospectivity. This meant that he received back pay amounting to R 5,300,600.72 plus a severance package of R 1,300,920.00.

Despite the fact that the employer, during the arbitration proceedings, argued that the amount of the severance package should be taken into account when considering the remedy to be granted the commissioner failed to do so. On review the court found that this failure was reviewable.

It did so in the following terms –

*“[24] ... In my view, in the light of his decision to reinstate the third respondent with backpay, the commissioner was obliged to deal with the repayment of the severance as this payment occurred only as a result of the retrenchment of the third respondent. Once the basis for that dismissal had been addressed by a remedy of reinstatement with full backpay, it was incumbent on the first respondent to deal with the severance aspect. The decision of the commissioner not to make any order with regard to the severance package, in my view, was not a decision which another reasonable decision maker could reach in the circumstances. Moreover, the only justification apparent from the award, for the commissioner electing not to deal with the issue of the severance payment, is that 'this [was] not the case before' him. This is not a situation where a commissioner has failed to identify good reasons for his decision. In regard to his failure to pronounce on the severance pay, I am of the view that the applicant has succeeded in establishing that both the reasons (such as they are) and the result of the award are unreasonable. There can be no justification for a result where the third respondent is reinstated with full backpay and retains a severance package which far exceeds the amount of his backpay. It is a decision that a reasonable decision maker would not reach.”* ■

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