

**DETERMINING THE THRESHOLD FOR
ORGANIZATIONAL RIGHTS: THE LEGAL
QUAGMIRE FACING MINORITY UNIONS
RESOLVED –**

***South African Post Office v Commissioner
Nowosenetz No (2013) 2 BLLR 216 (LC)****

1 Introduction

The issue of organizational rights facing minority unions has been a quagmire since the advent of the Labour Relations Act 66 of 1995 (hereinafter “the LRA”). This quagmire exists, notwithstanding the fact that the Constitution affords every trade union the right to engage in collective bargaining (s 23 of the Constitution, 1996).

The acquisition of organizational rights by trade unions plays a crucial role in as far as collective bargaining is concerned. It is through collective bargaining that unions are able to negotiate with employers regarding the terms and conditions of employment (*Cf* Visagie, Uys, Linde and Havenga “A Comparative Analysis of Current Trade Union Trends in the European and South Africa” 2012 6(44) *African Journal of Business Management* 11095–11108; Vettori “Alternative Means to Regulate the Employment Relationship in the Changing World of Work” 2005 Unpublished LLD Thesis University of Pretoria 88–105 <http://upetd.up.ac.za/thesis/pdf> (accessed 2012-11-22)).

Commentators have often viewed the LRA as favouring larger unions and as conferring clear advantages on unions with majority support at the industry level (*Cf* Brassey “Labour Law After Marikana: Institutionalized Collective Bargaining in South Africa Wilting? If So, Should we Be Glad or Sad” 2013 34 *ILJ* 826–834; Ngcukaitobi “Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana” 2013 34 *ILJ* 852–853; and Macun “Does Size Matter? The Labour Relations Act, Majoritarianism and Union Structure” 1997 *Law Democracy and Development Journal* 69–81). Chapter III of the LRA regulates collective bargaining. Whereas this chapter ostensibly promotes a pluralistic approach to organizational rights it is unequivocally biased towards majoritarianism.

* This case note is partly based on an article written by the author together with Kruger J in 2012, which has been accepted for publication in the *Potchefstroom Electronic Journal*, 2013. Nevertheless, this note considers the judgment of the Labour Court in the case of *South African Post Office v Commissioner Nowosenetz No (2013) 2 BLLR 216 (LC)*, and the recent developments and trends concomitant to the issue of organizational rights relating to minority unions.

This is the case despite minority trade unions fulfilling an important role in the current labour system especially when it comes to the balance of power in the employment arena. In light of the above, the legal quagmire faced by the minority unions in the quest for acquiring organisation rights in terms of the relevant provisions of the LRA is clearly illustrated by the decision in *South African Post Office v Commissioner Nowosenetz No* ((2013) 2 BLLR 216 (LC) (hereinafter “ the *South African Post Office* case”)).

2 Facts

These were the facts before the court in *South African Post Office* case. In the middle of 1996 and 2011 the applicant (South African Post Office), together with the fourth respondent (Communication Workers Union “CWU”), concluded four collective agreements in which the parties agreed to various representivity thresholds which were required in order for any registered trade union to be accorded the organizational rights provided in sections 12, 13 and 15 of the LRA. At the arbitration proceedings the third respondent (South African Postal Workers Union “SAPWU”) did not dispute the fact that the applicant and fourth respondent, as the majority trade unions at the workplace, were entitled to agree on the collective agreements setting the threshold of representivity.

The South African Post Office, together with CWU and SAPWU, concluded two collective agreements, namely, the Procedural and Recognition Agreement concluded on 31 January 2008 (“the 2008 agreement”) and the Procedural and Recognition Agreement concluded on 19 January 2011 (“the 2011 agreement”). In terms of the 2008 agreement the union shall be recognized if it upholds the threshold of 30% + 1 of the employees in the bargaining unit who are members of the union. In mid-2009 SAPWU approached the South African Post Office and requested certain organizational rights. At the time, the South African Post Office declined to grant these organizational rights to SAPWU.

Consequently SAPWU referred an organizational-rights dispute to the second respondent (“CCMA”) in late 2009. A settlement agreement was concluded to settle this dispute on the basis that 30% + 1 was the required threshold for the exercise of the organizational rights referred to in sections 12, 13 and 15 of the LRA. At the time, it was agreed that SAPWU’s membership exceeded this threshold. However, SAPWU was not granted the organizational rights referred to in sections 12, 13 and 15 of the LRA. It appears that the reason for this was that, notwithstanding the signature of the settlement agreement, the South African Post Office formed the view that the representivity threshold for purposes of the organizational rights referred to in sections 12, 13 and 15 of the LRA was in fact 40% + 1. The basis for this was an agency-shop agreement dated 1 November 2001 that had been concluded between the South African Post Office and CWU which provided for this threshold. In May 2010, the South African Post Office launched an application in the Labour Court to set aside the 2009 settlement agreement. In June 2010, SAPWU referred a further dispute to the CCMA relating to the interpretation and application of the settlement agreement. CWU subsequently also referred a dispute to the CCMA.

The two referrals to the CCMA were consolidated and the South African Post Office, SAPWU, and CWU agreed at a pre-arbitration conference that the following issues were to be decided by the commissioner. Firstly, whether the threshold for representativeness was 30% + 1 as per the Procedural and Recognition Agreement dated 31 January 2008. Secondly, whether the threshold for representativeness was 40% + 1 as per the Agency Shop and Threshold Agreement dated 1 November 2001. Thirdly, whether the same organizational rights enjoyed by CWU could be enjoyed by SAPWU as per the Procedural and Recognition Agreement dated 31 January 2008. Fourthly, whether the Procedural and Recognition Agreement dated 19 January 2011 would supersede and amend all other previous threshold agreements. Fifthly, whether the Applicant was entitled to exercise any organizational rights currently, in terms of the Procedural and Recognition Agreement dated 19 January 2011. Lastly, whether SAPWU could retrospectively enjoy organizational rights from the date it attained the 30% + 1 threshold.

In terms of the pre-arbitration minutes, CWU, SAPWU agreed that the South African Post Office should withdraw the entire Labour Court application lodged under case number J1941/10 which was aimed at setting aside the settlement agreement concluded with South African Post Office on 6 May 2010. The SAPWU and the South African Post Office agreed to set aside the settlement agreement entered into on 6 May 2010. On 19 January 2011, South African Post Office and CWU entered into the 2011 agreement, which dealt, *inter alia*, with the threshold for the exercise of the organizational rights referred to in sections 12, 13 and 15 of the LRA, and set the threshold at 40%+1 ("the Agency Shop and Threshold Agreement dated 1 November 2001").

The 2011 agreement provided that the Company and the Union, who represented a majority of the employees (50% + 1) in the bargaining unit, where this agreement would apply, hereby establishing a threshold of representativeness of 40% + 1 threshold for the purpose of any union seeking to exercise one or more of the organizational rights referred to in sections 12, 13 and 15 of the LRA ("the 2011 agreement clause 3.2.3"). Furthermore, the 2011 agreement also provided that this agreement would also amend and supersede any threshold of representativeness that was contained in any other previous agreement ("the 2011 agreement clause 14.2").

After having considered the matter at the arbitration, the CCMA ordered that the threshold of representativeness during 2009/2010 at the time when SAPWU applied for organizational rights from the South African Post Office in terms of section 21 of the LRA, was 30% + 1 as provided for in the recognition agreement between the South African Post Office Ltd and CWU dated 31 January 2008. The CCMA also held that the threshold in the 2011 agreement between the South African Post Office and CWU superseded all other previous threshold agreements but it did not operate retrospectively nor did it affect the attainment by SAPWU of the threshold that was valid as at November 2009, which was 30 + 1. SAPWU can enjoy organizational rights retrospectively from the date that it attained a 30% + 1 threshold, being 9 November 2010 or earlier if it was able to verify this with the South African Post Office. It is on this basis that the South African Post Office

challenged the commissioner's award. In this case the matter had only come before the Labour Court in the context of a review application (s 145 of the LRA). As the author have stated above, the focus of this case note is on the position faced by minority unions in cases dealing with the determination of threshold for organizational rights.

3 The judgment of the Labour Court

In this judgment the Labour Court did not address the interpretation of section 18 of the LRA, but rather focused on the procedural aspects relating to the review application brought in terms of section 145 of the LRA. In this note, I intend to discuss the implications of section 18 of the LRA on minority unions, and not the merits of the review application. However, it is important to discuss briefly the decision of the court in order to lay the foundation for the discussion on the application and interpretation of section 18 of the LRA.

The South African Post Office contended that the commissioner's finding was unreasonable, unjustifiable and/or irrational, and that the commissioner failed to apply his mind to material issues, focused upon irrelevant considerations, ignored relevant considerations, committed error of law, and exceeded his power in his final determination (*South African Post Office* par 17). In support of the review application the South African Post Office relied on the following issues: Firstly, at the time of the arbitration, the 2011 agreement had superseded all previous agreements by novation, and thus SAPWU's claim was novated. Secondly, organizational rights cannot practically be exercised retrospectively, rendering the award reviewable (*South African Post Office* par 18).

During the hearing of this application, counsel for SAPWU conceded that the 2011 agreement was valid and that clause 14.2 of that agreement constituted a novation of the representivity threshold contained in previous collective agreements between South African Post Office and CWU. SAPWU's primary submissions in opposing the review application were that notwithstanding the concessions made, the novation did not apply retrospectively, and the 30%+1 threshold contained in the 2008 agreement applied when determining SAPWU's right to organisational rights at November 2009 (*South African Post Office* par 20). Counsel for SAPWU also argued that organizational rights, specifically in respect of the deduction of trade-union subscriptions, could be implemented practically retrospectively because it only required the quantification of an amount of money to be paid to SAPWU. Counsel for SAPWU accordingly argued that no valid ground of review existed, and that the review application should be dismissed.

In considering the submissions and arguments raised by counsel for the South African Post Office and SAPWU respectively, the court relied on the following fundamental questions: Firstly, whether clause 14.2 of the 2011 agreement, read with clause 3.2.3 of the 2011 agreement, constituted a novation of the representivity threshold that existed immediately prior to the conclusion of the 2011 agreement. Secondly, whether the novation applied to third parties who were not party to the 2008 agreement or the 2011

agreement. Thirdly, the effect of novation on the representivity threshold applicable at November 2009 (*South African Post Office* par 22).

In analysing the effects of novation on the collective agreements entered into by the South African Post Office, CWU, and SAPWU. The court referred to the decision of *Tauber v Von Abo* (1984 (4) SA 482 (E)), where Van Rensburg J described novation as the replacing of an existing obligation by a new one, the existing obligation being discharged by the new obligation. The Labour Court in its judgment referred to the principles of novation which are firmly established on our law. In *Swadif (Pty) Ltd v Dyke NO* (1978 (1) SA 928 (AD)), Trengove AJA held that when parties novated they intended to replace a valid contract by another valid contract (*Wessels Law of Contract in South Africa Vol 2 2ed* (1951) par 2370–2379; *Acacia Mines Ltd v Boshoff* 1958 (4) SA 330 (AD) 337; and *Trust Bank of Africa Ltd v Dhooma* 1970 (3) SA 304 (N) 307).

In applying these principles to the present matter to determine whether a novation had occurred, the court considered the wording of the 2011 agreement. Clause 14.2 of the said agreement provided that the 2011 agreement would also amend and supersede any threshold of representativeness that was contained in any other previous agreement. The court held that the wording of the 2011 agreement clearly disclosed an intention to replace any existing representivity threshold with a new one. Accordingly, any representivity threshold in existence at the time the 2011 agreement was concluded was novated by the provisions of the 2011 agreement (*South African Post Office* par 26).

In addition, the court had to deal with the question of whether the novation of obligations between two contracting parties, could have an impact on the rights of a third party to whom a contractual provision had had application. In particular, where a collective agreement between two contracting parties set a representivity threshold that applied in respect of third parties and a novation occurred which varied that threshold.

The court made it clear that novation abolished not only the obligations between the contracting parties, but all obligations arising from a novated contract, including obligations that applied to parties other than the contracting parties. In this regard the court stated that the general effect of novation was to extinguish the debt asked by payment. All privileges and accessories vanished with it (*South African Post Office* par 28). In its judgment the court set aside and reviewed arbitration award of the CCMA Commissioner. According to the court the provisions of the 2011 agreement novated the representivity threshold contained in any collective agreements concluded between the South African Post Office and the CWU prior to the conclusion of the 2011 agreement. The 40% + 1 representivity threshold contained in the 2011 agreement, applied to SAPWU's request for the organizational rights referred to in sections 12, 13 and 15 of the LRA.

4 Comment

4.1 *The proposed amendments to the law on organizational rights*

Before dealing with the comment on this case, it is apposite to reflect briefly on the proposed amendments to the law on organizational rights. In describing the amendments to organizational rights and collective bargaining in general terms, Ngcukaitobi argues that any legislative amendment to organizational rights must adapt to the realities of the current collective bargaining (Ngcukaitobi 2013 34 *ILJ* 852–855). He states that, whilst the LRA encourages and facilitates collective bargaining, union leaders are able to negotiate improved living conditions for their members through collective bargaining structures. He further states that the legislative framework must provide in real terms for this ability to all leaders and that smaller unions must be included in labour bargaining so that all workers may have a voice.

It is within this context that the Government sought to introduce amendments to change circumstances under which a Commissioner of the CCMA might grant organizational rights where trade unions referred disputes relating to these rights. In terms of the proposed amendments, a Commissioner might consider the composition of the workforce, including the extent to which employees were engaged in non-standard working arrangements. Ngcukaitobi asserts that this provision is aimed at promoting the organization of those in atypical work situations including being placed in employment through temporary employment services.

The proposed Bill seeks to introduce a new sub-paragraph (v) to subsection (8)(b), which states that where there is an unresolved dispute regarding whether the trade union is representative or not, a commissioner must consider, “the composition of the workforce in the workplace taking into account the extent to which there are employees assigned to work by temporary employment services, employees engaged on fixed-term contracts, part-time employees or employees in other categories of non-standard employment ...” (Media Briefing by Minister of Labour on the Bills Amending the Labour Relations Act and the Basic Conditions of Employment Act 22 March 2012 -briefing-by-minister-of-labour-on-the-bills-amending-the-labour-relations-act-and-the-basic-conditions-of-employment-act <http://www.sabinetlaw.co.za/labour/legislation> (accessed 2013-10-11)).

4.2 *Comment on the South African Post Office case*

Notwithstanding these amendments, I now comment on the Labour Court judgment in the abovementioned case. Inasmuch as the decision of the Labour Court was based on section 145 of the LRA. It is argued that the court could have used this opportunity to interpret the application of section 18 of the LRA on minority unions. Substantively, section 18 of the LRA leaves much to be desired in the following respects. Firstly, the threshold required to determine the establishment of organizational rights is questionable. Secondly, the constitutionality of section 18 of the LRA must be examined against the International Labour-law standards. One of the major

functions of trade unions is that of procuring better working conditions and wages for its members.

Vettori asserts that the most important instrument of serving the interest of the members of trade union is by collective bargaining (Vettori 2005 Unpublished LLD Thesis University of Pretoria <http://upetd.up.ac.za/thesis/pdf> (accessed 2012-11-22); International Labour Organisation Report (ILO Report) on “Freedom of Association in Practice: Lessons Learned” International Labour Conference 97th Session (2008) 5–17 <http://www.ilo.org> (accessed 2012-11-22); and *cf* Ngcukaitobi 2013 *ILJ* 842–843).

In order to have a better understanding of section 18 of the LRA, a brief discussion of majoritarianism and pluralism is warranted. Baskin and Satgar (“South Africa’s New Labour Relations Act: A Critical Assessment and Challenges for Labour” 1995 National Labour Economic and Development Institute Johannesburg) note that:

“the LRA is profoundly majoritarian. Unions with majority support get distinct advantages. Small, minority and craft-based unions are disadvantaged. The message for unions is clear ... grow or stagnate”.

Pluralism is defined as “a term used by the predecessor of the LRA to describe a model of collective bargaining that, in contrast to the majoritarian model grants recognition to more than one trade union, provided they are sufficiently representative, of a defined bargaining unit” (Du Toit, Bosch, Woolfrey, Godfrey, Cooper, Giles, Bosch and Rossouw *Labour Relations Law: A Comprehensive Guide* 5ed (2006) 246–247). Being regarded as representative allows trade unions to claim the organizational rights in terms of sections 12 and 13 of the LRA. Bendix refers to the pluralist approach as central to the conduct of the labour relationship (Bendix *Industrial Relations in South Africa* 4ed (2001) 253). The pluralist approach presupposes that with different trade unions representing different interests, power will be distributed in a manner that is fair. It will contribute thereto that the unbridled exercise of power by one trade union is avoided because of the countervailing power of another trade union.

The model of majoritarianism, on the other hand, bestows a degree of primacy on unions with majority membership (50%+1) in a workplace. Besides the rights contained in sections 12 and 13 of the LRA, a number of empowering provisions in chapter III of the LRA exist. It is argued that the provisions in chapter III of the LRA are designed to promote a majoritarian system of collective bargaining in which a number of strong unions prevail as bargaining agents, are at the heart of the problems facing minority trade unions.

4.3 *Analysis of section 18 of the LRA in view of the provisions of section 21(8)(b) of the LRA*

Section 21 of the LRA sets out how organizational and collective bargaining rights in the LRA may be exercised. When a registered trade union wishes to exercise its collective bargaining rights, section 21(1) provides that such a trade union may notify its employer of its intention to do so in a workplace. Disputes arising from the exercise of section 21 rights must be referred to

arbitration before the CCMA. Subsection (8)(b) sets out criteria for consideration by the CCMA in the event that such a referral is made, which the CCMA is obliged to consider if the employer seeks to withdraw any of the organizational rights conferred on trade unions in terms of the LRA. This provision reads:

“If the unresolved dispute is about whether or not the registered trade union is a representative trade union, the commissioner must seek to minimise the proliferation of trade union representation in a single workplace and, where possible, to encourage a system of a representative trade union in a workplace; and to minimise the financial and administrative burden of requiring an employer to grant organisational rights to more than one registered trade union, the commissioner must consider; the nature of the workplace; the nature of the one or more organisational rights that the registered trade union seeks to exercise; the nature of the sector in which the workplace is situated; and the organisational history at the workplace or any other workplace of the employer; and may withdraw any of the organisational rights conferred by this Part and which are exercised by any other registered trade union in respect of that workplace, if that other trade union has ceased to be a representative trade union.”

It is clear from this section that mere numbers are not the only consideration and that the history of the workplace and the membership therein are, amongst others, significant factors to be considered before a trade union's representative status is revoked.

4 4 The impact of section 18 of the LRA on minority trade unions

The purpose here is to evaluate the impact and effect of the provisions of section 18 of the LRA on minority trade unions. South Africa's constitutional democracy is built on a number of cornerstones. Important cornerstone, are those of human dignity, the achievement of equality and the advancement of human rights and freedoms. Equality before the law is a fundamental right which is enshrined in section 9 of the Constitution. Despite this constitutional right, it appears that equality before the law for all trade unions is often in practice not seen.

In as far as the right to establish thresholds of representativeness is concerned section 18(1) of the LRA provides that 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 threshold of representativeness required in respect of one or more of the organizational rights referred to in sections 12, 13 and 15 of the LRA.

It follows from the discussion above that minority unions are often faced with a situation where majority trade unions and employers agree to establish a threshold for representativeness in terms of section 18(1) of the LRA, which is unreachable for minority unions. Quite clearly this creates a situation where a minority union cannot obtain organizational rights in terms of sections 12 and 13 of the LRA. This results in a minority union not being able to recruit members in the workplace while their subscriptions are deducted from their salaries on a monthly basis, despite the support that a

minority union may enjoy in a certain bargaining unit of the employer. It is extremely difficult for a union in this position to increase its membership, which again ensures that it will never reach the set threshold.

The implications of the *Bader Bop* judgment (*National Union of Metalworkers v Bader Bop (Pty) Ltd* 2003 24 ILJ (CC)), namely that a trade union is entitled to embark on strike action in order to obtain organizational rights in circumstances where it is not regarded as sufficiently representative, provides some form of relief for minority unions. Even in circumstances where wages are concerned, it is often difficult to muster enough support for a strike. This is even more so when it comes to convincing members to embark on a strike in order to assist their trade union to obtain organizational rights.

There is a number of cases where the threshold is raised in a new collective agreement after the previous collective agreement (with a lower threshold) expires, in order to strengthen the position of the majority union and diminish the impact that a minority union had while it enjoyed recognition (*United Association of South Africa – The Union v Impala Platinum Ltd Case no: JS 1082/09; UASA-The Union v BHP Billiton Energy Coal: South Africa (JS 1082/09) [2012] ZALCJHB 97; [2013] 1 BLLR 82 (LC)*).

The loss of recognition as a result of the raising of the threshold impacts heavily on minority unions. This has the effect that a trade union, which in certain circumstances has enjoyed certain organizational rights for a period of time, loses recognition (and as a result loses the organizational rights) that it had enjoyed up to that point. In these circumstances minority unions as a rule almost certainly lose their members in that specific workplace, because these members fail to see the advantages of belonging to a trade union when such a trade union has no organizational or bargaining rights.

A further situation which quite often occurs is that an agency-shop or a closed-shop agreement in terms of sections 25 (1) of the LRA exists in the workplace. Members of a minority union might be forced to become members of a majority trade union and pay the required monthly subscription and the compulsory agency fee, if the majority union can benefit them in the workplace. However, remaining a member of a minority union, and paying the monthly dues in terms of the agency-shop agreement, in circumstances where a minority union has lost recognition as a result of a section 18 collective agreement, is in practice not often seen. The ultimate result is that quite often the position of minority unions worsens as a result of agreements in terms of section 18 and the consequent loss of recognition, as this as a rule translates in the loss of members. Members of minority unions are at the same time left without a union of choice to bargain on their behalf.

4.5 *International-law position regarding minority unions*

In as far as the position of international law regarding minority unions is concerned, Dugard notes that international law is not foreign law and as such South African courts may take judicial notice thereof as if it were part of the common law (Dugard *Essays in Honour of Ellison Kahn, The Place of*

Public International Law in South African Law (1989)). In practice, he contends, the courts may turn to findings of international tribunals as well as international treaties in dealing with certain questions. In the matter of *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation Mediation and Arbitration* ((JR782/05) ZALC [2006] ZALC 122; [2006] 44), Van Niekerk AJ adopted the following line of reasoning in order to draw upon the contents of an unratified convention of the ILO legitimately in dealing with the matter before him:

“Although South Africa has not ratified Convention 158, and is therefore not obliged to implement its terms in domestic legislation, the Convention is an important and influential point of reference in the interpretation and application of the LRA. The observations and surveys by the ILO’s Committee of Experts on Convention 158 are equally important as a point of reference in the interpretation of Chapter VIII of the LRA and the Code since they give content to the standards that the Convention establishes. This is particularly so in the present instance because both Chapter VIII and the Code draw heavily on the wording of Convention 158.”

The approach adopted by van Niekerk AJ in the above matter was that it was manifest that the legislature had drawn on Convention 158 in Chapter VIII and the Code and therefore it is appropriate to use the contents thereof in adjudicating the matter. Section 3 of the LRA requires any person applying this Act to interpret its provisions in order to give effect to its primary objects in compliance with the constitution, in compliance with the public international-law obligations of the Republic. It is therefore clear that when one interprets the provisions of the LRA, these provisions are subject to the fundamental principles contained in the Constitution. In interpreting these provisions there must be compliance with the standards contained in international law, due to South Africa’s membership of the ILO.

The Digest of Decisions of the CFA contains its recommendations on majoritarianism and pluralism (ILO Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO Geneva, International Labour Office 5ed (revised) 2006). Its recommendation clearly states that, while it may be to the advantage of workers to avoid a multiplicity of trade-union movements, unification through state intervention, or be it a direct or indirect result of legislative provisions applicable to trade unions, it runs counter to the principle embodied in articles 2 and 11 of Convention 87.

For purposes of evaluating the tenability of section 18 of the LRA, it is important to evaluate the decisions of the courts in other jurisdictions. In the matter of *Wilson v UK* 2002 35 EHRR (“European Human Rights Reports”) 523, members of a trade union argued that the employers’ retraction of the recognition of their trade union violated their right of expression (s 10 of the ECHR “European Convention on Human Rights” 1953) as well as their right to association (article 11 of the ECHR). The applicants’ case was that the allowance of discrimination towards members of the trade union in terms of English law, was contrary to the prohibition of discrimination as contained in article 14 of the ECHR. The ECHR unanimously found that the right of freedom of association, as entrenched in article 11 of the ECHR, was violated by this conduct.

In the matter of *Demir and Baykara v Turkey* (2008 ECHR 1345), the ECHR found that collective bargaining has in principle become an essential element of article 11 (the right to associate). The court stated that only interference which is strictly necessary in a democratic society can be justified but also stated that it is still allowed to grant special status to representative trade unions.

5 Conclusion

From the discussion above, it is clear that minority trade unions are faced with a legal challenge with regard to the interpretation and application of section 18 of the LRA. It is argued in this note that a number of sections in the LRA have the purpose of promoting majoritarianism, while at the same time placing almost insurmountable obstacles for unions that do not have their members as the majority of workers in a workplace. The clear winners emerging from the collective-bargaining framework of the LRA are majority trade unions.

A particularly important provision included in the LRA is section 18. In terms of this section a majority trade union and an employer have the right to conclude a collective agreement setting a threshold for representivity for other unions in a workplace to meet. This would mean that failure by the union to attain a threshold of representivity entails that it will not be recognized as a trade union with the accompanying organizational rights in terms of sections 12, 13 and 15 of the LRA.

Furthermore, section 18 of the LRA permits workplace-specific bargaining by allowing a majority union in a workplace, as defined, to negotiate on behalf of all the employees in that workplace. What this section does not explicitly state is whether, when such negotiation takes place, the majority union and the employer may negotiate away the rights of currently recognized representative unions. Section 18 merely permits a majority union and an employer to enter into a collective-bargaining agreement to regulate the organizational rights of workers within a bargaining unit.

In conclusion, it appears that the legal quagmire facing minority unions might soon be resolved, particularly when one assesses the proposed amendments to the LRA and the BCEA relating to organizational rights discussed above. It is submitted that the proposed amendments will go a long way in adapting to the current realities faced by the minority unions in the bargaining process.

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