

In the Name of 'Workplace and Majoritarianism': Though Shalt not Strike
— *Association of Mineworkers & Construction Union v Chamber of Mines* (2017) 38 ILJ 831 (CC) and *National Union of Metalworkers of SA & Others v Bader Bop (Pty) Ltd & Another* (2003) 24 ILJ 305 (CC)

B.P.S. van Eck*

1 INTRODUCTION

Since the adoption of the South African Constitution, 1996, the Constitutional Court has jealously protected the right to strike (see *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* (1996) 17 ILJ 821 (CC) where the significance of the constitutional right to strike was confirmed in the very first decision of the CC). In one of its key decisions regarding the rights of minority trade unions, *National Union of Metalworkers of SA & others v Bader Bop (Pty) Ltd & another* (2003) 24 ILJ 305 (CC), the court cast a vote of confidence in the right to strike and pluralism of trade unions when it held that no matter how low a particular trade union's level of representativeness is, that union has a right to strike in order to persuade an employer to grant workers non-statutory organisational rights.

In what is predicted to be yet another significant decision regarding the right to strike and the required levels of representativeness of trade unions, the Constitutional Court in *Association of Mineworkers and Construction Union v Chamber of Mines* (2017) 38 ILJ 831 (CC) (AMCU) has apparently adopted a different approach. Based on the literal interpretation of the definition of 'workplace' and under the banner of 'majoritarianism', the court has held that minority trade unions do not

* Professor of Labour Law, Faculty of Law, University of Pretoria; Director, Centre for Insolvency, Labour and Company Law (CILC).

have the right to strike where the dominant unions have concluded a collective agreement that limits that right.

This contribution poses the question whether *AMCU* is compatible with *Bader Bop*. Furthermore, the discussion contemplates whether it is appropriate to have a single definition of a ‘workplace’ in the Labour Relations Act 66 of 1995 (LRA) in respect of, amongst others, the acquisition of organisational rights (ss 12-15), collective bargaining (ss 23(1)(d) and 65(2)(a)), the establishment of workplace forums (ss 78-94) and the termination of contracts of employment on operational grounds (ss 189(1)(a)). This note considers the question whether following the mantra of majoritarianism would not thwart some of the goals of the LRA, which include the promotion of labour peace, workplace democracy and orderly collective bargaining (s 1) (see also, regarding the often precarious situation of minority trade unions, J Theron, S Godfrey & E Fergus ‘Organisational and Collective Bargaining Rights through the Lens of Marikana’ (2015) 63 *ILJ* 853; L Corazza & E Fergus ‘Representativeness and the Legitimacy of Bargaining Agents’ in B Hepple, R le Roux & S Sciarra (eds) *Laws Against Strikes: The South African Experience in an International Comparative Perspective* (2015) 88; and T G Esitang & S van Eck ‘Minority Trade Unions and the Amendments to the LRA: Reflections on Thresholds, Democracy and ILO Conventions’ (2016) 64 *ILJ* 763).

2 *AMCU*: THE FACTS, THE LAW AND THE DECISION

The Chamber of Mines, an employers’ organisation formed by a number of gold mining companies, negotiated a collective agreement between three employers on the one hand, and the trade unions National Union

of Mineworkers (NUM), Solidarity and the United Association of South Africa (UASA) on the other. Each employer company operates more than one mine in different parts of South Africa. At some of these mines the Association of Mineworkers and Construction Union (AMCU) had majority membership. However, overall in this part of the mining sector, this aggressively up-and-coming union did not have the majority membership at all at the respective companies' mines. AMCU was not party to the above-mentioned collective agreement that contained a 'no-strike clause' which spanned two years.

AMCU did not agree with the annual wage increase and not being party to the agreement, AMCU gave notice to strike. The Labour Court granted an interdict against the trade union's planned industrial action regarding the dispute settled in terms of the collective agreement (Cele J granted the interim order in *Chamber of Mines of SA acting in its own name & on behalf of Harmony Gold Mining Company Ltd & others v Association of Mineworkers & Construction Union others* (2014) 35 ILJ 1243 (LC) and Van Niekerk J confirmed it on the return date in *Chamber of Mines of SA acting in its own name & on behalf of Harmony Gold Mining Company Ltd & others v Association of Mineworkers & Construction Union & others* (2014) 35 ILJ 3111 (LC)). This decision was taken on appeal to the Labour Appeal Court (LAC) (*Association of Mineworkers & Construction Union & others v Chamber of Mines of SA acting in its own name & on behalf of Harmony Gold Mining Co (Pty) Ltd & others* (2016) 37 ILJ 1333 (LAC)) and ultimately to the Constitutional Court. At the heart of the issue was the question whether AMCU's right to strike was legitimately restricted by the collective agreement that was concluded with the majority trade unions and to which AMCU was not a party.

The first provision of the LRA that was central to the court's finding is s 23(1) which deals with the binding effect of collective agreements on parties to such agreements and their members. The section's point of departure is that collective agreements bind the parties to the collective agreement as well as their members. However, s 23(1)(d)(iii) goes further and provides that collective agreements also bind employees who are not members of the signatory unions if:

- '(i) the employees are identified in the agreement;
- (ii) the agreement expressly binds the employees; and
- (iii) that trade union or those trade unions [that are party to the collective agreement] have as their members the *majority* of employees employed by the employer in the *workplace*'.
(Emphasis added.)

Amongst the requirements, the terms 'majority' and 'workplace' are of significance. The definition does not refer to bargaining unit, or the level where collective bargaining may have occurred, for example, at sectoral or plant level. Rather, the definition ties the majoritarian principle to the notion 'workplace'. This is in contrast to the extension of bargaining council agreements, to which I return below.

The second provision that was of foremost importance is the one that defines a workplace. In respect of the private sector, s 213 of the LRA defines a workplace as 'the place or places where the employees of an employer work. If an employer carries on or conducts two or more *operations* that are *independent* of one another by reason of their *size, function or organisation*, the place or places where employees work in connection with each independent operation constitute the workplace for that operation.' (Emphasis added.)

As an aside, the LRA definition of 'workplace' has two components for purposes of the public service. The one covers collective bargaining and dispute resolution issues, and the other relates to 'any other purpose'.

The first part of the definition reads that:

'(i) for the purposes of collective bargaining and dispute resolution, the registered scope of the Public Service Co-ordinating Bargaining Council or a bargaining council in a sector in the public service, as the case may be [constitutes a workplace]'

The second part refers to smaller organisational components, irrespective of whether they may be independent of each other, and provides that:

'(ii) for any other purpose, a national department, provincial administration, provincial department or *organisational component* contemplated in section 7(2) of the Public Service Act, 1994 (promulgated by Proclamation No. 103 of 1994), or any other part of the public service that the Minister for Public Service and Administration, after consultation with the Public Service Co-ordinating Bargaining Council, demarcates as a workplace'. (Emphasis added.)

The second part ostensibly includes aspects such as the granting of organisational rights (ss 12-15 of the LRA) and the establishment of workplace forums (ss 78-94 of the LRA). It could also potentially apply to the termination of contracts of employment on operational grounds regarding the parties that need to be consulted in terms of the collective agreement (s 189(1)(a) of the LRA; *Association of Mineworkers & Construction Union & others v Bafokeng Rasimone Management Services (Pty) Ltd & others* (2017) 38 ILJ 931 (LC)).

It should also be noted that the public service definition does not place emphasis on 'independence' for purposes of demarcating workplaces. It is clear that in respect of the public service, the definition does not adopt

a one shoe fits all approach. In respect of collective bargaining the sector is of importance and regarding other aspects the definition relates to smaller organisational components.

In *AMCU*, the Chamber of Mines relied on two main points which precluded members of AMCU from engaging in the strike. Firstly, it argued that the signatory trade unions constituted a majority at the workplace and, in terms of s 23(1)(d)(iii) of the LRA, minority trade unions were bound by the agreement that contained a peace clause. Secondly, the Chamber of Mines contended that this provision must be read in conjunction with s 65(1)(a) of the LRA, which prohibits an employee from participating in a strike if he or she is bound by a collective agreement that regulates the issue in dispute.

AMCU raised three main arguments and contended that s 23(1)(d) is constitutionally invalid in so far as it infringes every worker's right to strike (*AMCU* para 15); that the term 'workplace' should be accorded a broad interpretation which means that each of the mines is a separate workplace rather than all of an employer's operations taken together (para 11); and that the agreement should have been extended by means of s 32 of the LRA, which deals with the extension of bargaining council agreements and contains additional safeguards (paras 12-14). The argument was that the Chamber of Mines had in effect circumvented s 32 by extending the agreement to non-parties by means of s 23.

The Constitutional Court rejected AMCU's first argument and held that even though s 23 has the effect of limiting the fundamental right to strike, such limitation is justifiable. The court held that:

'AMCU is right that the codification of majoritarianism in section 23(1)(d) limits the right to strike. The key question is whether the principle

provides sufficient justification for that limitation In short, the best justification for the limitation the principle imposes is that majoritarianism, in this context, benefits orderly collective bargaining' (para 50).

The court accepted that it is internationally recognised that 'majoritarianism is functional to enhanced collective bargaining' (*AMCU* para 56.) However, the court did not delve further into the question whether South Africa has in fact adopted an exclusive majoritarian approach, which has the effect that the right to strike is a collective right which belongs to unions, or whether it remains an individual right which is exercised collectively. The Constitution coins it as an individual right. Rather than relying on the importance of the right to strike as a point of departure, as was done in *Bader Bop* (see the discussion below), the court delved into the definition of 'workplace' and relied on majoritarianism to determine whether any limitations were justifiable. The court endorsed the view of the Labour Appeal Court (LAC) in *Kem-Lin Fashions CC v Brunton* ((2001) 22 ILJ 109 (LAC) at para 19) where it held:

'The legislature has also made certain policy choices in the Act which are relevant to this matter. One policy choice is that the will of the majority should prevail over that of the minority. This is good for orderly collective bargaining as well as for the democratisation of the workplace and sectors. A situation where the minority dictates to the majority is, quite obviously, untenable. But also a proliferation of trade unions in one workplace or in a sector should be discouraged. There are various provisions in the Act which support the legislative policy choice of majoritarianism.'

Turning to *AMCU*'s second argument in relation to the interpretation of the definition of 'workplace', the Constitutional Court accepted that it is not a 'purely factual enquiry', but nonetheless held that there is no

‘reason in constitutional principle, legal analysis or factual assessment [which] provides a reason for this court to overturn’ the findings of the Labour Court and the LAC (*AMCU* para 37).

The court held that two things are clear about the definition. Firstly, ‘its focus [is] on employees as a collectivity’ and, secondly, there is a ‘relative immateriality of location’ where the employees work (para 24). It held that the definition that the LRA accords to ‘workplace’ is something different from its ordinary meaning. In terms of the first aspect, the words ‘the place or places where the employees of an employer work’ refer not to the physical place where a single employee works, but include all the places where the employer’s employees collectively work. Thus this aspect creates a default rule that ‘regardless of the places, one or more, where employees of an employer work, they are all part of the same workplace’ (para 27). The second aspect makes provision for an exception, namely that different operations may be different workplaces only if the operation is independent (para 27). Thus, the proviso does not relate to physical individuality, but to the independence of the organisation by reason of its functionality (para 28). The court accepted the findings of both the Labour Court and the LAC that the individual mining houses operated in an integral fashion thereby constituting a single workplace (para 31).

In relation to *AMCU*’s final argument, the court also rejected the trade union’s contention that the extension of the agreement should not have occurred under s 23(1)(d) but under s 32 with its sectoral characteristic and safeguards. With reference to *Transport & Allied Workers Union of SA v Putco Ltd* (2016) 37 *ILJ* 1091 (CC), which dealt with s 32 extensions, the court accepted that an extension may occur at the behest of the majority — thus recognising the ‘constitutional warrant for

majoritarianism in the service of collective bargaining' (para 57). The court in *AMCU* found that the implication of that judgment was analogous and that the principle also applied to s 23 extensions. The court did not, however, pay attention to the fact that s 32 of the LRA provides that the majority principle applies in respect of the members of the trade unions who are party to the bargaining council and not the workplace as per s 23 of the LRA.

The court further considered AMCU's contention that the extensions under s 23 are tantamount to an exercise of public power, and because they are unsupervised unlike in respect of s 32 they licence a lawless exercise of such power. The court accepted that even though s 23 concerns private actors, extensions under subsection (1)(d) of that section do entail the exercise of a public power. Nevertheless, the court found that despite concerns raised about a lack of protection that this process provides, it has its own inherent safeguards in the form of the principle of legality and concomitant review mechanisms (para 73).

The court concluded that the interdict against AMCU was valid under these circumstances and that the order's restriction on the right to strike was reasonable and justifiable within the collective bargaining framework established by the LRA.

3 *BADER BOP*: THE FACTS, THE LAW AND THE DECISION

Almost 14 years ago, the Constitutional Court in *Bader Bop* also grappled with the issues of pluralism and limitations on the right to strike. However, in that case the court was not faced with a set of facts that included a collective agreement which contained a no-strike clause. In *Bader Bop*, members of a non-recognised minority union sought to

enforce organisational rights by means of a strike, despite the fact that the LRA does not accord such rights to minority unions. The court in that case, contrary to the approach in *AMCU*, leaned towards pluralism and the recognition of the fact that minority trade unions' right to strike should not glibly be restricted if this can be prevented by an alternative interpretation of the LRA.

The facts were as follows: Bader Bop manufactured leather products for the automobile industry and at the time the company employed approximately 1 000 employees outside Pretoria. The General Industrial Workers Union of South Africa (GIWUSA) represented the majority of Bader Bop's workers and enjoyed all of the organisational rights in terms of Chapter III of the LRA.

Section 11 of the LRA provides that representative trade unions 'that are sufficiently representative of the employees employed by an employer in a workplace' may claim one or more of the following organisational rights at a workplace, namely, trade union access to an employer's premises (s 12); the deduction of trade union subscriptions from their members' pay (s 13); and reasonable time off for trade union officials in order to perform their functions of office (s 15).

The above provisions make it clear that the LRA, at least in as far as the granting of organisational rights is concerned, endorses a pluralist rather than a strict majoritarian approach. Nonetheless, the LRA does further prescribe that two of the organisational rights, namely, the right to elect trade union representatives and the right to relevant information (ss 14 and 16) are conferred only upon those trade unions that have as members a majority of the employees employed in the workplace.

In *Bader Bop* the National Union of Metalworkers of South Africa (NUMSA) represented only approximately 26% of the workers at the employer's workplace. Nonetheless, it claimed, amongst others, the right to elect shop stewards. Even though Bader Bop was willing to accord NUMSA access to its premises and stop-order facilities, it was not willing to recognise the union's shop stewards. The union declared a dispute at the Commission for Conciliation, Mediation and Arbitration (CCMA) over the acquisition of organisational rights and informed the employer that it intended to commence with strike action. Bader Bop contended that NUMSA could not strike as it was not entitled to claim the organisational rights in question in terms of the LRA.. NUMSA, it argued, in any event had the option of referring a dispute to the CCMA in terms of the LRA's s 21 procedure. This tailor-made arbitration process seeks to minimise the proliferation of trade unions in a single workplace, by taking factors such as organisational history and the composition of the workforce into account (see also s 21(8) of the LRA and *SA Clothing & Textile Workers Union v Marley (SA) (Pty) Ltd* (2000) 21 ILJ 425 (CCMA); C Mischke 'Getting a Foot in the Door' (2004) 13 (6) *CLL* 51).

Bader Bop sought an interdict against NUMSA's call for a strike. In its appeal to the Constitutional Court, NUMSA contended that either the provisions of the LRA which limit the right of minority unions to strike were unconstitutional or in the alternative that the court should interpret ss 65(1)(c) and 65(2) of the LRA in such a way that the fundamental right to strike was not infringed (*Bader Bop* para 12). O'Regan J considered the fact that minority unions do not have any entitlement to organisational rights (*Bader Bop* para 25), and weighed this up against the ILO principles pertaining to the right to freedom of association and

the right to strike (*Bader Bop* paras 29-32). Despite the LRA's well-ordered structure relating to the granting of statutory organisational rights only to majority and sufficiently representative trade unions, the court overturned the LAC decision which had confirmed the interdict.

The court held that there was no explicit prohibition against minority trade unions engaging in strikes to gain non-statutory trade union rights (*Bader Bop* para 40) and that the right to strike should be protected as far as possible. In its interpretation, the court posed the question 'whether the Act is capable of an interpretation that . . . avoid[s] limiting constitutional rights' (*Bader Bop* para 39). Stated differently, should there be any conceivable way of interpreting the LRA so that it does not limit the fundamental right to strike, that would be the court's preferred interpretation. It should be noted that some scholars criticised the court for not going far enough and argued that it should have found the provisions of the LRA which require majority representation in respect of certain organisational rights to be unconstitutional (M A Chicktay 'Democracy, Minority Trade Unions, and The Right to Strike: A Critical Analysis of *Numsa v Bader Bop (Pty) Ltd* 2003 2 BCLR (CC)' 2007 *Obiter* 159.)

Considering *AMCU* in the light of *Bader Bop*, the question remains whether the court in *AMCU* went far enough in seeking to interpret the LRA in such a way so as not to place an unreasonable limit on the right to strike.

4 THEORETICAL UNDERPINNINGS OF THE RIGHT TO ORGANISE AND THE RIGHT TO COLLECTIVE BARGAINING

Before embarking on a comparison of the two cases and answering the question whether the decisions are compatible with each other, it is appropriate to introduce the discussion with a conceptual discussion relating to the building blocks of collective labour law. It has long been recognised that the right to engage in collective bargaining is one of the most effective means of promoting a more equal balance between employers and employees (P Davies and M Freedland *Kahn-Freund's Labour and the Law* (1983) 18). The right to freedom of association and the right to organise form the cornerstones of collective bargaining. This much is recognised by two of the International Labour Organisation's 'core' conventions (A van Niekerk & N Smit *Law@work* (2015) 24). The first is the ILO Convention on Freedom of Association and the Right to Organise 87 of 1948, and the second is the Convention on the Right to Organise and Collective Bargaining 98 of 1949. It is instructive to note that the right to organise is central to both of these conventions.

Loosely defined, freedom of association relates to any person's right to decide whether he or she wishes to join (or not to join) a collective, whether it be a political party, a sports club, a trade union or a religious or social organisation. As alluded to by Cheadle, although 98 countries of the world have the right to strike explicitly guaranteed in their constitutions, some countries do not have such an explicit right but derive it from the right to freedom of association (H Cheadle 'Constitutionalising the Right to Strike' in B Hepple, R le Roux and S Sciarra (eds) *Laws Against Strikes: The South African Experience in an International and Comparative Perspective*' (2015) 67 and 71. The main examples are Germany, Finland and Canada).

In South Africa, the core collective labour rights constitute human rights. The Constitution confers on every worker the individual rights to freedom of association (s 18), to organise (s 23(2) and (4)), to engage in collective bargaining (s 23(5)) and to strike (s 23(2)(c)). Although all of these rights are crafted as individual rights in the Bill of Rights, the right to strike can only be exercised collectively (B Hepple 'The Freedom to Strike and its Rationale' Hepple et al above 31). It is significant that none of these constitutional rights requires representativeness before workers may claim them. However, this does not preclude policy makers from introducing legislation such as the LRA which contains requirements about representativeness and that seeks to give effect to these rights, subject to the constitutional principles that such limitations should meet the standards of reasonableness and justifiability within the acceptable norms of democratic rule (s 36 of the Constitution).

Hepple explains that in some countries the right to strike is a collective right which belongs to the union. For example, in Germany and in the Nordic countries, a strike called by a group of workers that does not have the backing of a union would be unlawful. By contrast, 'the right to strike in France, Italy and Spain is a right of the individual' which cannot be monopolised by one or more unions (Hepple 31). He also alludes to the fact that the South African Constitution provides that the right to strike is an individual right (s 23(2)(c)) which is not derived from the right to freedom of association or the right to collective bargaining. This, he says, is perhaps why the pluralist approach was followed in *Bader Bop* where the court 'held that members of a minority union, not recognised by the employer, have the right to take industrial action in order to persuade the employer to enter into collective bargaining with it' (Hepple 32). Whether the right to strike should be construed as a collective right,

which can be signed away in a peace clause, or whether it is an individual right which cannot be monopolised by a trade union which concludes the collective agreement, was not argued and considered by the court in either *Bader Bop* or *AMCU*.

The LRA gives effect to each of the above-mentioned constitutional rights. The logical sequence for the establishment and functioning of a collective in the world of work would be to establish an association, to organise its activities and promote its growth, and thereafter to commence with collective bargaining. Trade unions do not start off as majority unions and they gain members through serving the best interests of workers, and not those of the government or the employer. A democratic labour law framework should make it possible for new kids on the block to unseat ineffective sweetheart unions. It is also submitted that if such a logical flow is not allowed it could lead to frustration amongst workers who may seek mechanisms outside the legislative framework to gain traction at the workplace (J Theron, S Godfrey & E Fergus 'Organisational and Collective Bargaining Rights Through the Lens of Marikana' (2015) 63 *ILJ* 853).

However, in line with South Africa's policy choice of adopting a pro-majoritarian approach, thresholds of representativeness have been coupled to some, but not all, of these rights. For the most part, the LRA discourages the proliferation of trade unions. This contribution accepts the fact that during power play workers' strength lies in unity. However, a blind following of majoritarianism, combined with the effects of threshold agreements and the extension of collective agreements, could severely

impede the rights to freedom of association and the right to organise that precede the process of collective bargaining.

Chapter II of the LRA, under the heading 'Freedom of Association and General Protections', gives effect to the constitutional right to associate (ss 4-10). This part of the Act, which confers on every worker and employer the right to participate in forming and joining trade unions or employers' organisations respectively (ss 4(1) and 6(1)), does not place any qualifying restrictions pertaining to representativeness on trade unions or employers' organisations. This part of the LRA also assists persons relying on this right in so far as an onus of proof has been included in the Act. Any party that alleges a breach of this right need merely to prove the facts of the conduct and the party engaged in the conduct must disprove that the right to freedom of association was violated (s 10).

The LRA does not contain a separate chapter pertaining to the right to organise. Rather than clustering organisational rights, which assist trade unions in getting a foot in the door at an employer's premises, under Chapter II of the LRA, the architects of the Act placed this right in Chapter III, under the heading 'Collective Bargaining'. It might have been more appropriate to include the right to organise, and the organisational rights associated with it, in the chapter of the LRA dealing with the right to associate. Another possibility would have been to insert a separate chapter dealing with the right to organise in the LRA where a different definition of 'workplace' could have been adopted. Surely, trade unions first get a foot in the door, and through effective organisation develop a powerbase before engaging in collective bargaining. The rights to associate and to organise are jointly addressed in the first of the ILO's

collective bargaining conventions, the Convention on Freedom of Association and Protection of the Right to Organise 87 of 1948.

Whereas Chapter II of the LRA that deals with freedom of association has no requirements pertaining to representativeness, Chapter III deals with the rights to organise and collective bargaining which on the face of it give effect to a policy choice of pluralism, but have in fact been cast in a format that has a strong slant towards majoritarianism. Although the LRA does not prohibit the existence of minority trade unions, it encourages majoritarianism in so far as majority trade unions are entitled to conclude threshold agreements (s 18) and closed shop and agency shop agreements (ss 25-26). The extension of collective agreements within and outside the operations of bargaining councils are also based on the majoritarian principle (ss 23 and 32). These restrictions on minority trade unions hamper their chances of working towards a changing of the guard and ultimately to engage in effective collective bargaining.

With the inception of the LRA, the term 'workplace' was for the first time introduced into labour relations legislation. It appears in different contexts, such as for purposes of the establishment of workplace forums (ss 78-94), the granting of organisational rights to trade unions (ss 12-16), some aspects of collective bargaining (s 23(1)(d)) and in respect of appropriate procedures to be followed during the termination of contracts of employment based on the employer's operational requirements (s 189(1)). In respect of the private sector, the definition of 'workplace' applies irrespective of whether the issues covered relate to the right to engage in collective bargaining or the retrenchment of workers (see s

213 of the LRA and the discussion about the different definitions of 'workplace' that apply to the private and public sectors in Part 2 above).

However, in recent years, pursuant to developments in the collective bargaining arena that may have been influenced by developments at Marikana where more than 30 miners were tragically killed, amendments to the LRA have sought to relax some of the majoritarian principles which severely restrict minority unions. The LRA was amended in January 2015 to lessen the seemingly negative effects of the LRA's s 18 threshold agreements in a number of respects. In the first instance, a trade union can be awarded the organisational right to appoint trade union representatives and the right to information if there is no majority trade union at the workplace (s 21(8)(A)).

Secondly, in terms of the new s 21(8)(C)(a) and (b) a trade union or trade unions acting together may apply for organisational rights despite the existence of a threshold agreement as long as the following requirements are met: the trade union which is party to the collective agreement must be present at the arbitration when the organisational rights are applied for (s 21(8)(C)(a)); and a commissioner may grant the rights referred to in sections 12, 13 or 15 if 'the trade union, or trade unions acting jointly, represent a *significant interest*, or *substantial number of employees*, in the workplace' (s 21(8)(C)(b)). (Emphasis added.) The notion 'substantial interest' is reminiscent of the term 'bargaining unit' or 'bargaining constituency' as it was used during the era of the Industrial Court which recognised smaller units at a plant or workplace and has been described as

‘a group of employees who share a community of interests, such as conditions of employment, methods of payment [and] physical proximity ... It is left to the parties to determine the bargaining unit by collective agreement. The demarcation of the bargaining unit is important in establishing the union’s bargaining entitlement and other rights’ (J V du Plessis & M A Fouche *A Practical Guide to Labour Law* (2015) 260. See also J Theron, S Godfrey & E Fergus ‘Organisational and Collective Bargaining Rights through the Lens of Marikana’ (2015) 63 *ILJ* 854 for a discussion of the term ‘bargaining unit’ under the LRA of 1956).

Thirdly, the LRA was also amended to ensure that when bargaining council agreements are extended to minority trade unions and non-members, the bargaining council should have in place ‘an effective procedure to deal with applications by non-parties for exemption ... and is able to decide an application ... within 30 days’ (s 32(3)(dA). The last mentioned requirement was not included in section 23(1)(d) which was attacked for want of constitutionality by the AMCU.

5 SIMILARITIES AND DIFFERENCES BETWEEN THE CASES

What are the similarities and differences between *Bader Bop* and *AMCU* and are the cases compatible with each other? Starting with the similarities, both cases dealt with situations where an employer sought to interdict a minority trade union from relying on the right to strike. Added to this, in both instances it was argued on behalf of the respective minority unions that either the LRA should be interpreted in such a way that workers’ constitutional right to strike should not be limited, or in the

alternative, that the provisions that limit the right to strike should be held to be unconstitutional. However, this is where the similarities end.

The first dissimilarity is that the court in *Bader Bop* found a way of interpreting the LRA in such a manner that the right to strike would not be limited while in *AMCU* the court held that the LRA could not be interpreted in any other way but to limit the minority trade union's right to strike. This, it held, was justifiable against the background of the goals of the LRA.

The second dissimilarity lies in the difference of approach adopted by the decisions pertaining to who 'owns' the right to strike, and the notions of pluralism and majoritarianism. Subsequent to *Bader Bop*, Hepple wrote:

'In South Africa, s 23 of the Constitution provides that the right to strike is an *independent* and *individual* right. It is not derived from the right to freedom of association or the right to collective bargaining. It was perhaps inevitable that the individualist approach would be adopted [in *Bader Bop*] given the pluralist nature of the South African labour movement' (Hepple 32).

Contrary to this line of thought, in *AMCU* the court wholeheartedly endorsed the notion of majoritarianism. In a sense, and despite the wording of the Constitution, the court endorsed the principle that the right to strike (and the right to waive it) belongs to the majority trade union that can conclude and extend collective agreements that bind minority unions. This, the court found, purportedly strengthens peaceful and orderly collective bargaining. Whether the right to strike should, on a

conceptual level, be construed as a fundamental collective right, which can be signed away in a peace clause by the union that owns it, or whether it is an individual right which cannot be monopolised by a trade union which concludes the collective agreement, as yet has not been comprehensively addressed by the court.

Majoritarianism also impacts on the termination of contracts of employment in the sphere of operational requirement terminations. In *Bafokeng Rasimone Management Services* (see under Part 2 above) the question arose whether a collective agreement pertaining to retrenchment, which was extended to minority unions and which excluded their participation in consultations, could pass constitutional muster. The Labour Court concluded that this was one of the consequences of majoritarianism and that the sole involvement of majority trade unions during consultations did not infringe the fundamental right to fair labour practices, the right not to be unfairly dismissed, and workers' right to dignity (*Bafokeng* paras 167 and 199).

The next difference lies in the fact that the dispute which gave rise to the strike in *Bader Bop* concerned the right to organise and the acquisition of organisational rights. This is different from the dispute considered in *AMCU* that concerned a wage dispute and the extension of a collective agreement to workers who did not belong to the majority union. In as far as these aspects can be separated, the second aspect falls within the sphere of collective bargaining and not under the attainment of organisational rights. In the realm of organisational rights, the LRA does not contain specific provisions which preclude workers from striking about such disputes. Rather than limiting it, s 65(2)(a) of the LRA in no uncertain terms stipulates that a strike may take place 'if the dispute is about any matter dealt with in sections 12 to 15' of the LRA. By contrast

and in relation to the extension of collective agreements, s 65(1) explicitly provides that '[n]o person may take part in a strike or a lock-out . . . if — (a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute'.

With this difference in mind, one could argue that it would serve no purpose to ask whether the two cases are compatible with one another as they dealt with two completely separate issues. In the one, the LRA specifies that workers are eligible to strike in order to attain organisational rights, and in the other, the LRA makes it clear that once a collective agreement about wages has been concluded which contains a peace clause, workers are explicitly precluded from striking over the same issues. Against the background of the different levels of restriction that apply to the different scenarios, there is no argument to be made that the court in *AMCU* in any way contradicted *Bader Bop*. In other words, the way in which the LRA currently reads there can be no doubt that with the particular facts before the courts *AMCU* was correctly precluded from engaging in a lawful strike. However, the analysis can be taken one step further by asking whether the LRA is appropriately formulated. As appositely mentioned by the court in *AMCU* '[p]erhaps a different definition of "workplace" might have worked equally well, or maybe even better, or fairer to smaller and emergent unions . . . [b]ut that is not the question before us' (*AMCU* para 51).

6 CONCLUSION

Despite the conclusion that *AMCU* did not directly contradict *Bader Bop*, on a more philosophical level it can be argued that the respective

approaches adopted by the two court decisions are not finely attuned to one another. *Bader Bop* left room for an interpretation in terms of which the rights of minority trade unions were recognised, whereas *AMCU* in no uncertain terms endorsed majoritarianism. The court in *AMCU* cannot be faulted for this, as this is how policy makers framed the LRA.

However, the LRA with its policy choice of majoritarianism was enacted more than 20 years ago, at a time when there was much more unity within organised labour. The Congress of South African Trade Unions (COSATU) served as a coalescing force amongst trade unions and the National Union of Mineworkers (NUM) represented the majority of workers in the platinum sector. There was a strong alliance between COSATU and the African National Congress (ANC) government. In recent times a new trade union federation, the South African Federation of Trade Unions (SAFTU), has been established and new trade unions, such as AMCU, have come to the fore and this has significantly weakened coherence amongst organised labour. The alliance between COSATU and the government is no longer as strong as it used to be. This has coincided with violence and tension that is associated with the changing of the guard. Cohen alludes to the fact that

‘a loss of confidence in existing bargaining structures, and disappointed expectations have led to the alienation of unskilled and semi-skilled vulnerable employees from majority unions. Minority unions have taken up the cudgels of frustrated and disempowered employees – that have tired of the “co-dependent comfort zone” that majoritarianism has engendered’ (T Cohen ‘Limiting Organisational Rights of Minority Unions: *POPCRU v Ledwaba* 2013 11 BLLR 1137 (LC)’ (2014) 17 *Potchefstroom Electronic Law Journal* 60).

To this, Brassey adds:

'Majoritarianism, the leitmotif of both industry bargaining and plant-level organisational rights, is too crude to give proper expression to the interests of minority unions, which frequently represent skilled or semi-skilled workers but, as the Marikana experience demonstrates ... [which] may simply be acting on behalf of workers who feel alienated from the majority union' (M Brasseley 'Labour Law after Marikana: Is Institutionalized Collective Bargaining in SA Wilting? If So, Should We Be Glad or Sad?' 2013 *ILJ* 823-35).

The court in *AMCU* came to its decision on majoritarianism at a time when policy makers have amended the LRA to relax some of the harsh effects of majoritarianism on minority unions in so far as the acquisition of organisational rights is concerned. Additional safeguards have also been introduced in respect of the extension of bargaining council agreements. Despite the absence of mechanisms in s 23(1)(d) similar to those contained in s 32 of the LRA that deal with the extension of bargaining council agreements, policy makers during the last round of amendments added nothing to the protection of minority unions in the former section. Is it possible that this happened because the extension of collective agreements to minority parties by virtue of s 23(1)(d) did not even come to mind when s 32 was amended? This may be an opportune time for policy makers to reconsider s 23(1)(d) and to add the necessary protection to minority trade unions as in s 32, and to craft a more varied definition for the term 'workplace' in the private sector, following that in the public sector. Such a definition could be tailor-made to serve different aspects in the LRA.

It is also argued that another aspect that the courts thus far have not explored sufficiently is whether threshold agreements and collective agreements that are extended to minority trade unions by majority trade unions do in fact promote labour peace at the workplace. The

catastrophic incidents that occurred at Marikina serve as a stark reminder of the frustrations that can build up when employers and trade unions with cosy relations cling to thresholds that have been agreed to in collective agreements. The concern is that measures that promote majoritarianism may increase rather than defuse tensions within upcoming trade unions to the point of encouraging conduct that falls beyond statutory regulation and the rule of law.