

# THE LEGAL STATUS OF TRADE UNIONS AND POTENTIAL GROUNDS ON WHICH THEY MAY INCUR LIABILITY

Prof ME Manamela  
*BProc LLB LLM LLD*  
*College of Law, Mercantile Law Department*  
*University of South Africa, Pretoria, South Africa*  
<https://orcid.org/0000-0003-0690-947X>

## SUMMARY

Employees exercise their right to freedom of association by forming or joining trade unions. It is not required that a trade union be registered to function as such. However, under the Labour Relations Act (LRA), there are a number of benefits available to registered trade unions. A registered trade union acquires the status of a body corporate with rights and duties. However, it functions through natural persons, and those who represent it may not be held liable if they act in line with the union's constitution and within their authority. This article is aimed at considering the legal status of trade unions in South Africa and in the United Kingdom (UK) respectively. It further considers different circumstances under which a trade union may incur liability, including instances where there is non-compliance with the union's constitution, a breach of contract or delict, or a discrimination claim.

## 1 INTRODUCTION

Employees' right to freedom of association is protected in terms of the International Labour Organization's (ILO) Conventions<sup>1</sup> and the Constitution of the Republic of South Africa, 1996 (Constitution). Flowing from this right, employees have the right to form or join trade unions of their choice.<sup>2</sup> This right is protected and has been given effect to by the Labour Relations Act<sup>3</sup> (LRA). The LRA defines a trade union as "[a]n association of employees whose principal purpose is to regulate relations between employees and employers, including any employers' organisations."<sup>4</sup>

---

<sup>1</sup> ILO *Freedom of Association and Protection of the Right to Organise Convention* C087 (1948) Adopted: 09/07/1948; EIF: 04/07/1950; and ILO *Right to Organise and Collective Bargaining Convention* C098 (1949) Adopted: 01/07/1949; EIF: 18/07/1951.

<sup>2</sup> S 23 of the Constitution.

<sup>3</sup> 66 of 1995.

<sup>4</sup> S 213 of the LRA.

A trade union should therefore be an association of employees aimed at regulating relations between employees and employers. According to the definition, it is not required that a trade union be registered in order to function as such. However, the LRA affords registered trade unions certain exclusive rights, including organisational rights;<sup>5</sup> the right to conclude collective agreements;<sup>6</sup> the right to become a party to a bargaining council;<sup>7</sup> the right to apply for the establishment of a workplace forum;<sup>8</sup> and the right to authorise a picket<sup>9</sup>. The registration of trade unions is aimed mainly at the promotion of the observance of democratic principles in the internal operation and governance of trade unions. It also serves to enforce proper financial control over trade union funds.<sup>10</sup>

The right to freedom of association is accorded to employees and not to trade unions. Nevertheless, employees collectively express their interests through trade unions, and trade unions are expected to act in the interests of their members.<sup>11</sup> Trade unions act through their representatives in order to realise the interests and wishes of their members. Unfortunately, this may at times result in trade unions incurring liability owing to their representatives' acts or conduct. This article reflects on the legal status of South African trade unions and the possible grounds on which they may be held liable. It further briefly considers the legal status of trade unions in the UK and the possible grounds on which UK trade unions may be held liable in order to determine whether there are lessons to be learned for South Africa.

## **2 THE LEGAL STATUS OF TRADE UNIONS AND POSSIBLE GROUNDS FOR LIABILITY IN SOUTH AFRICA**

### **2.1 The legal status of a trade union under the LRA**

The law recognises two forms of legal subject, namely, a natural person and a juristic person. A juristic person derives its personality from statutory provisions or from common law.<sup>12</sup> A legal subject can therefore be a human being or an entity such as a company or an organisation. Thus, a trade union (as a juristic person) is regarded as a legal subject. Legal subjects

---

<sup>5</sup> S 11 of the LRA.

<sup>6</sup> S 23(1)(c) of the LRA. A collective agreement is defined by s 213 of the LRA as "a written agreement concerning terms and conditions of employment or any matter of mutual interest concluded by one or more registered trade unions, on the one hand and on the other hand – one or more employers".

<sup>7</sup> S 27 of the LRA.

<sup>8</sup> S 78 of the LRA.

<sup>9</sup> S 69 of the LRA.

<sup>10</sup> Du Toit, Godfrey, Cooper, Giles, Cohen, Conradie and Steenkamp *Labour Relations Law: A Comprehensive Guide* 6ed (2015) 236.

<sup>11</sup> Du Toit *et al Labour Relations Law* 243. See also *SA Polymer Holdings (Pty) Ltd v Llale* (1994) 15 ILJ 277 (LAC).

<sup>12</sup> Van Jaarsveld and Van Eck *Principles of Labour Law* 3ed (2005) 228.

have legal capacity, which means that they can be bearers of rights and duties.<sup>13</sup> Chapter IV of the LRA provides for the registration of trade unions. In South Africa, the most important advantage of registering a trade union is that it becomes a body corporate with legal personality.<sup>14</sup> It has perpetual succession. As stated above, a trade union can only function through natural persons and must, accordingly, have natural persons to act and function on its behalf. These may include trade union representatives,<sup>15</sup> officials<sup>16</sup> and office-bearers.<sup>17</sup> Provided the conduct and acts of such persons fall under the trade union's constitution, they are regarded as conduct and acts of the trade union – an independent legal entity.<sup>18</sup> A registered trade union therefore becomes distinct from its representatives, members, office-bearers and officials.<sup>19</sup>

A trade union can enter into agreements and contracts in its own name. As a result, it can sue or be sued in its own name,<sup>20</sup> or on behalf of its members. It can acquire, hold, sell or transfer movable or immovable property.<sup>21</sup> The liabilities of a trade union remain those of the body corporate and members cannot be charged with its debts.<sup>22</sup> Membership of a trade union also does not make a member liable for the obligations or liabilities of that trade union.<sup>23</sup> A trade union can also act as a plaintiff or defendant in legal proceedings. However, it cannot legally do anything that is not covered in its constitution<sup>24</sup> because that will be regarded as *ultra vires* and therefore null and void.<sup>25</sup>

It must be noted that trade unions are voluntary organisations, and therefore employees may not be forced or compelled to form or join them<sup>26</sup> – unless under trade union security arrangements,<sup>27</sup> such as closed shop agreements<sup>28</sup> and agency shop agreements.<sup>29</sup> As a legal person, a trade

<sup>13</sup> Heaton *The South African Law of Persons* 6ed (2021) 2.

<sup>14</sup> S 97(1) of the LRA. See also *FAWU v Wilmark (Pty) Ltd* 1998 ILJ 928 (CCMA); *SAMWU v Jada* 2003 ILJ 1344 (W).

<sup>15</sup> S 213 of the LRA defines a trade union representative as “a member of a trade union who is elected to represent employees in the workplace”.

<sup>16</sup> S 213 of the LRA defines an “official” in relation to a trade union as “a person employed as a secretary, assistant secretary or organiser of a trade union”. Officials are ordinary employees in terms of contracts of employment (see *Grundling v Beyers* 1967 (2) ASA 138 (W)).

<sup>17</sup> S 213 of the LRA defines an “office-bearer” as “a person who holds office in a trade union ... and who is not an official”.

<sup>18</sup> Van Niekerk, Christianson, McGregor, Smit and Van Eck *Law@work* 5ed (2019) 424.

<sup>19</sup> *Mbobo v Randfontein Estate Gold Mining Co* 1992 ILJ 1485 (IC).

<sup>20</sup> See also *NEWU v Sithole* [2004] 11 BLLR 1085 (LAC), where the union applied to the Labour Court for a judgment against members for arrear fees.

<sup>21</sup> S 95(5)(f) of the LRA; Van Jaarsveld and Van Eck *Principles of Labour Law* 228; *AEU v Minister of Labour* 1949 (4) SA 908 (A); *NUFAWSA v PWAWU* 1984 ILJ 161 (W).

<sup>22</sup> S 97(2) of the LRA.

<sup>23</sup> S 97(2) and (3) of the LRA.

<sup>24</sup> *AWUSA v Fedics Food Services* 1999 ILJ 602 (LC).

<sup>25</sup> *Sorenson v Executive Committee Tramway & Omnibus Workers' Union (Cape)* 1974 (2) SA 545 (C); *Fraser Alexander Bulk Materials Handling (Pty) Ltd v CWIU* 1996 ILJ 713 (IC).

<sup>26</sup> Grogan *Collective Labour Law* 3ed (2019) 38.

<sup>27</sup> S 23(5) of the Constitution.

<sup>28</sup> S 26 of the LRA.

union can prescribe requirements for admission to its membership and can decide whom to admit to membership.<sup>30</sup> An association cannot be registered as a trade union unless it is an association of employees and its principal purpose is to regulate relations between employees and employers. Thus, the LRA now requires a trade union to be genuine in order to be registered.<sup>31</sup> The Registrar must also be satisfied, before registering a trade union, that it meets the criteria set by the LRA for registration,<sup>32</sup> considering that a decision not to register a trade union may be taken on appeal to the Labour Court.<sup>33</sup>

A trade union may act in any dispute to which its member is a party, or in its own interest; or on behalf of any of its members or in the interest of any of its members.<sup>34</sup> Members of a trade union pay joining fees and monthly subscription fees so that the trade union may represent their interests. A trade union may not violate its members' constitutional rights, and members may not be bound by a trade union's dishonest or inappropriate conduct.<sup>35</sup> The relationship between a trade union and its members is similar to that of an agent and a principal; and when it performs functions in terms of its constitution, it is acting as an agent for its members.<sup>36</sup> Furthermore, a trade union's authority to conclude collective agreements for its members is founded in agency.<sup>37</sup> However, in *Blyvooruitzicht Gold Mining v Pretorius*,<sup>38</sup> the court stated that a trade union's right to represent its members does not flow from agency, but from "representative governance" emanating from its collective bargaining role. As with lawyers, trade union representatives may be held liable in their personal capacities if they behave unacceptably during judicial proceedings.<sup>39</sup>

In South Africa, a trade union is therefore a legal person that can sue or be sued in its own name. Consequently, it can be held liable in certain instances, as discussed below.

---

<sup>29</sup> S 25 of the LRA.

<sup>30</sup> *Garment Workers Union v Keraan* 1961 (1) SA 744 (C).

<sup>31</sup> S 95(7) of the LRA; GN R1446 in GG 25515 of 2003-10-10. The Registrar will examine the manner in which it was established, its composition, membership and the activities it undertakes on behalf of its members.

<sup>32</sup> S 96 of the LRA.

<sup>33</sup> S 111(3) of the LRA; *WUSA v Crouse NO* (2005) 26 ILJ 1723 (LC).

<sup>34</sup> S 200(1) of the LRA. A trade union acting on behalf of its members becomes a party to the dispute and acquires *locus standi* to represent its members. In terms of s 162(3) of the LRA, the Labour Court may make a costs order against a party to the dispute, including any person who represented that party in proceedings before the court. In *Simelane v Letamo Estate* (2007) 28 ILJ 2053 (LC), the Labour Court made a costs order against the union and the employees jointly and severally. The union was obstructive during retrenchment consultations by refusing to consult pending the disclosure of financial statements that were not available at the time.

<sup>35</sup> *Moloi v Euijen NO* [2000] 5 BLLR 552 (LAC); *Benjamin v Plessey Tellimat SA Ltd* [1998] 3 BLLR 272 (LC).

<sup>36</sup> Grogan *Collective Labour Law* 48.

<sup>37</sup> Grogan *Collective Labour Law* 56.

<sup>38</sup> [2000] 7 BLLR 751 (LAC).

<sup>39</sup> Grogan *Collective Labour Law* 55.

## 2 2 Trade union duties under the LRA and consequences of non-compliance

Under the LRA, it is compulsory amongst others for a registered trade union to keep proper books and records of its income, expenditure, assets and liabilities.<sup>40</sup> It must also prepare an annual statement of income and expenditure and a balance sheet of its assets, liabilities and financial statement for the previous year.<sup>41</sup> Its accounting books must be audited by an auditor according to set professional standards.<sup>42</sup> A trade union must preserve and keep, for at least three years, all books of account, records of subscriptions paid, financial statements, auditor's reports and minutes of meetings.<sup>43</sup> It must provide to the Registrar within 30 days of receipt of its auditor's report, a certified copy of that report and the financial statements.<sup>44</sup>

It is submitted that the above duties assist in holding trade unions accountable and responsible because, without them, trade union funds may be misused and abused by those involved. The Registrar may also cancel the registration of a trade union by removing its name from the register if satisfied that the trade union is not, or has ceased to function as, a genuine trade union,<sup>45</sup> or if the Registrar has issued a written notice requiring the union to comply with sections 98, 99 and 100 of the LRA within a period of 60 days of the notice and the trade union has, despite the notice, failed to comply.<sup>46</sup> The effect of such a deregistration is that a union stops enjoying all the rights it attained through registration.<sup>47</sup>

## 2 3 Circumstances under which a trade union may incur liability in South Africa

### 2 3 1 Trade union liability for non-compliance with its constitution

Trade unions have certain rights in terms of section 8 of the LRA – such as the right to determine their own constitutions and rules. This section ensures and protects the autonomy of trade unions.<sup>48</sup> Furthermore, section 95 of the LRA requires trade unions to have constitutions in order to be registered.<sup>49</sup> A union's constitution is a document that regulates the relationship between a trade union and its members; it also contains rules and procedures relevant

<sup>40</sup> S 98(1)(a) of the LRA.

<sup>41</sup> S 98(1)(b) of the LRA.

<sup>42</sup> S 98(2)(a) of the LRA.

<sup>43</sup> Ss 98(4) and 99(b) and (c).

<sup>44</sup> S 100(b) of the LRA.

<sup>45</sup> S 106(2A)(a) of the LRA; *UPUSA v Registrar of Labour Relations* (2010) 31 ILJ 198 (LC). See also *NEWU v Minister of Labour* (2012) 33 ILJ 2585 (LAC).

<sup>46</sup> S 106(2A)(a) of the LRA.

<sup>47</sup> S 106(3) of the LRA.

<sup>48</sup> Garbers, Le Roux, Strydom, Basson, Christianson and Germishuys-Burchell (eds) *The New Essential Labour Law Handbook 7ed* (2019) 403.

<sup>49</sup> S 95(1)(b) of the LRA.

to this relationship. A constitution determines the rights and obligations of a trade union and its members, and its relations with outsiders.<sup>50</sup> The LRA prescribes certain compulsory provisions that must form part of the constitution of every registered trade union.<sup>51</sup> A trade union's constitution must, among other things, state that the trade union is not an association for gain,<sup>52</sup> and must provide information relating to: qualifications for membership;<sup>53</sup> termination of membership and removal of office-bearers;<sup>54</sup> membership fees and other payments by members;<sup>55</sup> the manner in which decisions are to be taken;<sup>56</sup> circumstances under which office-bearers or trade union representatives may be removed from office;<sup>57</sup> and pre-strike ballots.<sup>58</sup> An employee becomes a member of a trade union after satisfying all the membership requirements prescribed by a trade union in its constitution.<sup>59</sup> In *Simunye Waters Forum v Registrar*,<sup>60</sup> the application for registration was refused by the Registrar for two reasons: first, the appellant's constitution did not meet the requirements of section 95(5)(i)–(n) of the LRA; and secondly, the Registrar did not consider the appellant to be a genuine trade union for purposes of section 95(7) of the LRA. The appellant had been established by non-standard employees from a community advice office called the Casual Workers Advice Office (CWAO). The court found that, although the appellant's structure was unique, it was a genuine trade union that did comply with the requirements prescribed in section 95 of the LRA.

A trade union's constitution should also state the industry, service or sector in which the trade union will operate and have members.<sup>61</sup> In *SACCAWU obo Members of King Edward VII School*,<sup>62</sup> the union (whose constitution authorised it to organise in tea rooms, restaurants, the catering trade, boarding houses, holiday flats and cleaning services) was denied the

<sup>50</sup> Van Jaarsveld and Van Eck *Principles of Labour Law* 229; *BIFSA v Minister of Labour* 1980 (4) SA 810 (W); *SASBO v Standard Bank of SA Ltd* (1994) 15 ILJ 332 (IC); *FAWU v Wilmark (Pty) Ltd supra*.

<sup>51</sup> S 95 of the LRA. See also *FAWU v Buthelezi* 1998 ILJ 829 (LC).

<sup>52</sup> S 95(5)(a) of the LRA; see also *Vidar Rubber Products (Pty) Ltd v CCMA* (1998) 19 ILJ 1275 (LC); *Registrar of Labour Relations v CAESAR* (2015) 36 ILJ 182 (LAC). This requirement serves to prevent trade unions from being used as vehicles for enriching individuals or as cover for profit-making businesses. It is therefore important to evaluate the actual financial operation of a trade union. Examples of activities showing that an organisation is for gain are: unrealistically high salaries and allowances to officials, office-bearers or employees of the union; and interest-free or low-interest loans made to officials, office-bearers or employees (see guidelines issued in terms of s 95(8) of the LRA).

<sup>53</sup> S 95(5)(b) of the LRA.

<sup>54</sup> S 95(5)(d) of the LRA.

<sup>55</sup> S 95(5)(f) of the LRA.

<sup>56</sup> S 95(5)(h) of the LRA.

<sup>57</sup> S 95(5)(m) of the LRA.

<sup>58</sup> Failure to conduct a pre-strike ballot will not affect the legality of the strike (s 67(7) of the LRA).

<sup>59</sup> *TGWU v Multi Bus Service CC* 1995 ILJ 213 (IC); *Van Wyk & Taylor v Dando & Van Wyk Print (Pty) Ltd* [1997] 7 BLLR 906 (LC).

<sup>60</sup> (2023) 44 ILJ 2021 (LC).

<sup>61</sup> *Agri Operations Ltd v MacGregor NO* (2013) 34 ILJ 2847 (LC).

<sup>62</sup> (2008) 29 ILJ 204 (CCMA).

right to organise among workers performing the services in a model C, public school.<sup>63</sup> In *City of Johannesburg v SAMWU*,<sup>64</sup> SAMWU's branch in Gauteng had split into two groups both claiming to be legitimate. The City approached the Labour Court for an order to determine the lawfully elected office-bearers. The court ruled that neither of the two groups complied with the union's constitution and therefore that all the appointments by the two groups were irregular. Trade union members rely on their unions to meet the provisions of the union's constitution in its dealings, including with regard to conducting ballots when necessary.<sup>65</sup> In *National Union of Metal Workers of South Africa v Lufil Packaging (Isithebe)*,<sup>66</sup> the issue was whether a trade union could ignore its own constitution and demand organisational rights from the employer for its members, even though the members did not form part of the scope of the union's constitution, which governs eligibility for membership. The Labour Appeal Court (LAC) held that NUMSA was not entitled to organisational rights within Lufil's workplace, which operated in the paper and packaging industry, because its employees fell outside of NUMSA's registered scope (metal and related industries) and therefore that it was not sufficiently representative. The Constitutional Court (CC) found that when it came to organisational rights, until its constitution was properly amended, NUMSA was bound to the categories of membership set out in its scope and that any admission of members outside that scope was *ultra vires* and invalid.

A trade union is the custodian of its constitution, and it is incumbent on the union to ensure that it complies with its provisions. A trade union member or a person applying for membership may refer a dispute in relation to non-compliance with the union's constitution to the Labour Court.<sup>67</sup> In cases where a trade union concludes a collective agreement contrary to provisions of the law or of its constitution, a dispute may also be referred to the Labour Court.<sup>68</sup>

In South Africa, trade unions may therefore be held liable for non-compliance with their constitutions.

### 2 3 2 Trade union liability for claims in contract and delict

The constitution of a trade union contains rights and duties that the union and its members owe to each other. Both members and the trade union are expected to comply with these provisions. Failure by a trade union to perform or render services as stated in its constitution or any other agreement may amount to breach of contract. If a contract is breached, the

<sup>63</sup> See also *Democratic Union of Security Workers and Squires Foods t/a Morton's* (2008) 29 ILJ 2815 (CCMA), where the principle was confirmed.

<sup>64</sup> (2017) 38 ILJ 1342 (LC).

<sup>65</sup> S 95(5)(o) of the LRA.

<sup>66</sup> [2020] ZACC 7.

<sup>67</sup> S 158(1)(e) of the LRA.

<sup>68</sup> S 158(1)(e) of the LRA; see also *George v Western Cape Education Department* [1996] 2 BLLR 166 (IC) 182–183.

innocent party has at their disposal legal remedies that include the execution of the contract or cancellation of the contract or damages.<sup>69</sup> The Labour Court has jurisdiction to direct the performance of any act that may remedy a wrong and give effect to the primary objects of the LRA.<sup>70</sup> It also has powers to review the performance or purported performance of any function provided for in the LRA, on any grounds permissible in law.<sup>71</sup> In *FAWU v Ngcobo*, the High Court,<sup>72</sup> the Supreme Court of Appeal (SCA),<sup>73</sup> and the Constitutional Court<sup>74</sup> confirmed that members may pursue a contractual claim against a trade union in cases where the member acts to their detriment based on the union's advice. In this case, two sales representatives of Nestle SA had been retrenched. Their union, FAWU, referred a dispute to the CCMA on their behalf. However, FAWU shelved the issue for two years before it referred the matter to an attorney for an opinion. The attorney advised the union that the application would not succeed. When the employees decided to take legal action against the union, FAWU denied they were its members when they were dismissed. The High Court, however, found that they were indeed members of FAWU, and that the union had failed to provide them with legal assistance as required by its constitution. It was found that if the dispute had been referred to the Labour Court, the employees' dismissals would have been proved substantively and procedurally unfair, and they would have been entitled to compensation equal to 12 months' remuneration based on a finding of procedural unfairness. As a result, FAWU was ordered to pay each of them an equivalent of that amount, plus interest. It must, however, be stated that members or officials who conclude contracts on behalf of a trade union may not sue or be sued based on the contract in their individual capacity.<sup>75</sup>

In addition to contractual claims, trade union members may pursue delictual claims against their trade union. A delict is an unlawful culpable act through which a person causes another party damage or injury to personality, and the prejudiced person is granted a right to damages or compensation.<sup>76</sup> In *SAMWU v Jada*,<sup>77</sup> trade union members were dismissed for engaging in an unprotected strike. They then brought a claim against the union because the union failed in its duty of care to ensure that it did not do anything that could cause them to be dismissed. The court, however, stated that there was no clear link between the trade union and the actions that led to the dismissal of its members. It must be noted that a trade union that does not intentionally mislead members into engaging in an unprotected strike is

---

<sup>69</sup> Huyssteen, Lubbe, Reinecke and Du Plessis *Contract General Principles* 6ed (2019) 428.

<sup>70</sup> S 158(1)(a)(iii) of the LRA.

<sup>71</sup> S 158(1)(g) of the LRA.

<sup>72</sup> *Ngcobo NO v FAWU* (2012) 33 ILJ 1337 (KZD).

<sup>73</sup> *FAWU v Ngcobo NO* [2013] 7 BLLR 648 (SCA).

<sup>74</sup> *FAWU v Ngcobo NO* [2013] 12 BLLR 1171 (CC).

<sup>75</sup> Van Jaarsveld and Van Eck *Principles of Labour Law* 228. See also section 97(2) of the LRA.

<sup>76</sup> Neethling, Potgieter and Visser *Law of Delict* 6ed (2010) 4.

<sup>77</sup> *Supra*.



unlikely to be held liable in delict. Furthermore, if a delict is committed against the trade union, only the trade union can sue for damages.<sup>78</sup>

Despite the above, and considering that a trade union is a collective body, the principle of majoritarianism will generally apply. In *Fakude v Kwikot (Pty) Ltd*,<sup>79</sup> it was held that trade unions are entitled to conclude collective agreements on behalf of their members based on the principle of “majoritarianism”, even though such an agreement may be to the detriment of some members. The court upheld a collective agreement that provided for members who engaged in an unprotected strike to receive final written warnings, while others would get severance packages. It was further found in *Theron v FAWU*<sup>80</sup> that, if a trade union takes decisions by majority vote, such decisions are not reviewable on grounds of substantive or procedural unfairness. This view is in line with the above-mentioned majoritarian principle, which is encouraged by the LRA through its various provisions.<sup>81</sup> An exception will, however, be made in cases where a person’s constitutional right is unreasonably and unjustifiably limited, as required by section 36 of the Constitution.

It is evident from the above discussion that, in South Africa, members of trade unions may pursue contractual and delictual claims against their trade unions in cases where there is a failure by the union to perform services in accordance with the union’s constitution, or where the union fails in its duty of care.

### 2 3 3 Trade union liability for unfair discrimination claims

The LRA states that the constitution of a trade union may not include a provision that discriminates directly or indirectly against any person on grounds of race or sex.<sup>82</sup> This is in line with the Constitution,<sup>83</sup> and the Employment Equity Act<sup>84</sup> (EEA), which prohibit discrimination on different grounds, including race and sex. Section 6(1) of the EEA, states that “no person” may discriminate against an employee on any of the grounds listed. The prohibition therefore applies to anyone, including trade unions. If a trade union is found to be discriminating against an employee unfairly, it may therefore incur liability.<sup>85</sup> Those who act on behalf of the union may also not discriminate against anyone.<sup>86</sup> However, the Registrar may, it seems, not consider discrimination on any ground other than race and sex when considering a trade union’s application for registration.<sup>87</sup>

<sup>78</sup> *AEU v Minister of Labour supra*; *NUFAWSA v PWAWU supra*.

<sup>79</sup> [2013] 6 BLLR 580 (LC).

<sup>80</sup> [1998] 5 BLLR 528 (LC).

<sup>81</sup> Ss 14, 16, 25, 26, 23(1)(d)(iii) of the LRA.

<sup>82</sup> *NEWU v Ministry of Labour* (2010) 31 ILJ 574 (LAC).

<sup>83</sup> S 9(4) of the Constitution.

<sup>84</sup> 55 of 1998.

<sup>85</sup> S 10 of the EEA.

<sup>86</sup> S 158(1)(e) of the LRA.

<sup>87</sup> S 95 of the LRA. Grogan *Collective Labour Law* 344–45.

Like any other employer, a trade union may not discriminate against any person in its employment.<sup>88</sup> An employee who alleges discrimination against a trade union may refer a dispute to the CCMA for conciliation. If the dispute is unresolved, it may be referred to the Labour Court for adjudication.<sup>89</sup> Members may also seek a remedy against a trade union for alleged unfair discrimination in terms of the Promotion of Equality and Prohibition of Unfair Discrimination Act<sup>90</sup> (PEPUDA).

Based on the above discussion, a trade union in South Africa may be held liable if it discriminates against any person in the provisions of its constitution or where it discriminates against its employees.

### 2 3 4 *Trade union liability for lack of authority by trade union representatives*

Constitutions of trade unions should contain provisions on how disputes within the union are to be resolved.<sup>91</sup> Members are permitted to litigate after internal remedies have been exhausted. Where a trade union representative has acted contrary to the union's constitution, an application may be lodged in terms of section 158(1)(e) of the LRA, and where they have acted in bad faith, the aggrieved person may find a remedy in terms of section 158(1)(a)(iii) or (g) of the LRA. Trade union representatives are to be appointed in terms of the trade union's constitution and their conduct should fall within the scope of the trade union's constitution in order for their activities to bind the trade union.<sup>92</sup> It has been held that it is not an employer's duty to determine whether a trade union representative has authority to act on behalf of the trade union.<sup>93</sup> An employer may therefore rely on estoppel to hold a trade union bound by an agreement where the trade union wants the agreement rendered invalid because its representative exceeded their authority.<sup>94</sup> In terms of the principle of estoppel, if the principal has culpably represented to the third party that the agent had authority to contract on their behalf, and the third party to whom the representation was made acted to their detriment on the strength of that impression, the principal can be prohibited by law from denying the authorisation.<sup>95</sup> In other words, the principal is estopped from denying the authorisation and will be bound to the transaction. An action by a trade union

<sup>88</sup> A trade union may employ officials. S 213 of the LRA provides that an "official" "in relation to a trade union, ... means a person employed as the secretary, assistant secretary or organizer of a trade union".

<sup>89</sup> S 10 of the EEA; *Theron v FAWU supra*.

<sup>90</sup> 4 of 2000.

<sup>91</sup> S 95(5)(c), (d), (e), (m) and (n) of the LRA.

<sup>92</sup> Du Toit *et al Labour Relations Law* 247. See also *Manyele v Maizecor (Pty) Ltd* [2002] 10 BLLR 972 (LC) par 16; *Mzoku v Volkswagen SA (Pty) Ltd* [2001] 8 BLLR 857 (LAC) par 58.

<sup>93</sup> *SASBO v Standard Bank of SA Ltd supra*.

<sup>94</sup> *Samancor Ltd v NUMSA* [2000] 8 BLLR 956 (LC); *Coca-Cola Bottling East London v CCMA* [2003] 2 BLLR 159 (LC) par 49.

<sup>95</sup> *Sonnekus The Law of Estoppel in South Africa* 3ed (2012) 1; Schulze, Kelbrick, Manamela, Stoop, Manamela, Hurter, Masuku and Stoop *General Principles of Commercial Law* 8ed (2015) 312.

representative that is unauthorised may, however, later be ratified by the trade union concerned.<sup>96</sup> In *Ramolesane v Andrew Mentis*,<sup>97</sup> it was found that authority could be implied if a trade union's action was to the benefit of a majority of the members concerned.

Flowing from the above discussion, trade unions in South Africa may be held liable for their representatives' actions if they acted within the scope of the union's constitution or based on estoppel.

### 2 3 5 Trade union liability relating to industrial action

#### (i) Liability under the LRA

Every worker has a right to strike as provided for in terms of the Constitution.<sup>98</sup> This right is regulated and given effect to by the LRA.<sup>99</sup> Just like any other right, the right to strike may be limited in terms of section 36 of the Constitution, as long as the limitation is reasonable and justifiable. The LRA limits the right by: providing a definition of what constitutes a strike;<sup>100</sup> setting procedural requirements that must be complied with for a strike to be protected;<sup>101</sup> and setting limitations/prohibitions in terms of its section 65. For any action to qualify as a strike and be protected under the LRA, it must meet the elements of a strike as provided for in the definition. There must therefore be a refusal to work, by employees, for the purpose of remedying a grievance or resolving a matter of mutual interest between the employer and employees.<sup>102</sup> Furthermore, procedurally, the issue in dispute must have been referred to a bargaining council or the CCMA for conciliation, and 30 days must have passed since the referral, or a certificate of non-resolution must have been issued, and proper notice must have been given for the commencement of a strike.<sup>103</sup> There must also be no prohibition in terms of section 65 of the LRA.

Section 65(2)(b) of the 1956 Labour Relations Act<sup>104</sup> contained balloting requirements for strike actions, but these were excluded from the LRA. The section entitled trade unions to call a strike only if the majority of members of

<sup>96</sup> *Merlin Gerin (Pty) Ltd v All Current and Drive Centre (Pty) Ltd* 1994 (1) SA 659 (C); *National Co-operative Dairies v Smith* 1996 (2) SA 719 (N). See also Kahanovitz "The Standing of Unions to Litigate on Behalf of Their Members" (1999) 20 *ILJ* 856 860. If a person purports to act on behalf of another without authority to do so, the principal will not be held liable; however, if the principal ratifies that particular transaction, the principal becomes liable. The effect of ratification by the principal is that it validates the transaction by an unauthorised person *ab initio*.

<sup>97</sup> (1991) 12 *ILJ* 329 (LAC) 336J.

<sup>98</sup> S 23 of the Constitution.

<sup>99</sup> S 64 of the LRA.

<sup>100</sup> S 213 of the LRA.

<sup>101</sup> S 64(1) of the LRA.

<sup>102</sup> Manamela "Matters of Mutual Interest for Purposes of a Strike: *Vanachem Vanadium Products (Pty) Ltd v National Union of Metalworkers of South Africa* [2014] 9 *BLLR* 923 (LC)" 2015 *Obiter* 794.

<sup>103</sup> S 64 of the LRA.

<sup>104</sup> 28 of 1956.

a trade union in good standing in the area or particular undertaking or industry or trade in which the strike is called voted in favor of such action. Nonetheless, section 95(5) of the LRA provides that a union that applies for registration must adopt a constitution that makes provision for secret balloting before a strike can take place. The Labour Relations Amendment Act<sup>105</sup> provides transitional arrangements for trade unions that do not provide for secret ballots in their constitutions, allowing them to amend their constitutions to comply with section 95 of the LRA.<sup>106</sup> Until a trade union complies with the above, it must conduct a ballot of its members before engaging in a strike.<sup>107</sup> However, in terms of section 67 of the LRA, failure to comply with ballot requirements in relation to strikes will not necessarily give rise or constitute a ground of litigation that will affect the legality of the strike.

Employees have immunity against legal action for initiating or participating in a protected strike.<sup>108</sup> A protected strike may also not be interdicted.<sup>109</sup> Employees may not be dismissed based on their participation in a protected strike, unless the dismissal is based on misconduct or the operational requirements of a business.<sup>110</sup> Otherwise, such a dismissal will be regarded as automatically unfair under the LRA.<sup>111</sup> Employees may, however, be dismissed for acts of misconduct that took place during a protected strike. Inappropriate and unlawful conduct by employees will in fact attract both civil and criminal liability.<sup>112</sup>

Although, the right to strike is granted to individual workers by the Constitution,<sup>113</sup> in terms of the LRA, it can only be exercised collectively, as it must be a concerted action.<sup>114</sup> A number of persons must be involved and must act with a common purpose.<sup>115</sup> As a result, it is mainly a trade union that organises or calls employees to strike. This emanates from the trade union's right to plan and organise its lawful activities.<sup>116</sup> A trade union that initiates a protected strike therefore also has immunity against legal action.<sup>117</sup> However, such a trade union may become liable for damages that occur during a strike.<sup>118</sup> A trade union that organises a strike can also be held liable for losses suffered by the employer during such a strike, provided the requirements of delictual liability are met.<sup>119</sup>

<sup>105</sup> 8 of 2018.

<sup>106</sup> S 19(1)(a) and (b) of the Labour Relations Amendment Act 8 of 2018.

<sup>107</sup> See also *Mahle BEHR SA (Pty) Ltd v NUMSA*; *FOSKOR (Pty) Ltd v NUMSA* (2019) 40 ILJ 1814 (LC).

<sup>108</sup> S 67(2) of the LRA.

<sup>109</sup> See also *Coin Security Group (Pty) Ltd v SANUSO* (1998) 19 ILJ 43 (C).

<sup>110</sup> S 67(5) of the LRA.

<sup>111</sup> S 187(1)(a) of the LRA. See also *Adams v Coin Security Group (Pty) Ltd* (1999) 20 ILJ 1192 (LC).

<sup>112</sup> See *Du Toit et al Labour Relations Law* 311.

<sup>113</sup> S 23 of the Constitution.

<sup>114</sup> S 213 of the LRA.

<sup>115</sup> Grogan *Collective Labour Law* 212.

<sup>116</sup> Ss 4(2)(a) and 8(b) of the LRA.

<sup>117</sup> S 67(6)(b) of the LRA.

<sup>118</sup> S 68 of the LRA.

<sup>119</sup> *Atlas Organic Fertilizers v Pikkewyn Ghwano* (1981) 2 SA 173 (T) 202G.

It is on record that South Africa has experienced strikes by trade union members that resulted in damage to property and loss of lives. SATAWU members, within the security industry, damaged property and about 50 people lost their lives during a strike.<sup>120</sup> The mineworkers' strike in Marikana resulted in damaged property and many people lost their lives, including miners, and policemen.<sup>121</sup> The Constitution gives everyone the right to assemble, demonstrate, picket and present petitions; however, this must be done peacefully, and participants must be unarmed.<sup>122</sup>

In terms of the LRA, the employer has the right to apply to the Labour Court for an interdict against a trade union and its members for initiating and participating in an unprotected strike.<sup>123</sup> The employer may apply for a mandatory order to direct a trade union to intervene in order to prevent violent actions by its members during a strike.<sup>124</sup> In case of any loss caused by an unprotected strike, the Labour Court may also order the payment of "just and equitable compensation".<sup>125</sup> It has been held in *Mangaung Local Municipality v SAMWU*,<sup>126</sup> that a trade union may be held liable in terms of section 68(1)(b) of the LRA to compensate the employer for any loss that is incurred owing to a strike, if the union was aware that its members engaged in an unprotected strike but failed to intervene without a good reason. Employees who participate in an unprotected strike may be dismissed for such conduct as the conduct in itself constitutes an act of misconduct.<sup>127</sup> A trade union must ensure that there is no violence or damage to property or acts of misconduct by its members during a strike.<sup>128</sup> Although not directly provided for by legislation, if a trade union fails in this duty, it may become vicariously liable for the wrongful acts of its members during a strike. In terms of the doctrine of vicarious liability, the master becomes liable for the conduct of his servant. It is a type of strict liability of one person for the delictual act of another.<sup>129</sup> This is one person's liability, without fault, for the delict of another.<sup>130</sup> In *Mondi Ltd v CEPPAWU*,<sup>131</sup> the employer incurred

<sup>120</sup> *SATAWU v Garvis* (2012) 33 ILJ 1593 (CC).

<sup>121</sup> President of the Republic of South Africa "Terms of Reference of the Commission of Inquiry into the Tragic Incidents at or Near the Area Commonly Known as the Marikana Mine in Rustenburg, North-West Province, South Africa" Proclamation 50 (2012) in GG 35680 of 2012-09-12.

<sup>122</sup> S 17 of the Constitution.

<sup>123</sup> S 68(1)(a) of the LRA.

<sup>124</sup> Manamela and Budeli "Employees' Right to Strike and Violence in South Africa" 2013 46(3) *CILSA* 325.

<sup>125</sup> S 68(1)(b) of the LRA. See also Cohen, Rycroft and Whitcher *Trade Unions and the Law in South Africa* (2009) 84.

<sup>126</sup> [2003] 3 BLLR 268 (LC).

<sup>127</sup> S 68(5) of the LRA.

<sup>128</sup> Cohen *et al Trade Unions and the Law* 81.

<sup>129</sup> Manamela and Budeli 2013 *CILSA* 333.

<sup>130</sup> Manamela "Vicarious Liability: Paying for the Sins of Others" *SAMerc LJ* 2004 16(1) 125; Neethling *et al The Law of Delict* 365.

<sup>131</sup> (2005) 26 ILJ 1458. Also, in *Eskom Ltd v National Union of Mineworkers* (2001) 22 ILJ 618 (W), the union was sued for more than R6 million in damages caused by union members who were part of a demonstration organised by the union, and who ran amok and vandalised the premises. Eskom claimed that the union was vicariously liable for the damages.

damages of R673 000 after striking employees switched off the employer's machinery. Subsequently, the employer claimed the amount from the trade union. The court stated that for the union to be held vicariously liable for its members' actions, it must be proved that it acted with common purpose by authorising the employees' behavior. Ultimately, the union could not be held vicariously liable because there was insufficient evidence to identify the employees responsible for switching off the machine. In *In2Food (Pty) Ltd v FAWU*,<sup>132</sup> the court stated that the time had passed for trade unions to wash their hands of responsibility for their members' acts of violence during strikes. The union was fined R500 000 for failing to control its members during the strike.

## (ii) Liability under the Regulation of Gatherings Act

Section 11(1) of the Regulation of Gatherings Act,<sup>133</sup> (RGA) provides that if any riot damage occurs as a result of a gathering or demonstration, an organisation or convener responsible for such gathering or demonstration is jointly and severally liable together with any other person who unlawfully caused or contributed to the damage. However, section 11(2) of the RGA states that an organisation or person may defend such a claim by proving that they did not permit the act that caused the damage, that the act did not fall within the scope of the objectives of the gathering or demonstration, and that reasonable steps were taken to prevent the act in question.

Provisions of the RGA came into the picture in *SATAWU v Garvis*,<sup>134</sup> where there was a protest organised by SATAWU. The protest resulted in damage to property and death of some people. The respondents claimed damages from SATAWU in the High Court in terms of section 11 of the RGA. Denying liability, SATAWU challenged the constitutionality of section 11(2)(b) of the RGA, arguing that it was inconsistent with the constitutional right to assemble, demonstrate and picket. After the court found against SATAWU, the union appealed to the SCA, where the appeal was dismissed. The union appealed further to the Constitutional Court, which held that section 11 of the RGA was rational and that the constitutional right to assemble and demonstrate is constitutionally protected and guaranteed as long as it is exercised peacefully. The Constitutional Court found that because the decision to assemble resides with the organisation, it should be responsible for any reasonably foreseeable damage arising from such assembly because the purpose of section 11(2) of the RGA is to protect the safety and property of the public from foreseeable damage. The appeal was therefore dismissed.

From the above discussion, it is evident that trade unions in South Africa may be held liable in situations where damage occurs as a result of a strike organised by the trade union.

---

<sup>132</sup> (2013) 34 *ILJ* 2589 (LC).

<sup>133</sup> 205 of 1993.

<sup>134</sup> *Supra*.

### **3 THE LEGAL STATUS OF TRADE UNIONS AND POSSIBLE GROUNDS FOR LIABILITY IN THE UNITED KINGDOM**

#### **3.1 The legal status of trade unions under the Trade Union and Labour Relations (Consolidation) Act, 1992 (TULRCA)**

In the UK, trade unions are regulated under the TULRCA. The TULRCA defines a trade union as:

an organisation—

- (a) Which consists wholly or mainly of workers of one or more descriptions and whose principal purposes include the regulation of relations between workers of that description or those descriptions and employers or employers' associations; or
- (b) Which consists wholly or mainly of—
  - (i) Constituent or affiliated organisations which fulfil the conditions in paragraph (a) (or themselves consist wholly or mainly of constituent or affiliated organisations which fulfil those conditions), or
  - (ii) Representatives of such constituent or affiliated organisations, and whose principal purposes include the regulation of relations between workers and employers or between workers and employers' associations, or the regulation of relations between its constituent or affiliated organisations.<sup>135</sup>

It is important to note from the above definition that the purpose of a trade union in the UK is more or less the same as the one for trade unions in South Africa, except that it refers to workers<sup>136</sup> instead of employees and that it relates mainly to the regulation of relations between workers and employers.<sup>137</sup> On registration (listing) by the Certification Officer, a trade union in the UK is also issued with a certificate.<sup>138</sup> However, if the Certification Officer is of the view that an organisation whose name has been entered in the list of trade unions is in fact not a trade union, they may remove its name from the list.<sup>139</sup> One of the advantages of listing is that a trade union can apply for a certificate of independence. Members of a trade union with such a certificate are entitled not to suffer a detriment or be dismissed on the grounds of trade union membership.<sup>140</sup> In *Squibb UK Staff*

<sup>135</sup> S 1 of the TULRCA.

<sup>136</sup> In terms of s 295(1) of the TULRCA, "employee" means "an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment", whereas in terms of s 296(1) of the TULRCA, "worker" means "an individual who works, or normally works or seeks to work – (a) under a contract of employment, or (b) under any other contract whereby he undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of his, or (c) in employment under or for the purposes of a government department".

<sup>137</sup> Manamela *The Social Responsibility of South African Trade Unions* (2015) 146.

<sup>138</sup> S 2(5) of the TULRCA.

<sup>139</sup> S 4(1) of the TULRCA.

<sup>140</sup> See s 146(1) of the TULRCA.

*Association v Certification Officer*,<sup>141</sup> a certificate of independence was denied based on fears of vulnerability to employer interference.<sup>142</sup> The Certification Officer may also withdraw the certificate of independence if they are of the view that the union is no longer independent.<sup>143</sup>

Unlike in South Africa, a trade union in the UK is not really regarded as a body corporate. However, it can conclude contracts, and sue and be sued in its own name – whether in proceedings relating to property or based on contract or tort or any other cause of action, or for an offence alleged to have been committed by the union or on its behalf.<sup>144</sup> A trade union can only be treated as a body corporate to the extent authorised by provisions of the TULRCA.<sup>145</sup> Trade unions may not be registered under the Companies Act of 1985 or under the Friendly Societies Act of 1974 or the Industrial and Provident Societies Act of 1965.<sup>146</sup> In the UK, trade unions held a quasi-legal personality between 1901 and 1971, but this was removed by section 10 of the TULRCA. In *Electrical, Electronic Telecommunications and Plumbing Union v Times Newspapers*,<sup>147</sup> it was stated that a trade union does not have legal personality, and therefore could not sue for libel in respect of its reputation based on the provisions of section 10 of the TULRCA.

The property of a trade union is vested with trustees in a trust. However, a judgment or order brought against a trade union is enforceable by way of execution against property held in trust to the same extent and in the same manner as if the trade union were a body corporate.<sup>148</sup> Notably, it is unlawful for the property of a trade union to be used towards the payment of an individual's penalty imposed for an offence or for securing such payment.<sup>149</sup>

Although in the UK a trade union is not regarded as a body corporate, as it is in South Africa, it can conclude contracts, and can sue and be sued in its own name.

### **3 2 Trade union duties under the TULRCA and consequences of non-compliance**

Similar to trade unions in South Africa, a UK trade union is required to keep proper accounting records regarding its transactions, assets and liabilities. It must also establish and maintain a satisfactory system of control of its accounting records, cash holdings and all receipts and remittances.<sup>150</sup> These

<sup>141</sup> [1978] *Industrial Cases Reports* (ICR) 115.

<sup>142</sup> See also *Government Communications Staff Federation v Certification Officer* [1993] ICR 163.

<sup>143</sup> An independent trade union is “a trade union which is not under the domination or control of an employer or group of employers or of one or more employers' associations and is not liable to interference by an employer or any such group or association”.

<sup>144</sup> S 10(1) of the TULRCA.

<sup>145</sup> S 10(2) of the TULRCA.

<sup>146</sup> S 10(3) of the TULRCA.

<sup>147</sup> [1980] *All England Reports* (All ER) 1097.

<sup>148</sup> S 12(2) of the TULRCA.

<sup>149</sup> S 15 of the TULRCA.

<sup>150</sup> S 28 of the TULRCA.



must reflect a true and fair view of the state of the affairs of the union.<sup>151</sup> A trade union must also provide the Certification Officer with a return relating to its affairs. This must among other matters contain revenue accounts showing the income and expenditure of the trade union for the reporting period, and a balance sheet providing a true reflection of the affairs of the trade union. There must also be a copy of a report made by the auditor of the trade union on those accounts.<sup>152</sup>

If a trade union fails to perform the above duties, it commits an offence. Such offence is deemed also to have been committed by every officer of the trade union who is bound by the rules of the union to discharge on its behalf the duty, breach of which constitutes an offence, or if there is no such officer, every member of the general committee of management of the union.<sup>153</sup>

### **3 3 Circumstances under which a trade union may incur liability in the UK**

#### *3 3 1 Trade union liability for non-compliance with its constitution*

An application for the registration of a trade union should among other things be accompanied by the organisation's rules (constitution).<sup>154</sup> In *Frost v Clarke & Smith Manufacturing Co Limited*,<sup>155</sup> it was held that a body of workers that claims to be a trade union in order to claim sole bargaining rights under the Industrial Relations Act of 1971 was not an organisation since it had no name, no constitution, and no rules, held no meetings and kept no minutes. The constitution constitutes a contract between the union and its members and it is important that both parties should adhere to it.<sup>156</sup> Membership of a trade union entitles members to certain rights contained in its constitution and they can claim damages if the union does not fulfill its role.<sup>157</sup> For example, a trade union that fails to provide legal advice as promised in its rules may be sued for loss incurred from such a breach.<sup>158</sup> It was stated in *Friend v Institution of Professional Managers and Specialists*<sup>159</sup> that the union can execute its duty to use ordinary care and skill by lodging a possible claim through a firm of solicitors.<sup>160</sup>

In terms of section 109 of the TULRCA, a trade union member who claims that there has been a breach of other rules of the union may apply to the Certification Officer for a declaration. Those rules include the appointment or

---

<sup>151</sup> S 28(2) of the TULRCA.

<sup>152</sup> S 33 of the TULRCA.

<sup>153</sup> S 45(2) of the TULRCA.

<sup>154</sup> S 3(2) of the TULRCA.

<sup>155</sup> [1973] Industrial Relations Law Reports (IRLR) 216.

<sup>156</sup> Selwyn Selwyn's Law of Employment 15ed (2008) 558.

<sup>157</sup> Selwyn Selwyn's Law of Employment 560.

<sup>158</sup> *Ibid.*

<sup>159</sup> [1999] IRLR 173.

<sup>160</sup> Selwyn Selwyn's Law of Employment 560.

election of a person to, or the removal of a person from, any office, and the balloting of members on any issue other than industrial action.

As in South Africa, a UK trade union may be held liable for failure to comply with its constitution.

### 3.3.2 *Trade union liability for claims in contract and delict*

Section 20 of the TULRCA concerns proceedings that are brought against a trade union based on an act that induces a person to break a contract, or that interferes or induces another person to interfere with its performance, or that threatens that a contract will be broken. In order to determine whether the union is liable in respect of the act, that act is taken to have been done by the union, on condition it has been authorised or endorsed by that trade union.<sup>161</sup> This is the case if, for example, the act was by any person empowered by the rules of the union to do, authorise or endorse acts like the one in question, or by the principal executive committee or the president or general secretary or any other committee or official<sup>162</sup> of the union. It was however, held in *Buckley v National Union of General and Municipal Workers*,<sup>163</sup> that no breach of contract arises where a member cannot show that their case had judicious prospects of success. The TULRCA specifically states the amounts that may be awarded against the union by way of damages during proceedings in tort.<sup>164</sup> Each employee who has suffered damage may sue the union for a maximum sum depending on the size of the union. Interest may also be added to the award.<sup>165</sup>

If a trade union fails to apply for a protective award in appropriate circumstances or negligently delays the presentation of a claim to a tribunal such that it becomes out of time, the aggrieved member will have a right of action against the union for damages.<sup>166</sup> Section 14 of the Trade Union and Labour Relations Act 1974 (TULRA) granted total legal immunity to trade unions in respect of various actions in tort. The immunity was, however, repealed by the Employment Act 1982, which provides for a remedy against the striking employees' trade union in tort.<sup>167</sup> A trade union is liable in tort if the protection of section 219 of the TULRCA is not available to it.<sup>168</sup> A union

<sup>161</sup> S 20(1) of the TULRCA.

<sup>162</sup> In terms of s 119 of the TULRCA, an official is "an officer of the union or of a branch or section of the union or a person elected or appointed in accordance with the rules of the union to be a representative of its members or of some of them and includes a person so elected or appointed who is an employee of the same employer as the members. An officer includes any member of the governing body of the union and any trustee of any fund applicable for the purposes of the union".

<sup>163</sup> [1967] 3 All ER 767.

<sup>164</sup> S 22 of the TULRCA. The Liability of Trade Unions in Proceedings in Tort (Increase of limits on damages) Order 2022 increased the limits on the amounts that may be awarded against a trade union.

<sup>165</sup> *Boxfoldia Ltd v National Graphical Association* [1988] IRLR 383.

<sup>166</sup> Selwyn *Selwyn's Law of Employment* 560.

<sup>167</sup> S 15 of the Employment Act of 1982.

<sup>168</sup> This section offers protection from certain tort liabilities.

---

that imposes upon its members a levy that is *ultra vires* can be restrained from doing so through an injunction.<sup>169</sup>

The above discussion has demonstrated that, similar to South Africa, trade unions in the UK may be held liable for their members' contractual and delictual claims.

### 3 3 3 Trade union liability for unfair discrimination claims

The European Court of Human Rights held in *ASLEF v United Kingdom*<sup>170</sup> that, just as a worker is free to join or not join a union, a trade union is also free to choose its members. In terms of section 174 of the TULRCA, a trade union may prescribe requirements for membership, but these may not be exercised in an arbitrary and unreasonable manner.<sup>171</sup> In terms of section 12 of the Sex Discrimination Act of 1975, a trade union cannot discriminate against a woman in relation to membership or discriminate against her in the way it affords her access to any benefits, facilities or other services.<sup>172</sup> There can also be no discrimination on the basis of race in terms of section 12 of the Race Relations Act, 1976.

As in South Africa, trade unions in the UK may therefore not unfairly discriminate against employees based on sex and race.

### 3 3 4 Trade union liability for lack of authority by trade union representatives claims

In the UK, trade union officials are expected to act within the ambit of the union rules. In *Weakley v Amalgamated Union of Engineering Workers*,<sup>173</sup> the president of the union exercised a casting vote on a motion based on the fact that the committee was divided. An injunction was granted restraining the union from acting on the motion because the president was not allowed to exercise a casting vote. If a shop steward has authority to act on behalf of the union, the union may be responsible for their actions, unless it has a defence.<sup>174</sup> The union will, for example, not be held liable if the act was repudiated by the principal executive committee or president or general secretary as soon as reasonably practicable.<sup>175</sup>

In *White v Kuzych*,<sup>176</sup> it was stated that a trade union member who seeks a determination or conciliation of a dispute under the union rules should first pursue their case through the union's internal disputes procedure before seeking recourse to the courts. Nevertheless, the union member has a right

---

<sup>169</sup> *Hopkins v National Union of Seamen* [1985] ICR 268.

<sup>170</sup> [2007] ECHR 184.

<sup>171</sup> *Nagle v Feilden* [1966] 2 Law Reports, Queen's Bench Division (QB) 633.

<sup>172</sup> *Selwyn Selwyn's Law of Employment* 557.

<sup>173</sup> (1975) 125 *New Law Journal* (NLJ) 621.

<sup>174</sup> *Heaton's Transport (St Helens) Ltd v Transport and General Workers' Union* [1997] AC 15.

<sup>175</sup> S 21 of the TULRCA.

<sup>176</sup> [1951] AC 585.

to apply to court any time after six months from the date when the union first received their application regarding the matter.

In *Heaton's Transport (St Helens) Ltd v Transport and General Workers Union*,<sup>177</sup> the trade union argued that it was not liable for its shop stewards' actions – neither the unfair industrial practices for which it was found liable nor for being in contempt of restraining orders made. It was found that in accordance with the rules and practice of the trade union, shop stewards had implied authority to act in the interests of members they represented, to defend and improve their rates of pay and working conditions, which could be done by negotiation or by industrial action at the relevant workplace. However, they were not authorised to do any act outside of the trade union rules or policy. In this case, Lord Wilberforce stated as follows:

“To be effective in law a withdrawal or curtailment of any existing actual authority of an agent must be communicated by the principal to the agent in terms which the agent would necessarily understand forbidding him to do that which he had previously been authorized to do on the principal's behalf.”<sup>178</sup>

As in South Africa, trade unions in the UK may be held liable for authorised acts of officials and shop stewards.

### 3 4 Trade union liability relating to industrial action

Whereas employees in South Africa have the right to strike, in the UK they do not have a positive right to organise or take part in industrial action; instead, they have a freedom to strike.<sup>179</sup> Industrial action is defined under the TULRCA as “a strike or other industrial action by persons employed under contracts of employment”.<sup>180</sup> The freedom to strike is obtained on condition that the act is done in contemplation or furtherance of a trade dispute.<sup>181</sup> In terms of the TULRCA, a “trade dispute” must relate to terms and conditions of employment or the physical conditions under which workers are required to work; engagement or non-engagement, or termination or suspension of employment or duties of employment; allocation of work; and matters of discipline.<sup>182</sup>

If a union calls for industrial action in violation of balloting provisions of the TULRCA, or for a reason not allowed by the TULRCA, it can be sued and will not have immunity in terms of section 219. A trade union member who claims that members are likely to have been induced by the union to take part or to continue to take part in industrial action that is not supported by a ballot may apply to court for an order.<sup>183</sup> The court has power to grant an

<sup>177</sup> *Supra*.

<sup>178</sup> *Supra* 68.

<sup>179</sup> Morris and Archer *Trade Unions, Employers and the Law* 2ed (1993) 207; Manamela *The Social Responsibility of South African Trade Unions* 162.

<sup>180</sup> S 62(6) of the TULRCA.

<sup>181</sup> Perrins *Trade Union Law* (1985) 293.

<sup>182</sup> Ss 218 and 244 of the TULRCA.

<sup>183</sup> S 62(1) of the TULRCA.

injunction<sup>184</sup> or interdict, and may require the union to take steps as the court considers appropriate for ensuring that there is no further inducement of persons to take part or to continue to take part in the industrial action. An award of £130 000 was awarded in *Willerby Holiday Homes Ltd v Union of Construction, Allied Trades and Technicians*,<sup>185</sup> where the union called a strike notwithstanding that the pre-ballot notice did not comply with sections 22, 227(1) and 234 of the TULRCA. It must be noted that South Africa does not have a similar provision.

It was confirmed in *Simmons v Hoover Ltd*<sup>186</sup> that if notice of strike action is not given, the strike is treated as a breach of contract by the courts. In the UK, there are two torts: the tort of interference with a contract, trade or business as stated in *Lumley v Gye*;<sup>187</sup> and the tort of causing loss by unlawful means.<sup>188</sup> The first is a tort of secondary or accessory liability, where a third party is the wrongdoer who was persuaded or induced to breach their contract with the claimant and the defendant incurs accessory liability as having induced the breach. The latter tort is a tort of primary liability informed by the defendant's unlawful act.<sup>189</sup>

In the UK, section 20 of the TULRCA provides for vicarious liability of a trade union for its officials, but this only applies to liability for torts, including breach of contract, intimidation and conspiracy. The union will be liable if the act was authorised from the beginning or was endorsed at a later stage by, among others, the principal executive committee acting within set rules, or any other person empowered by the rules to authorise such acts.

Where a trade union official calls employees to strike, it is the employee who is breaking the contract but, as previously stated, the union could be held liable for inducing a breach of contract. Also, where a union calls a secondary boycott, it is regarded as inducing a breach of a commercial contract.<sup>190</sup> An action by a trade union to induce a person to take part in industrial action is prevented from being actionable in tort by section 219 of the TULRCA, unless the union takes such steps as are reasonably necessary to ensure that the employer receives relevant notice of the industrial action within the appropriate period. Employees who are dismissed for participation in an unofficial industrial action will have no claim of unfair dismissal.<sup>191</sup>

As in South Africa, there are circumstances in the UK under which a trade union may be held liable in relation to industrial action by its members.

---

<sup>184</sup> *Solihull Metropolitan Borough Council v National Union of Teachers* [1985] IRLR 211.

<sup>185</sup> [2003] *England and Wales High Court* (EWHC) 2608 (QB).

<sup>186</sup> [1977] ICR 61 76.

<sup>187</sup> [1853] 2 E & B 216.

<sup>188</sup> Bowers, Duggan, Reade and Apps *The Law of Industrial Action and Trade Union Recognition* 3ed (2019) 18–19.

<sup>189</sup> *OBG Limited v Allan* [2008] 1 AC 1.

<sup>190</sup> Selwyn *Selwyn's Law of Employment* 577.

<sup>191</sup> S 223 of the TULRCA.

## 4 EVALUATION AND CONCLUSION

Internationally, trade unions are recognised as important collective bargaining agents and representatives of employees' interests. Whereas in South Africa a trade union is considered a body corporate, in the UK it is not, and it does not have legal personality.<sup>192</sup> Nonetheless, in both countries, trade unions have rights and duties in the same way that any legal person does. They can enter into contracts, and they can sue or be sued in their own names.<sup>193</sup> Generally, trade unions have legal or statutory duties to meet; should they fail to meet these, they may face certain consequences, such as deregistration.<sup>194</sup> Furthermore, in the UK, failure by a trade union to perform those duties amounts to an offence. Such offence is also deemed to have been committed by every officer of the trade union who is bound by the rules of the union to discharge on its behalf the duty, breach of which constitutes an offence, or if there is no such officer, every member of the general committee of management of the union.<sup>195</sup> It is evident from the discussion that, in both countries, the constitutions of trade unions are important for trade unions' proper functioning, and therefore that trade unions may be held liable for breaching their provisions.<sup>196</sup> Moreover, in both countries, trade unions may be held liable under the law of contract or the law of delict,<sup>197</sup> unless in instances where a trade union has immunity – for example, under section 219 of the TULRCA in the UK. Unlike in South Africa, under the TULRCA, amounts for which employees or trade union members may sue a trade union for suffered damage are specified.<sup>198</sup>

In both countries, although a trade union acts through natural persons, it is distinct from them, and generally its representatives cannot be held liable for authorised acts or for acting within the prescribed limits of the union's constitution.<sup>199</sup> Notwithstanding that trade unions in both countries have the right to prescribe who may become a member,<sup>200</sup> unfair discrimination based on sex and race is prohibited.<sup>201</sup> In both countries, trade unions are also expected to act conscientiously with regard to industrial action as they may be held liable in certain instances. In both countries, there is a provision for pre-strike balloting, but in the UK, if a pre-strike ballot is required before industrial action, trade unions must ensure that such ballot is conducted in order to avoid being sued. An order may also be issued by the court against such action.<sup>202</sup> By contrast, in South Africa, failure to comply with ballot requirements in relation to strikes will not necessarily give rise to or

<sup>192</sup> In *Electrical, Electronic Telecommunications and Plumbing Union v Times Newspapers supra*.

<sup>193</sup> *NEWU v Sithole supra*; s 10(1) of the TULRCA.

<sup>194</sup> S 106(2A) of the LRA.

<sup>195</sup> S 45(2) of the TULRCA.

<sup>196</sup> S 158(1)(e) of the LRA; *Selwyn Selwyn's Law of Employment* 560.

<sup>197</sup> *FAWU v Ngcobo supra*; *SAMWU v Jada supra*.

<sup>198</sup> S 22 of the TULRCA.

<sup>199</sup> *Weakley v Amalgamated Union of Engineering Workers supra*.

<sup>200</sup> *ASLEF v United Kingdom supra*.

<sup>201</sup> S 6(1) of the EEA.

<sup>202</sup> *Willerby Holiday Homes Ltd v Union of Construction, Allied Trades and Technicians supra*.

constitute a ground to contest the legality of the strike.<sup>203</sup> Trade unions are also expected to ensure that their members conduct themselves well during industrial action.<sup>204</sup> In the UK, if a trade union official calls employees to strike, even though it is an employee who breaches his or her contract of employment, a trade union could be held liable for inducing such a breach.<sup>205</sup> Before claiming damages against a trade union, members must, however (where internal procedures are prescribed), exhaust them first, before approaching courts.<sup>206</sup>

The discussion has demonstrated that although trade unions are free to determine their constitutions and rules, and to plan and organise their administration and lawful activities,<sup>207</sup> as organisations they must act appropriately because they might be held liable on a variety of grounds. Trade unions must ensure that they or their representatives comply with their statutory duties and provisions of their constitutions in order to avoid likely claims in contract and delict. They should also ensure that their representatives act with authority, avoid claims of unfair discrimination, and become responsible and accountable when it comes to industrial action.

South Africa can learn from the UK position, where the TULRCA requires more accountability from trade unions and their representatives. In order to increase accountability for trade unions in South Africa, the LRA should (like the TULRCA) provide for specific offences for which a trade union could be found liable, and also possible fines that could be issued against trade unions in cases of non-compliance.<sup>208</sup> This would encourage trade unions and their representatives to act appropriately and responsibly in their functioning. It would furthermore promote the observance of the law and better governance in trade unions. It is submitted that this would not limit, or not unduly limit, their rights to determine their constitutions and rules, and to plan and organise their administration and lawful activities as provided for in terms of the Constitution<sup>209</sup> and the LRA.<sup>210</sup> Nevertheless, whatever form of limitation which may arise owing to the above should be reasonable and justifiable as required by the Constitution.<sup>211</sup>

---

<sup>203</sup> S 67(7) of the LRA.

<sup>204</sup> S 68 of the LRA; *Mangaung Local Municipality v SAMWU supra*.

<sup>205</sup> Selwyn Selwyn's *Law of Employment* 577.

<sup>206</sup> Du Toit *et al Labour Relations Law* 236; *White v Kuzych supra*.

<sup>207</sup> S 8(a) of the LRA.

<sup>208</sup> S 22 of the TULRCA. The Liability of Trade Unions in Proceedings in Tort (Increase of limits on damages) Order 2022 increased the limits on the amounts that may be awarded against a trade union.

<sup>209</sup> S 23(4) of the Constitution.

<sup>210</sup> S 8(a) of the LRA.

<sup>211</sup> S 36(1) of the Constitution.