

**AN EVALUATION OF CERTAIN LIMITATIONS TO THE RIGHT OF
FREEDOM OF ASSOCIATION**

by

MONGEZI ZACHARIA JANTJIE

Student No: 15334432

Submitted in fulfillment of the requirements for the degree

MASTER LEGUM

In the

FACULTY OF LAW

UNIVERSITY OF PRETORIA

PROMOTER: PROFESSOR MONRAY MARSELLUS BOTHA

MAY 2018

Dedication and Acknowledgement

This work is dedicated to those workers whom in the exercise of the right to freely associate or not to associate (freedom of association) lost their lives, livelihood and limbs.

I would like to extend my sincere gratitude to Professor Monray Marsellus Botha, Professor BPS van Eck, Leana Diedericks, Klaas Ntuli and Moipone Williams for providing readership and ideas, support and helpful suggestions; paramount to the realization of this work.

I would also like to thank AmaGcina, AmaTshawe, Batshweneng and Barolong to whom I trace my adjacent lineage.

INDEX

CHAPTER 1

INTRODUCTION

1. Introduction	1
1. Objectives of the study	5
2. Key research questions	6
3. Significance of the study	6
4. Research Methodology	6
5. Research Outline and Structure	6

CHAPTER 2

HISTORICAL DEVELOPMENT OF LABOUR LEGISLATION DEALING WITH FREEDOM OF ASSOCIATION AND TRADE UNIONS

1. Introduction	9
2. Development of craft unionism	10
3. The regulation of labour relations post the formation of Union South Africa in 1910 to 1979	12
4. From Wiehahn Commission to 1991	20
5. Conclusion	23

CHAPTER 3

INTERNATIONAL LAWS, INTERNATIONAL INSTRUMENTS REGULATING FREEDOM OF ASSOCIATION AND TRADE UNIONS

1. Introduction	24
2. ILO and setting of labour standards	24
3. Role of ILO post 1994 in South Africa	26
4. Relevant international standards and their application in our domestic law	28
5. Conclusion	30

CHAPTER 4

STRIKES AND COLLECTIVE BARGAINING

1. Introduction	32
2. South Africa's adversarial industrial relations	32
3. Strikes post 1994 democratic dispensation	34
4. Conclusion	44

CHAPTER 5

PRINCIPLE OF MAJORITARIANISM

1. Introduction	46
2. Principle of majoritarianism	46
3. Extension of collective agreements non-agent/bargaining parties	51
4. The notion of negative freedom of association in international law.	59
5. Conclusion	68

CHAPTER 6

CONCLUSION AND RECOMMENDATION	70
--------------------------------------	-----------

BIBLIOGRAPHY	77
---------------------	-----------

CHAPTER ONE

INTRODUCTION

1. Introduction
 2. Objectives of the study
 3. Key research questions
 4. Significance of the study
 5. Research Methodology
 6. Research Outline and Structure
-

1. Introduction

On 23 June 2015, The Sowetan, one of the most widely read dailies in the country, ran a front-page story with the headline “The forgotten Marikana widow”.¹ In it, the writer gives a harrowing account of a miner² who was brutally murdered on 13 August 2012 by fellow miners while on his way to work. His only offence was attempting to report for work as opposed to heeding a call of joining other miners who, for that matter, were on an unprotected strike. As unpalatable as that story sounds, the sad reality is that it has become an all too familiar scene in our industrial relations.

The right to freedom of association is a wide ranging freedom and it covers objectives such as “the right to associate for social, political, religious, commercial or industrial purposes”.³ This right covers civil society organisations as well as trade unions,⁴ employers, political parties and any other forms of group established not-for-profit⁵ activity.

¹ Ledwaba L (2016) “The forgotten Marikana widow” 03 June 2016 *Sowetan*. Available at: <<http://www.sowetanlive.co.za/news/2016/06/03/the-forgotten-marikana-widow>> (accessed 16 November 2016)

² Mr Julius Langa, a production team leader at Lonmin. However his death was preceded by the death of Hassan Fundi, Mr. Frans Mabelane, and Mr. Thapelo Eric Mabebe on 12 August 2016 and Mr. Isaiah Twala on 14 August 2012.

³ Creighton (1990) 285.

⁴ According to International Covenant on Civil and Political Rights (ICCPR), trade unions are organisations which workers seek to promote and defend their common interests.

⁵ See Council of Europe, Recommendation CM/Rec(2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe, 10 October 2007 at para 9. Available at: <<https://rm.coe.int/16807096b7>> (accessed 22 March 2017)

The scope of this research paper is limited to freedom of association in the field of industrial relations, in particular, trade unions in South Africa. In this context, the concept of freedom of association means that workers can form, join, belong to a trade union, participate in trade union activities, engage in collective bargaining and whenever necessary to take part in industrial action. Manamela and Budeli, regard the “importance of the right to form and join a trade union, to bargain collectively and to strike as the main components of the right to freedom of association”.⁶

The aforesaid analysis is crucial if one takes into account the unequal bargaining power between employee and employer.⁷ The employer controls the means of production and exert considerable power over an employee. The most effective means which an employee can mitigate this power is, if the employee together with other employees act collectively.⁸ This concept was developed by Kahn Freund and was called “collective laissez- faire”.⁹ By acting collectively, it places the employees in a bargaining position with the employer and as such employees can meaningfully pursue their workplace goals.¹⁰

In South Africa, the right to freedom of association is enshrined in fairly broad terms in section 18 of the Constitution¹¹ and this right is qualified and restricted, insofar as it relates to trade unions, in section 23¹² of the Constitution. The Labour Relations Act¹³ (LRA) was enacted to give effect to section 23 of the Constitution¹⁴ by providing a legislative framework within which it could be exercised. These rights are recognized both in international law¹⁵ and in other liberal democracies around the world.

⁶ Manamela and Budeli "Employees' Right to Strike and Violence in South Africa" (2013) *CILSA* 309.

⁷ Davies & Freedland (1983)15.

⁸ Dau-Schmidt et al "The Relative Bargaining Power of Employers and Unions in the Global Information Age: A Comparative Analysis of the United States and Japan" (2010) *Articles by Maurer Faculty*. Paper 1332.

Available at: <<http://www.repository.law.indiana.edu/facpub/1332>> (accessed 23 March 2017)

⁹ Davies & Freedland (1983) 2. See also van Niekerk and Smit N (eds) *Law@Work* (2018) 10.

¹⁰ *Ibid.*

¹¹ Constitution of the Republic of South Africa, 1996 states that “everyone has the right to freedom of association”.

¹² Ss 23(2) (4) and (5) of The Constitution of the Republic of South Africa, 1996.

¹³ Labour Relations Act 66 of 1995.

¹⁴ S 1(a) of the Labour Relations Act.

¹⁵ Freedom of association and the right to collective bargaining are enshrined in the ILO’s Convention on Freedom of Association and Protection of the Right to Organise, 1948 (No 87) and

Analysis of our legislative provisions about freedom of association, literature and case law¹⁶ covering this concept show that freedom of association is a right that can be enjoyed by an individual or by an association in the performance of its activities and in pursuit of the common interests of its members.¹⁷ Cheadle defines the right to form and join trade unions and employer organisations as but a simple phrase that belies its complexity as these words constitute one of those rights that span both individual and collective rights.¹⁸ What this means is that a “right may have a content that relates to a collectivity without its [*sic*] being a group right”.¹⁹

This analysis become important if one takes into account the positive and negative right fundamentals²⁰ associated with the concept. Things which are regarded as negative rights include fundamental freedoms such as the right not to be harmed, freedom of speech, association, assembly, religion, movement and so on, which are honoured by people and government not doing things that would infringe these rights, creating a negative obligation.²¹ Positive rights, on the other hand, create positive obligations on government to provide things such as security, education or legal representation for an individual to exercise that right.²² What this means is that

Convention on the Right to Organise and Collective Bargaining (No 98). These rights are recognised as fundamental rights in the ILO’s 1998 Declaration on the Fundamental Principles and Rights at Work. The right to freedom of association is also recognised as a basic human right in various international instruments, most notably the Universal Declaration of Human Rights.

¹⁶ In *Re Certification of the Constitution of the Republic of South Africa 1996* (4) SA 744 (CC); *National Union of Metal Workers of South Africa v Bader BOP (Pty) Ltd and Minister of Labour 2003* (2) BCLR 182 (CC), the Constitutional Court dealt extensively with the interpretation of s 23 of the Constitution.

¹⁷ Cheadle H “Labour Relations” in Cheadle *et al South African Constitutional Law: The Bill of Rights* (LexisNexis 2002, looseleaf)
Available at: <ftp://ftp.uwc.ac.za/users/DMS/Clint/Clint%20My%20Docs/MDT-Docs/Darcy/Topic%207/Labour_Relations_HaltonCheadle.pdf> (accessed on 12 April 2017)

¹⁸ Cheadle (n 17 above) 16.
Available at
<ftp://ftp.uwc.ac.za/users/DMS/Clint/Clint%20My%20Docs/MDT-Docs/Darcy/Topic%207/Labour_Relations_HaltonCheadle.pdf> (accessed 27 March 2017)

¹⁹ (Feb., 1999) 21 *Human Rights Quarterly* 80 at 82
Available at: <<http://www.jstor.org/stable/762737>> (accessed 24 March 2017)

²⁰ See David L “A Principled Approach to the Positive/Negative Rights Debate in Canadian Constitutional Adjudication (2014) 23 *Constitutional Forum constitutionnel*.
Available at:
<https://journals.library.ualberta.ca/constitutional_forum/index.php/constitutional_forum/article/view/21754> (accessed 24 March 2017)

²¹ David (n 20 above) 41.

²² S 7(2) of the Constitution of South Africa.

as much as an individual has a right to associate which is considered a positive right, conversely an individual has a right not to associate²³ which is considered a negative right.

However, the fact that the right to freedom of association is recognised as a fundamental labour right by almost all international legal instruments does not mean that workers and trade unions are able to exercise the right without restrictions. Freedom of association can be limited, provided that the limitation is provided for by law and is necessary in a democratic society in the interests of national safety, territorial integrity, public safety, interests of third parties, prevention of riots and offences, and protection of health and public decency.²⁴

In addition, just like other rights found in the Bill of Rights, freedom of association is not absolute and may be limited. The Constitution provides a general limitation clause at section 36, which provides for all rights in the Bill of Rights to be limited in terms of law of general application and that "limitations must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom." In addition freedom of association may be limited by way of specific limitation clause where individual rights are subject to limitations set out in the individual sections of the LRA.

Section 23(1)(d) of the LRA allows employers, by means of a principle of majoritarianism to extend collective agreements entered into by them to employees who are not members of the majority union and employer organisation, provided only that those employees are expressly identified in the agreement and that it is expressly made binding on them. This has significant implications for minority unions and employers who are not party to the collective agreement. As a result, agreements extended through the provision of this clause have been subject to

²³ The Universal Declaration of Human Rights, Article 20(2) (1948) (Universal Declaration), provides, in relevant part, that "No one may be compelled to belong to an association"

²⁴ Article 11(2) of The European Convention on Human Rights, Available at: <http://www.echr.coe.int/Documents/Convention_ENG.pdf> (accessed 23 March 2017)

scrutiny from trade unions²⁵ and employers²⁶ who were non-parties to the agreement.

Section 65 of the LRA further set out limitations on the right to strike or recourse to lock-out. However, other limitations to strike are not set out in our laws but take place as a result of practice, strike violence and intimidation levelled against non-strikers is one case in point. It is an open secret that strikes in South Africa are characterised by acts of violence and intimidation to non-strikers.²⁷ Therefore, it is clear is that any limitation should also be less restrictive, reasonable and may only be made with good cause.²⁸

2. Objectives of the study

2.1. Broad objective

The broad objective of this study is evaluating certain limitations to the right of freedom of association as result of legislation and practice. This despite the constitutional provision guaranteeing everyone the right to freedom of association.

2.2. Specific objectives

The study is guided by the following specific objectives:

- a) To establish the concepts and principles underlying the limitation of rights.

²⁵ Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others [2017] ZACC 3

²⁶ National Employers' Association of South Africa ('NEASA') and Others v Minister of Labour and Others (JR75/15) [2017] ZALCJHB 136 (26 April 2017); National Employers Association of South Africa (NEASA) v Metal And Engineering Industries Bargaining Council (MEIBC) and Others (2015) 36 ILJ 2032 (LAC); National Employers Association of South Africa and Others v Minister of Labour Matal And Engineering and Others (JR860/13) [2014] ZALCJHB 524).

In 2014 Labour Minister Mildred Oliphant signed a notice by which she extended a July 2014 agreement between the Steel and Engineering Industries Federation of South Africa (SEIFSA) and trade unions to non-parties, effective from January 5, 2015.

In 2014 the National Employers' Association of South Africa (Neasa), challenged the said directive in court. The Labour Court in Johannesburg set aside this agreement – which was concluded under the auspices of the Metal and Engineering Industries Bargaining Council (MEIBC) – finding, in December, that the agreement, which was extended by Oliphant, could not be considered representative of the positions of MEIBC members.

²⁷ See Chinguno C 'Marikana: fragmentation, precariousness, strike violence and solidarity' (2013) 40(138) *Review of African Political Economy* 639. 639.

²⁸ See "Limitation clause" s 36 of the Constitution of South Africa.

- b) To assess the extent to which legislation and practice has impacted on the right to freedom of association.

3. Key research questions

- a) Does freedom of association, in relations to trade unions, exist in our current labour relations regime?
- b) What principles underlie the limitation of rights?
- c) Are our current Labour Relations Act limitations to freedom of association fair to individual workers, non-unionised workers and minority unions.
- d) What reforms ought to be considered to enhance the freedom of association of workers who do not want to associate?

4. Significance of the study

The study will be useful to legal scholars for it shed lights on how pervasive are some of the trade unions practices in limiting rights of employees to freely associate including the freedom to participate or not to participate in activities and programs of a trade union. This research will identify shortcomings in our judicial and law enforcement agencies to protect negative rights of workers. As a result, policy makers may find the research relevant in making appropriate measures to protect positive and negative rights of workers to associate freely.

5. Research Methodology

This is a desktop study and the compilation of this mini-dissertation will include visits to various libraries to consult information resources as well as the extensive uses of the interlibrary loan facility are envisaged. Numerous sources will be utilised in writing this dissertation, which include both South African and international sources such as books, journal articles, conference papers, cases and articles.

6. Research outline and structure

All in all, this study consists of six chapters as follows:

1. *Chapter one - Introduction*

Contains the proposal of the study which offers a general introduction, outlines the research problems, motivation of the study, objectives of the study, the subject matter of the study, significance and its scope and the research methodology.

2. *Chapter two - Historical development of labour legislation dealing with freedom of association and trade unions*

Contains an analysis of discriminatory labour laws post the formation of the Union of South Africa in 1910 and how these laws influenced freedom of association and trade unionism.

3. *Chapter three-International laws, international instruments regulating freedom of association and trade unions*

Analyses the role international law, international legal instruments and foreign law played in shaping our interpretation of the right to freedom of association.

4. *Chapter four- Anatomy of strikes in South Africa*

Analyses the development of freedom of association and trade unions post 1994 democratic dispensation with emphasis on the right to strike and collective bargaining. It will further analyse the anatomy of strikes in South Africa, the role strike violence and intimidation play in limiting freedom of association.

5. *Chapter five –Principle of Majoritarianism*

Analyses how the principle of majoritarianism has impacted on the rights of minority unions, this in light of legislative provisions giving credence to closed and agency shop agreements. A brief comparative analysis of how these concepts are practiced in other jurisdictions will be covered.

6. *Chapter six- Conclusion and Recommendations*

Chapter six concludes the study. It provides the summary of the findings of the study, conclusions and recommendations.

The study ends with a comprehensive bibliography that refers to the various research materials (textbooks, chapters in books, articles, conference papers, case law, and legal instruments) used as sources for the analysis undertaken in the study.

CHAPTER TWO

HISTORICAL DEVELOPMENT OF LABOUR LEGISLATION DEALING WITH FREEDOM OF ASSOCIATION AND TRADE UNIONS

1. Introduction
 2. Development of craft unionism
 3. The regulation of labour relations post the formation of Union of South Africa in 1910 to 1979
 4. From Wiehahn Commission to 1991
 5. Conclusion
-

1. Introduction

The rise of the trade union movement in South Africa can be directly attributed to the expansion of the industrial mining complex as a result of discovery of diamond and gold, in the 1860s and 1880's respectively.²⁹ During this period, there were three groups of workers working on the mines:³⁰ white miners from Europe whom performed mainly skilled jobs, Afrikaans-speaking white workers whom were semi-skilled and unskilled, and African workers whom were semi-skilled and unskilled. Understanding these distinctions of group of workers is crucial as it will help clarify social, economic and political dynamics of each group and how attempts by each group to protect and promote their interests, at times, had an indirect³¹ impact on the right to freedom of association of other group of workers. Conversely, informed largely by political considerations, government of the day directly limited the right to freedom of association of other group of workers by enacting legislation protecting and promoting, in the main, interests of white workers.

²⁹ Harington McGlashan and Chelkowska "A century of migrant labour in the gold mines of South Africa" (2004) 104 *J S Afr Inst Mining Metall* 66.

³⁰ Visser "The political, economic and social consequences of the discovery of minerals for labour in South Africa, 1867 – 1926" (1996) 32 *Yesterday & today = Gister & vandag* 33.

³¹ Indirect limitations were based largely on practice as opposed to legislation i.e due to the constitution of the particular trade union.

2. Development of craft unionism

The Union of South Africa was born in the midst of a thriving industrial revolution which desperately needed labour potential to serve the mines, consequently industries were established to serve the needs of the growing mining industry. The first unions that emerged in South Africa were formed by immigrants from Britain, United States, Australia, New Zealand and Continental Europe.³² One area in which these immigrants worked in was mining. Mining is a capital, technical and labour intensive industry. Therefore, in order to protect and maximise their investment, it was necessary for the mining conglomerates to recruit a large number of skilled miners from abroad as these immigrants possessed requisite skills which Africans and Afrikaans speaking whites lacked. According to Visser, Afrikaners lived an agrarian and as such possessed only farming skills which put them at the disadvantage because the new economy needed workers with industrial skills.³³

These immigrants not only brought their labour potential to South Africa but the culture of trade unionism³⁴ and colour bar politics (policy of protectionism) in the mining sector. Visser opines that the model of industrial relations that was imported was adversarial in nature as opposed to the “conciliatory system” of the European continent.³⁵ Quigley argues that during the 1913 strikes Crawford of the Amalgamated Society of Engineers (ASE), espoused 'direct action as part of the struggle for socialism, urged the strikers to be militant, to sabotage and destroy machinery.³⁶ Furthermore, Limb argues that gold attracted 5 000 Australians artisans to the Rand and that these artisans brought with them “ideas of exclusivist craft

³² Van der Walt “The First Globalisation and Transnational Labour Activism in Southern Africa: White Labourism, the IWW, and the ICU, 1904–1934” (2007) 66 *African Studies* 225.

³³ Visser WP “*Urbanization and Afrikaner Class Formation: The Mine Workers’ Union and the Search for a Cultural Identity*” Paper presented at the African Urban Spaces Conference, 28-30 March 2003, University of Texas at Austin at 4.

Available at:

https://www.academia.edu/6459922/Urbanization_and_Afrikaner_class_formation_The_Mine_Workers_Union_and_the_search_for_a_cultural_identity (accessed 13 July 2017)

³⁴ Ulrich and van der Walt “South Africa, labor movement” (2009) *International Encyclopedia of Revolution and Protest* ed. Immanuel Ness Blackwell Publishing 3091.

³⁵ Visser “The South African labour movement's responses to declarations of martial law, 1913-1922.” (2003) 31 *Scientia Militaria: South African Journal of Military Studies* 143 See also O'Quigley A “*The 1913 and 1914 White Workers’ Strikes*” African Studies Seminar Paper, presented in October 1978, at 2.

³⁶ O'Quigley (n 35 above) at15.

unionism and job colour bars that provided South Africa with a model of a rigid labour market”.³⁷

The first trade unions to emerge in South Africa were craft unions.³⁸ Craft unions were established by immigrant workers, and included, inter alia, the Amalgamated Society of Carpenters and Joiners in 1881,³⁹ and the Amalgamated Society of Engineers in 1894,⁴⁰ South African Engine Drivers, Firemen and Operators' Association⁴¹ During the early part of mining in South Africa there were separate unions for engine drivers, engineers, carpenters, plumbers and other artisans.

Lewis argues that from inception craft unions maintained a conservative logic⁴² by accepting only skilled workers into their ranks and jealously guarded the crafts against encroachments by Black, White unskilled workers, Coloureds and Chinese workers. They went to great lengths to protect the relatively high wages of their members. To achieve this end, they stifled competition from whoever posed a threat to them. Between 1904 and 1907, craft unions, applying tactics used in the 1850s at the Australian goldfields,⁴³ vehemently objected to importations of Chinese to work in the mines to an extent that in an effort to allay craft unions' fears of the so-called the “yellow peril”,⁴⁴ the Transvaal government reserved 44 jobs for whites only.⁴⁵

³⁷ Limb P “The Anti-Apartheid Movements in Australia and Aoteroa/New Zealand”. In *The Road to Democracy in South Africa* (2008) 3 *International Solidarity* 910.

³⁸ Trade unions comprising of workers who are engaged in a particular craft or skill e.g., plumbers, electricians, bricklayers, ironworkers, carpenters, machinists, and printers. Formed to improve wage levels and working conditions of their members. They derive their power from their control over the supply of skilled labour control that is maintained through licensing and apprenticeship arrangements. Craft unions were established in Britain and the United States in the middle of the 19th century.

Available at: <<https://www.britannica.com/topic/craft-union>> (accessed on 1 July 2017)

³⁹ Simons & Simons (1969) 25.

⁴⁰ *Idem* 90.

⁴¹ Simons and Simons (1987) “*One hundred years of job reservation on the South African mines*” Geneva: International Labour Organisation at 24.

⁴² Freund B (1985) 118.

⁴³ Hyslop J “The Imperial working class makes itself 'white': White labourism in Britain, Australia and South Africa before the First World War”, Seminar paper presented on the 11 October 1999 at Richard Ward building, at 6

Available at: <<http://wiredspace.wits.ac.za/jspui/bitstream/10539/8782/1/ISS-193.pdf>> (accessed 16 July 2017)

⁴⁴ Drew A (2007) 71.

⁴⁵ “Chinese workers: Migrants across the world”

Available at:

<<http://www.sahistory.org.za/sites/default/files/file%20uploads%20/Chapter%2014.pdf>> (accessed on 17 July 2017)

3. The regulation of labour relations post the formation of Union of South Africa in 1910 to 1979

Shortly after the formation of the Union of South Africa in 1910, government, largely due to pressure from the Labour Party and craft unions, passed a series of regulations and statutes protecting white workers' interests. The first piece of colour bar legislation enacted to achieve that end was the Mines and Works Act 12 of 1911. The Act applied not only to mines and works, but to railways, roads and buildings. Even though the Act did not discriminate on grounds of race or colour,⁴⁶ yet, in administering it, General Smuts, Minister of Mining, introduced Regulations which served to legitimise the long-standing mining practice of restricting skilled jobs to Europeans only. The regulation, in effect, reserved over 32 mining occupations⁴⁷ for whites only while 19 mining occupation⁴⁸ were reserved for them by custom, opinion and trade union pressure.⁴⁹ However, any form of colour bar whether introduced through practice or legislation effectively restricted the right of excluded workers to join craft unions. What that meant was that Blacks, Indians and to some extent Coloureds⁵⁰ even though skilled could not join craft unions.

Manamela and Budeli, regard the "importance of the right to form and join a trade union, to bargain collectively and to strike as the main components of the right to freedom of association".⁵¹ Conversely, following the January 1911 African mineworkers strikes at Dutoitspan, Voorspoed and Village Deep mines,⁵² government enacted Native Labour Regulation Act 15 of 1911. The Act specifically prohibited strikes by African Workers and any African worker found guilty of absenting himself from work without cause could be found guilty of an offence and

⁴⁶ Alexander and Simons Alexander (1959) "Job reservation and the trade unions" *Enterprise* 4. See also *Rex v. Hildick Smith* 1924 TPD 69.

⁴⁷ These jobs included, inter alia, the positions of mine manager, overseer, foreman, shift boss, banksman, onsetter, skipman, electrician, pumpman, driver of winding engines, winches, and locomotives, underground inspectors, surveyors, samplers, haulage men, blasters and miners engaged in reclaiming, stoping, developing and shaft-sinking.

⁴⁸ They included, inter alia, jobs of trammer, timberman, carpenter, pipemen, platelayer, fitter, drill packer and sharpener, jumperman, waste packer, sand filler, mason, bricklayer, stableman, drain-cleaner, track repairer and handyman.

⁴⁹ Fn 46 above.

⁵⁰ Under the Mines and Works Amendment Act of 1926, Coloureds and Whites were bracketed in the same group.

⁵¹ Manamela and Budeli (2013) *CILSA* 308 at 309.

⁵² Simons (1969) 154.

liable to a fine not exceeding ten pounds or period of imprisonment, with or without hard labour, not exceeding two months.⁵³ Nevertheless, statutory restrictions did not deter African workers from striking. In 1913, 13 000 black mineworkers went on strike in the Rand and in 1920 around 71 000 black workers struck against the terrible conditions they worked in.⁵⁴ Yet, according to Padayachee *et al* strikes by black mineworkers did not result in the formation of their trades unions⁵⁵ as any form of worker organisation for black workers was not realised until 1919.

Following the 1922 Rand Rebellion, the government produced three important labour laws, namely the Industrial Conciliation Act No 11 of 1924, Wage Act (No. 27 of 1925) and Mines and Works Act of 1911, Amendment Act no 25 of 1926.⁵⁶ The Industrial Conciliation Act of 1924 made provision for the registration of trade unions⁵⁷ and collective bargaining structure. Subsequent to the passing of the Industrial Conciliation Act, a number of registered rose from 46 in 1924 to 113 in 1930 and their membership from 38,000 to 75,500.⁵⁸ The Act also made a provision for the formation of an industrial council, where representatives of both employers' organisations and organised labour could meet to discuss and decide issues of mutual interest.⁵⁹ The Act and its subsequent amendments⁶⁰ had a profound effect on African workers' aspiration to organise themselves into trade unions as African workers were excluded from the provisions of this Act by virtue of their exclusion from the definition of employee.⁶¹ What that meant was that African trade unions were ineligible for registration, they could not be represented on industrial councils,

⁵³ S 14 of the Native Labour Regulation Act 15 of 1911.

⁵⁴ "1922 White Miner's Strike"
Available at: <http://www.lrs.org.za/salhap/e-books_docs/The%201922%20White%20Mineworker's%20Strike.pdf> (accessed 12 July 2017)

⁵⁵ Padayachee (1985) 5.

⁵⁶ Hepple A (1957) 8.

⁵⁷ S 14(2) of the Industrial Conciliation Act 11 of 1924.

⁵⁸ Simons and Simons (n 39 above) 37.

⁵⁹ S 2(1) of the the Industrial Conciliation Act 11 of 1924.

⁶⁰ The Industrial Conciliation Act 36 of 1937; The Industrial Conciliation Amendment Act 28 of 1956.

⁶¹ The definition reads as follows-

"employee" means any person engaged by an employer to perform, for hire or reward, manual, clerical, or supervision work in any undertaking, industry, trade or occupation to which this Act applies, but shall not include a person whose contract of service or labour is regulated by any Pass laws and Regulations, or by Act No.15 of 1911 or any amendment thereof, or any regulations made thereunder, or by Law No. 25 of 1891 of Natal or any amendment thereof, or any regulations made thereunder, or by Act No. 40 of 1894 of Natal or any amendment thereof.

excluded from all industrial agreements, conciliation and arbitration machinery as well as the "no victimization" clause.⁶²

The exclusion of African workers from the definition of employee under the Industrial Conciliation Act did not prevent the development of trade unions amongst them as, even before the passing of the Act, there were attempts by African workers to organise themselves into trade unions. These unions came about largely as result of influence of organisations like International Socialist League (ISL), renamed Communist Party of South Africa (CPSA) in 1921.

The CPSA contrary to the prevailing conservative sentiments calling for "*Workers of the world fight and UNITE for a white S.A.*"⁶³ advocated for the unity of all workers regardless of race.⁶⁴ Fearing prosecution from the government, ISL worked tirelessly behind the scene and were instrumental in the formation of Durban Indian Workers' Industrial Union in 1917, the Industrial Workers of Africa (the IWA), the Clothing Workers' Industrial Union, the Horse Drivers' Union in Kimberley, and the Sweet and Jam Workers' Industrial Union in Cape Town.⁶⁵ The largest black trade union to emerge from this period was the Industrial and Commercial Workers' Union (ICU). This union was founded in Cape Town in 1919 by Clements Kadalie, Selby Msimang and AWG Champion.⁶⁶ It was a general union, open to Africans, Coloureds and Indians in any kind of employment. ICU received national prominence following the dockworkers' strike and as a result by 1927 it had approximately 100,000 members.⁶⁷ Yet, despite the enormous growth of ICU, its application for registration under the Industrial Conciliation Act was rejected as the registrar was of the view that its members were not employees as defined in the Act.⁶⁸

⁶² See Theron J (1997) 'Trade Unions and the law: Victimisation and self-help remedies *Law Democracy and Development* 1 at 18; See also s 66 of the Industrial Conciliation Act No 36 of 1937.

⁶³ Potenza E "All That Glitters - Bound to strike back"
Available at: <<http://www.sahistory.org.za/archive/all-glitters-bound-strike-back-emilia-potenza>>
(accessed 21 July 2017)

⁶⁴ Ulrich and van der Walt (2009) *International Encyclopedia of Revolution and Protest* ed. Immanuel Ness Blackwell Publishing 3090 at 3094.

⁶⁵ *Idem* 3092.

⁶⁶ "The Turn to the Masses"
Available at: <<http://www.sacp.org.za/docs/history/fifty3.html>> (accessed 03 July 2017)

⁶⁷ Visser (1996) 32 Yesterday & today = Gister & vandag 32 at 38.

⁶⁸ Simons and Simons (1969) 361.

The African Mine Workers Union (AMWU),⁶⁹ was formed in 1941 with the aid of the African National Congress (ANC) and Communist Party of South Africa (CPSA).⁷⁰ Thus setting the precedence for tri-partite alliance politics which would become more pronounced with the formation of COSATU in 1985. The formation of AMWU coincided with the formation of the first major federation of black unions, the Council of Non-European Trade Unions (CNETU), in November 1941. Nevertheless, during this period, the make-up of trade union federations mirrored the politics of the day as federations were formed along racial lines. CNETU was formed out of two groups of unions namely the Joint Committee of African Trade Unions.⁷¹ At the time, CNETU claimed to have about 37,000 members from 25 affiliated trade unions but five years into its formation membership rose to 158 000 from 119 affiliated unions countrywide.⁷² Weakened structurally as result of internal squabbles, arrest and banning of its leaders, in 1956 CNETU eventually merged with the South African Congress of Trade Unions (SACTU).⁷³

In 1954, in an effort to consolidate the position of the trade union movement, Trade and Labour Council (T&LC), the South African Federation of Trade Unions (SAFTU), and the Amalgamated Engineering Union formed what would later be known as Trade Union Council of South Africa (TUCSA).⁷⁴ In 1962, TUSCA allowed black union membership but was placed under pressure by the government that in 1967, the federation was forced to expel the black unions that had just joined.⁷⁵ TUCSA excluded black trade unions⁷⁶ and it was of composed of registered trade unions who mainly represented industries.⁷⁷ In the 1970s, TUCSA relaxed its stance on allowing black unions to affiliate on condition that they become parallel unions.⁷⁸ These exclusively black unions, due to their dependence on mother unions for

⁶⁹ J B Marks, a communist, was the first president of AMU)

⁷⁰ "The role of communism in the struggle of workers' rights"
Available at: <<https://www.marxists.org/history/erol/ncm-5/bacu-2/resolution2.htm>> (accessed 22 July 2017)

⁷¹ " Rise and fall of NECTU"
Available at:
<http://disa.ukzn.ac.za/sites/default/files/pdf_files/FwJul85.1562.7624.000.039.Jul1985.16.pdf>
(accessed 21 July 2017)

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ Bendix (1996) 87.

⁷⁵ Plaut & Ward (1982) 8.

⁷⁶ *Ibid.*

⁷⁷ Finnemore (1989) 19.

⁷⁸ Fn 75 above

finance and administration were generally viewed with suspicion and lacked credibility on the shop floor.⁷⁹

In 1955 the South African Congress of Trade Unions (SACTU) was formed.⁸⁰ It consisted of non-racial trade unions of the TLC (South Africa Trades and Labour Council) and the black unions of the TLC as well as the black unions of the CNETU (Council for Non-European Trade Unions). SACTU advocated for trade unions to play an active role in politics and maintained links with the ANC.⁸¹ This despite the fact that Industrial Conciliation Act of 1956 prohibited links affiliation of trade unions with political parties.

In 1962, largely due to Verwoerd government's discriminatory labour laws, (SACTU)⁸² made submissions to the Director-General of the International Labour Organisation calling for the expulsion from the ILO citing, among others, (a) government's prohibition of strikes, in terms of the Native Labour (Settlement of Disputes) Act 1953, (b) entrenchment of Apartheid in Trade Unions by Government legislation in terms of the Industrial Conciliation Act of 1956 through the separation of workers into racial groups within their own trade unions to the exclusion of African from the membership of registered unions, (c) Job Reservation for White persons in terms of Section 77 of the Industrial Conciliation Act 1956 thereby causing grave hardship and injustice to Coloured, Indian and African workers and (d) persecution and banning of Trade Unionists in terms of the Suppression of Communism Act and the Riotous Assemblies Act.⁸³

⁷⁹ "The Parallel Union Thrust Memorandum" Issued by FOSATU on 8 November 1979 at 85
Available at:

<http://www.sahistory.org.za/sites/default/files/DC/LaMar80.0377.5429.005.006.Mar1980.11/LaMar80.0377.5429.005.006.Mar1980.11.pdf> (accessed 22 July 2017)

⁸⁰ Plaut & Ward (1982) 3

⁸¹ Ulrich and van der Walt (2009) *International Encyclopedia of Revolution and Protest* ed. Immanuel Ness Blackwell Publishing 3090 at 3094.

⁸² Under Article 24 of the ILO constitution, a representation may be made to the ILO by an industrial association of employers or of workers if a state "has failed to secure in any respect the effective observance within its jurisdiction of any convention to which it is a party." However, at the time of the SACTU complaint, South Africa was not a signatory to Convention 87.

⁸³ Memorandum concerning the withdrawal of the Republic of South Africa from membership of the International Labour Organisation, submitted by the South African Congress of Trade Unions, 11th May, 1962. Issued by: The South African Congress of Trade Unions, Johannesburg.
Available at: <http://www.historicalpapers.wits.ac.za/inventories/inv_pdfo/AD1137/AD1137-Ef8-1-4-001-jpeg.pdf> (accessed on 29 July 2017)

South African Confederation of Labour (SACOL) was formed in 1957 and consisted of mainly white conventional unions who represent workers in mining, steel and railways.⁸⁴ According to Nel et al, the aims of SACOL, inter alia, were to protect the interest of the White worker and to preserve White culture, traditions and identity.⁸⁵ One of its affiliates, The Mynwekersunie (Mineworkers Union-MWU) formed in 1913, opposed any attempt to remove laws advocating for colour bar from the mining industry. MWU's erstwhile general secretary, Arrie Paulus, is credited of having called "all whites to join one union"⁸⁶ and also defending job reservation laws as necessary measures to protect "white labour minority against 'black oppression'".⁸⁷

It is worth noting that from 1910 until 1991, two pieces of legislation which expressly encompassed the regulation and management of labour relations were passed.⁸⁸ However, in the same vein government passed a number of legislations which although *prima facie* seemed not to deal with labour relations but had an impact on freedom of association and labour politics in general. One such legislation was the Riotous Assemblies and Criminal Law Amendment Act no 27 enacted in 1914. Chapter 2 of the Act totally prohibited picketing and made provision for the deportation of undesirables including trade union leaders.⁸⁹ The measure was denounced in Parliament by Creswell as an attempt to "curb the growth of the labour movement on its industrial side".⁹⁰

⁸⁴ Nel (1989) 156.

⁸⁵ *Ibid.*

⁸⁶ Plaut & Ward (1982) 7.

⁸⁷ Visser "From MWU to Solidarity-A trade union reinventing itself" (2006) 30 *SAJLR* 19 at 23.

⁸⁸ See Native Labour Regulation Act 15 of 1911 and amendments thereof (Black Labour Relations Regulation Act, 48 of 1953; Black Labour Relations Regulations Amendment Act, 70 of 1973; Black Labour Relations Regulation Amendment Act, 84 of 1977); See also Industrial Conciliation Act No 11 of 1924 and amendments thereof (Labour Relations Act, 28 of 1956; Industrial Conciliation Amendment Act, 41 of 1959; Industrial Conciliation Amendment Act, 18 of 1961; Industrial Conciliation Amendment Act, 43 of 1966; Act No. Industrial Conciliation Further Amendment Act, 61 of 1966; Industrial Conciliation Amendment Act, 104 of 1967; Industrial Conciliation Amendment Act, 21 of 1970 1970; Industrial Conciliation Amendment Act, 94 of 1979; Industrial Conciliation Amendment Act, 95 of 1980; Labour Relations Amendment Act, 57 of 1981; Labour Relations Amendment Act, 51 of 1982; Labour Relations Amendment Act, 2 of 1983; Labour Relations Amendment Act, 81 of 1984; Labour Relations Amendment Act, 83 of 1988; Labour Relations Amendment Act, 9 of 1991)

⁸⁹ O'Quigley (n 35 above) at 27,

⁹⁰ Mathews S "*Freedom and State Security in the South African Plural Society*": The Alfred and Winifred Hoernle Memorial Lecture, 1971, Natal Witness (Pty) Ltd at 20.

Available at:

<<http://www.sahistory.org.za/sites/default/files/DC/boo19710000.001.058/boo19710000.001.058.pdf>>(accessed 13 July 2017)

Government alarmed by growing number of strikes during Second World War enacted a series of War Measures' Act. The War Measures' Acts had a significant effect on the freedom of association of all workers irrespective of race. According to Visser approximately seventeen acts relating to war measures and its legal consequences were promulgated by Parliament between 1940 and 1947.⁹¹ Article 1 of the War Measures' Act No. 29 of 1940, called for the amendment of Clause 135 of the Mynwekersunie (Mineworkers Union-MWU) constitution effectively prohibiting any contestations for position in the MWU executive during the war and up to six months after the cessation of hostilities.⁹² That struck a blow to the aspirations of large contingent of Afrikaner members of MWU whom, fuelled by growing Afrikaans nationalism fervour, wanted to see a complete overhaul of the English led MWU executive.

The general feeling among Afrikaner MWU members was that the MWU executive was corrupt and collaborating with the Chamber of Mines to keep the economic standard of the miners at a low level.⁹³ As a result of War Measures' Act,⁹⁴ Afrikaner miners, despite the fact that following World War I, they made up about 90% of MWU 12 0000 members in 1936⁹⁵ they, not until the Nationalist Party under DF Malan won the 1948 general elections, failed to take control of the MWU executive.

War measure 6 of 1941 authorised the secretary of labour to fix wages and settle disputes.⁹⁶ War measure 9 of 1942 prohibited strikes in industries declared to be essential, and provided for compulsory arbitration.⁹⁷ War measure 145 of 1942 outlawed strikes by Africans, exposed strikers to the savage maximum penalty of a £500 fine or three years' imprisonment, and imposed compulsory arbitration at his discretion.⁹⁸ In August 1944, government enacted war measure 1425 which

⁹¹ Visser "Politics Under Conditions of War: the effect of the War Measures Acts on Political Struggles within the South African Mine Workers' Union, 1939-1947" (2016) 44 *Scientia Militaria South African Journal of Military Studies* 219.

⁹² Visser (2016) 44 *Scientia Militaria South African Journal of Military Studies* 209 at 214.

⁹³ *Idem* 211.

⁹⁴ No 29 of 1940.

⁹⁵ Visser (2016) 44 *Scientia Militaria South African Journal of Military Studies* 209 at 211.

⁹⁶ Simons and Simons (1969) 556.

⁹⁷ Visser (2016) 44 *Scientia Militaria South African Journal of Military Studies* 209 at 212.

⁹⁸ Simons and Simons (1969) 557.

prohibited gatherings of more than twenty persons on proclaimed mining ground.⁹⁹ The ban, observed JB Marks, was 'the beginning of the undoing of the union'.¹⁰⁰ The National Party under DF Malan won the 1948 election and one of its first projects after assuming power was dealing with communism and its growing influence in the trade union movement. Thus, according to Simons et al, when the National Party took office in 1948, it was committed by resolutions and electioneering programmes to four major objectives on the industrial front: suppression of communism; dismantling of African trade unions, extension of job colour bars and segregation in the unions.¹⁰¹ Therefore to achieve those ends, government on 26 June 1950, parliament passed The Suppression of Communism Act, No. 44 of 1950. The Act, through amendments, was progressively tightened up in 1951, 1954, and yearly from 1962 to 1968.¹⁰²

The Suppression of Communism Act,¹⁰³ outlawed the Communist Party of South Africa (CPSA) and any organisation promoting communistic activities, barred listed persons from hold office¹⁰⁴ and from being members of certain specified public bodies, offices or organisations¹⁰⁵ or from attending gatherings.¹⁰⁶ After this date and the passing of the Act, many trade unionists who were suspected of having been Communist Party members were forced to resign their positions in the respective trade unions, and banned from attending all gatherings. Between 1948 and 1991, the apartheid government banned more than 1,600 men and women.¹⁰⁷ Ben Schoeman, the Minister of Labour, acknowledged that the "banned leaders were probably among the most competent trade union organisers in the country" but he was determined that they should not gain control of unions.¹⁰⁸

⁹⁹ Idem 572.

¹⁰⁰ Ibid.

¹⁰¹ Simons and Simons (1969) 46.

¹⁰² "Suppression of Communism Act 44 of 1950 approved in parliament"
Available at: <<http://www.sahistory.org.za/dated-event/suppression-communism-act-no-44-1950-approved-parliament>> (accessed 23 July 2017)

¹⁰³ No. 44 of 1950.

¹⁰⁴ S 5(1)(c) of the Suppression of Communism Act 44 of 1950.

¹⁰⁵ S 5(1)(a) of the Suppression of Communism Act 44 of 1950.

¹⁰⁶ S 9 of the Suppression of Communism Act 44 of 1950.

¹⁰⁷ Fn 102 above

¹⁰⁸ Simons and Simons (n 41 above) at 47.

4. From Wiehahn Commission to 1991

The government, unable to contain the spate of industrial action¹⁰⁹ that continued to escalate, there was a need for an overhaul of labour legislation. The growing strength of black unions, increasing international pressure for change, fears of isolation and the structural changes in the economy brought by rapid and diversification are cited as having contributed to the need for a renovation of South Africa's apartheid labour policies.¹¹⁰ It was against this backdrop that the government in 1977 appointed the Wiehahn and Riekert 's Commission of Inquiry into Labour Legislation. The previous commissions of enquiry into labour legislation, 1934 Van Reenen Commission and 1948 Botha Commission,¹¹¹ in essence recommended the establishment or a further entrenchment of dualistic characteristics in our labour relations structure. The Industrial Conciliation Act (1924, 1937 and 1956) excluded blacks from its scope effectively barring them from forming or being members of registered trade unions, Black Labour Relations Regulation Act made provision for the formation of trade union which did not enjoy the privileges of registration.

It was against this dualistic background that the Wiehahn commission began its deliberations. The Report of the commission recommended, inter alia, that:

- freedom of association be granted to all workers irrespective of colour, race or sex¹¹² including the registration of mixed unions or non-racial unions depending on the circumstances of each case.¹¹³
- Prohibitions on political activity by unions be extended.¹¹⁴

¹⁰⁹ See Sithole J & Ndlovu S "The revival of the labour movement, 1970–1980" 2006) 2 The Road to Democracy in South Africa" at 191.
Available at:<<http://sadet.co.za/docs/RTD/vol2/volume%20-%20-%20chapter%205.pdf>>(accessed 23 July 2017)

¹¹⁰ The Wiehahn Report and the Industrial Conciliation Amendment Act: A New Attack on the Trade Union Movement in South Africa.
Available at:
<http://www.aluka.org/action/showMetadata?doi=10.5555/AL.SFF.DOCUMENT.nuun1979_27>
(accessed 23 July 2017)

¹¹¹ Troskie (1998) A comparative survey of the law relating to strikes in South Africa and the Netherlands, Unpublished dissertation, University of South Africa at 95

¹¹² Para 3.153.2 of the Wiehahn Commission Report.

¹¹³ Paras 3.64, 3.66, 3.69 and 3.72 of the Wiehahn Commission Report.

¹¹⁴ Para 3.157.5 of the Wiehahn Commission Report.

- Statutory work reservation that was introduced in 1956 under Section 77 of the Industrial Conciliation Act be abolished by removing Section 77.¹¹⁵
- Restructuring of the Industrial Tribunal into an Industrial Court to adjudicate on disputes of rights, disputes of interest and to create a body of case law.¹¹⁶
- Continuance of the closed shop practice.¹¹⁷

The release of the Wiehahn Commission report was a watershed moment in labour relations in South Africa as it abolished dualism which had been a feature of our labour laws. The government was cautious of alienating the Afrikaner working class whom had been the Nationalist Party's strong support base and during the commission's hearing had demanded the maintenance of existing labour legislation, the continued exclusion of Africans from labour rights, and the retention of job reservation.¹¹⁸ Nevertheless, the government in 1979, informed by the commission's recommendations, introduced a number of amendments to the Industrial Conciliation Act.¹¹⁹

However, despite government efforts to enact inclusive labour laws, Federation of South African Trade Unions (FOSATU) viewed the Wiehahn Commission recommendations and more particularly the Government White Paper with considerable misgivings because it considered them to be in conflict with the principle of freedom of association. FOSATU's misgivings were based on the following:¹²⁰

- Migrant labour was excluded from union membership.

¹¹⁵ Para 3.159.2 of the Wiehahn Commission Report.

¹¹⁶ Para 4.28.1 of the Wiehahn Commission Report.

¹¹⁷ Para. 3.157.19 of the Wiehahn Commission Report.

¹¹⁸ (2016) 43 *History in Africa* 229-258.

¹¹⁹ Amendments to the ICA came in the form of Industrial Conciliation Amendment Act, 94 of 1979 and 95 of 1980, the Labour Relations Amendment Act 82, and 57 of 1981, Labour Relations Amendment Act 51 of 1982, Labour Relations Amendment Act 2 of 1983. Labour Relations Amendment Act, 81 of 1984, Labour Relations Amendment Act, 83 of 1988 and Labour Relations Amendment Act, 9 of 1991.

¹²⁰ "Statement on The Wiehahn Commission Report and Its Implications Issued by FOSATU after its Central Committee Meeting on the 18 and 19 May 1979"

Available at:

http://disa.ukzn.ac.za/sites/default/files/pdf_files/LaMar80.0377.5429.005.006.Mar1980.5.pdf
(accessed 23 July 2017)

- It retained racial restrictions on membership and racially segregated executives in the case of mixed unions.
- Retained restrictions on the right to registered union membership.
- It changed the context of registration and operation of unions from one of reasonable legislative certainty to one of unreasonable administrative discretion and uncertainty by introducing new areas of Ministerial discretion and powers of exemption including a discretion by the Registrar to provisionally register a union.

Yet, despite their misgivings, the 14 unions affiliated to the Federation of South African Trade Unions in January 1980 applied for registration under the newly amended Industrial Conciliation Act.¹²¹

The Labour Relations Amendment Act, 1981, changed the title of the original Act to the Labour Relations Act, 1956 (LRA). It changed the definition of "employee" to enable that all workers in South Africa could, subject to the rules of the union, join trade unions of their choice. It removed racial discrimination from the original Act and from the industrial relations system enabling the formation of mixed trade unions.

The Labour Relations Act, 83 of 1988 introduced the concept of unfair labour practices. The concept of "unfair labour practice" was broadly defined and could cover disputes about freedom of association. Under the Act, employees of the state, including the teachers at universities, technikons, colleges, or schools, maintained whole or partly from public funds were excluded from belonging to a union. Persons employed in farming operations, and private domestic services were also excluded. The Act placed certain requirements on unregistered unions such as keeping audited accounts and membership registers,¹²² the holding of strike ballots¹²³ in order for the strike to be legal and victimising¹²⁴ an employee for belonging to a union and freedom to belong and not to belong to a trade union.¹²⁵ Both unregistered and registered unions were prevented from affiliating or supplying assistance to a political party. However, the South African Coordinating Council on Labour Affairs

¹²¹ (1980) 5 South African Labour Bulletin (1980) 44 at 44.

¹²² S 8 of the LRA of 1988.

¹²³ S 65 (2)(b) of the LRA of 1988.

¹²⁴ S 66 (1)(c) of the LRA of 1988.

¹²⁵ S 78(1) of the LRA of 1988.

(SACCOLA), The Congress of South African Trade Unions (COSATU) and the National Council of Trade Unions (NACTU) objected to six clauses in the Act, inter alia, changes with regard to the provisions regulating the registrations of trade unions,¹²⁶ restrictions on the right to strike, onus of proof on unions that it did not authorise a wild cat strike.¹²⁷

5. Conclusion

Early on, South Africa's labour relations dualistic character was largely informed by Colour bar politics of the day. Government after government, despite international condemnation from organisation like the ILO, hell-bent to protect the interest of skilled, mainly white workers, enacted labour laws to achieve that end. However, no repressive state apparatus including labour laws could deter the resolve of workers to strike, to form and join trade unions. It was therefore inevitable that the Wiehahn Commission recommended that all workers regardless of race and class should enjoy freedom of association. However, with history being cyclical,¹²⁸ the adversarial nature of our labour relations brought to our shores by immigrants would, at least, prove to be an ever present threat to workers' freedom of association.

¹²⁶ Nel (1989) 182.

¹²⁷ Grosset (1998) 41.

¹²⁸ Reuben A (1976) *"The Study of History: What is the Past"* Chapter 15 Summary/excerpts taken from *Man is the Measure* New York Free Press, 164-175. Available at: <<http://www.amyscott.com/The%20Study%20of%20History%20Abel.pdf>> (accessed 12 July 2017)

CHAPTER THREE: INTERNATIONAL NORMS

6. Introduction
 7. ILO and setting of labour standards
 8. Enforcement of ILO labour standards in South Africa
 9. Role of ILO post 1994 in South Africa
 10. Relevant international standards and their application in our domestic law
 11. Conclusion
-

1. Introduction

The Labour Relations Act gives effect to international law obligations accepted by South Africa in the field of labour law and labour relations. South Africa is a member of various international governmental organizations (IGOs), inter alia, International Labour Organisation (ILO), African Union (AU) and the Southern African Development Community (SADC). It has ratified some international human rights legal instruments including those giving effect to freedom of association. Therefore South Africa has an obligation to ensure that its labour laws and policies are adapted, among others, to conform to ILO conventions it has ratified.¹²⁹ ILO's Conventions 87 and 98 remain critical as they relate to the right to freedom of association and collective bargaining and remain sources upon which other international bodies instruments on aspects of labour law and labour relations rely on regarding nature and extent of freedom of association.

2. ILO and setting of labour standards

Since its inception in 1919, ILO has been setting rules about employment in order to ensure that social justice, prosperity and peace for all develop along with economic progress.¹³⁰ These rules are commonly referred to as 'labour standards', but at times

¹²⁹ Van Eck and Smit "International perspectives on South Africa's unfair dismissal law"(2010) 43 *Comparative and International Law Journal of Southern Africa* 48.

¹³⁰ "Rules of the game: A brief introduction to International Labour Standards" at 9.

have been referred to as 'labour conditions' and 'labour rights' as these terms seem to be used interchangeably. Labour standards are referred to as actual or proposed legal requirements whereas 'labour conditions' refer to the 'actual working conditions'.¹³¹ According to the ILO thesaurus, which is used for indexing and retrieval by various role players, defines labour standard as "standards concerning employment and working conditions found acceptable by employers and workers through collective bargaining and by the legislator through labour laws and regulations."¹³²

There are two kinds of international labour standards, conventions and recommendations.¹³³ Conventions are legally binding international treaties that may be ratified by the ILO's member states.¹³⁴ Recommendations are non-binding guidelines which often provide detailed suggestions on how conventions could be applied.¹³⁵ Recommendations can be autonomous, in other words, not linked to any convention. ILO issues declarations which are adopted at Conferences with the aim of articulating "universal and significant principles", case in point is the Declaration of Philadelphia (on freedom of association).¹³⁶ The ILO also issues codes of practices although non-binding, but can assist states "in the development of legislation, collective agreements, and workplace policies and rules".¹³⁷

The following ILO Conventions have been identified as fundamental, and are at times referred to as the core labour standards:¹³⁸

Available at:

<http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_108393.pdf (accessed on 6 March 2017)

¹³¹ Flanagan (2003) "Labour Standards and International Competitive Advantage" at 7.

¹³² ILO, Thesaurus,

Available at <<http://www.ilo.org/thesaurus/defaulten.asp>> (accessed on 30 March 2017)

¹³³ Van Niekerk and Smit N (eds) *Law@Work* (2018) 25.

¹³⁴ Sengenberger (2013) *The International Labour Organization: Goals, functions and political impact* at 27.

Available at: <http://library.fes.de/pdf-files/iez/10279.pdf>, (accessed on 3 March 2016).

¹³⁵ *Ibid.*

¹³⁶ Van Niekerk and Smit N (eds) *Law@Work* (2018) 26.

¹³⁷ *Ibid.*

¹³⁸ The eight fundamental Conventions have meanwhile been ratified by between 150 and 175 countries. With these ratification rates, between 47 per cent (in the case of freedom of association) and 94 per cent (in the case of abolishing forced labour) of the world population is covered. Forty - eight member states have not yet ratified the core labour standards (International Labour Office 2012: 14, 18).

"The International Labour Organization's Fundamental Conventions"

- Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)
- Right to Organise and Collective Bargaining Convention, 1949 (No. 98)
- Forced Labour Convention, 1930 (No. 29)
- Abolition of Forced Labour Convention, 1957 (No. 105)
- Minimum Age Convention, 1973 (No. 138)
- Worst Forms of Child Labour Convention, 1999 (No. 182)
- Equal Remuneration Convention, 1951 (No. 100)
- Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

3. Role of ILO post 1994 in South Africa

The LRA now gives effect to the constitutional right to freedom of association and ensures its protection through its Chapter II. In terms of section 1 of the Labour Relations Act 66 of 1995, one of the primary objects of the Act is to “give effect to obligations incurred by the Republic as a member state of the International Labour Organization”. In terms of section 3 of the LRA, interpretations of the provisions of the Act, must be in such a manner that it gives effect to the primary objects of the Act, is in compliance with the public international law obligations of the Republic and is in compliance with the Constitution.

The provision governing international agreements in South African law is found in section 231 of the 1996 Constitution.¹³⁹ According to Dugard this constitutional provision is in line with the pre-1994 position whereby the process of negotiating, signing, ratifying and acceding to the treaty was the exclusive function of the executive, however, an international treaty does not become part of municipal law merely upon ratification, it should be incorporated in an Act of Parliament to be effective.¹⁴⁰

Available at: <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/-/declaration/documents/publication/wcms_095895.pdf> (accessed 7 February 2017)

¹³⁹ Constitution of the Republic of South Africa, Act 108 of 1996.

¹⁴⁰ Dugard “Kaleidoscope: International Law and the South African Constitution” 1997) 8 *European Journal of International Law* 81. See also *Pan American World Airways Inc v SA Fire and Accident Insurance Co Ltd* 1965 (3) SA 150 (A).

The influence of international labour law and the Constitution gave rise to Chapter II of the Labour Relations Act No.66 of 1995. As earlier stated one of the purposes of section 1 of the LRA is to give effect to obligations incurred by the Republic as a member state of the ILO. The following articles of Convention 87 discussed below address freedom of association.¹⁴¹

Article 2 of Convention 87 provides:

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

Article 3 (1) of Convention 87 provides:

Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.

Article 5 of Convention 87 provides:

Workers' and employers' organisations shall have the right to establish and join federations and confederations and any such organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers.

A close scrutiny of the above articles point to their similarities to Sections 4(1), 4(2) and 4(3) Labour Relations Act¹⁴² is indicative of the influence the ILO had in our labour legislation. However, these similarities are not a misnomer in that as soon as South Africa re-joined the ILO, ILO provided technical assistance especially around the drafting of new labour legislation. On 08 August 1994, the Department of Labour selected a ministerial legal task team headed by Halton Cheadle¹⁴³ to draft a new labour relations bill that would for the first time create an inclusive labour relations framework in compliance with the Constitution and relevant ILO Conventions. This

¹⁴¹ " C087 Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87") Available at: <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232> (accessed 23 June 2017)

¹⁴² 66 of 1995.

¹⁴³ Ironically Cheadle was detained and banned under apartheid state repressive laws that targeted trade union leaders whilst he was the acting general secretary of the National Union of Textile Workers (NUTW fighting for an inclusive labour relations.

task team spent time at the ILO offices in Geneva interacting with ILO members and people who had been influenced by the ILO thinking.¹⁴⁴

4. Relevant international standards and their application in our domestic law

The importance of international standards as both a substantive and an interpretational tool is emphasised by sections 232 and 233 of the Constitution. Section 232 provides that “customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament”. Section 233 regulates the application of international law. The section provides:

“When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”

In the case of *National Union of Metalworkers of SA & others v Bader Bop (Pty) Ltd & another* (2003) 24 ILJ 305 (CC), the Constitutional Court had to decide whether a minority trade union has a right to strike to compel the employer to grant it organisational rights in sections 12 to 15 of the Labour Relations Act. Numsa wanted the employer to grant it shop steward recognition to enable it to represent its members in grievance and disciplinary procedures.¹⁴⁵ In interpreting the relevant legal and constitutional provisions, the court took international legal standards as outlined in ILO Conventions 87 and 98 and the related rulings made by the Committee of Experts and the Committee on Freedom of Association into account. The constitutional court took notice of principles developed by these committees in

¹⁴⁴ The Task Team comprised of the following members: Professor H. Cheadle (Convenor); Mr R Zondo; Ms A Armstrong; Ms D Pillay; Mr A van Niekerk; Professor W le Roux; Professor A Landman (President of the Industrial Court); Mr D van Zyl (State Law Advisor seconded to the team). Assisting the team were advocates M Wallis, SCj Gauntlett, SC Professor SM Brassey and S Ngcobo, Attorney Ms H Seady, and a researcher, Ms C Cooper. The task team was also assisted by the ILO which provided resources for a 10 day stay at the ILO in Geneva and also provided the Task Team with an opportunity to consult internationally renowned experts within the ILO itself. The task team was also assisted by three experts: Professor B Hepple, Master of Clare College, Cambridge; Professor A Adigun, University of Lagos, Nigeria; and Professor Manfred Weiss, JW Goethe, University, Frankfurt, Germany. See Vishwas Satgar, *The LRA and work-place forums: Legislative provisions, origins, and transformative possibilities*. Available at: <<http://www.saflii.org/za/journals/LDD/1998/4.pdf>> (accessed 23 June 2017)

interpreting South African law, and thus came to the conclusion that a right to strike must also be guaranteed for the minority union concerned.¹⁴⁶

The court at paragraph 34 held that:

Of importance to this case in the ILO jurisprudence described is firstly the principle that freedom of association is ordinarily interpreted to afford unions the right to recruit members and to represent those members at least in individual workplace grievances; and secondly, the principle that unions should have the right to strike to enforce collective bargaining demands. The first principle is closely related to the principle of freedom of association entrenched in section 18 of our Constitution,³¹ which is given specific content in the right to form and join a trade union entrenched in section 23(2)(a), and the right of trade unions to organise in section 23(4)(b). These rights will be impaired where workers are not permitted to have their union represent them in workplace disciplinary and grievance matters, but are required to be represented by a rival union that they have chosen not to join.

In *SA National Defence Union v Minister of Defence & Another* (1999) 20 ILJ 225 (CC), the Constitutional Court applied this provision in a labour context and said:¹⁴⁷

Section 39 of the Constitution provides that, when a court is interpreting Chapter 2 of the Constitution, it must consider international law. In my view, the conventions and recommendations of the International Labour Organisation ('the ILO'), one of the oldest existing international organisations, are important resources for consider the meaning and scope of 'worker' as used in section 23 of the Constitution.

In *SANDU* case, the Minister argued for the provisions of Section 126B of the Defence Act that prohibited members of the Defence force from participating in public protest action and from joining trade unions. The Constitutional Court found the said provisions unconstitutional.¹⁴⁸

Furthermore, the Southern African Development Community (SADC) Charter of Fundamental Social Rights also contains provisions on freedom of association and organisational rights.¹⁴⁹ South Africa, as a Member State of SADC, is obliged to respect and promote the rights provided by the Charter. Article 4 provides:

¹⁴⁶ *Idem* para 33.

¹⁴⁷ *Idem* para 25.

¹⁴⁸ See Van Niekerk and Smit (eds).*Law@Work* (2018) 32-33.

¹⁴⁹ "Charter of the Fundamental Social Rights in SADC (2003)"

Available at: < <http://www.sadc.int/documents-publications/show/837>> (accessed 19 May 2017)

Member States shall create an enabling environment consistent with ILO Conventions on freedom of association, the right to organise and collective bargaining so that:

- a) Employers and workers of the Region shall have the right to form employers association or trade unions of their choice for the promotion and defence of their economic or social interests;
- b) Every employer and every worker shall have the freedom to join and not to join such employers association or trade unions without any personal or occupational damage being thereby suffered by him or her.

Article 4(f) also provides for organisational rights for trade unions and lists such rights to include accessing “employers’ premises for union purposes subject to agreed procedures”, deducting “trade union dues from members’ wages”, electing trade union representatives.

Article 5 provides that “Member States shall take appropriate action to ratify and implement relevant ILO instruments and as a priority the core ILO Conventions”, and that “Member States shall establish regional mechanisms to assist Member States in complying with the ILO reporting system”.

Article 12 of European Union Charter of Fundamental Rights ¹⁵⁰ deals with freedom of association and at 12(1) states that “everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.”

5. Conclusion

This chapter is meant to provide insight on the role of IGOs, international human rights instruments and how it relates to the protection of freedom of association. This is crucial in a young democracy which was in the abyss of human rights abuses for a

¹⁵⁰ “Charter of fundamental rights of the European Union (2000/C 364/01)”
Available at: < http://www.europarl.europa.eu/charter/pdf/text_en.pdf > (accessed 19 May 2017)

long period in our history. International legal instruments will continue to play an important role in our interpretations of our law when issues of human rights are in disputes. The relevance of sections 39, 232 and 233 of the Constitution in this regard cannot be underestimated.

CHAPTER FOUR: ANATOMY OF STRIKES IN SOUTH AFRICA

5. Introduction
 6. South Africa's adversarial industrial relations
 7. Strikes post 1994 democratic dispensation
 8. Conclusion
-

1. Introduction

In 2012, Congress of South African Trade Unions (COSATU) conducted Workers' Survey covering 3,030 workers in 37 urban districts across the country.¹⁵¹ The survey was meant to objectively analyse the views of both union members and potential members on matters facing the labour movement.¹⁵² In what is arguably one the most contentious findings, the survey found that almost half of COSATU members polled believed that violence is necessary during a strike to achieve the results required. Violence identified includes threats or assaults to managers, public and scabs, killing of scabs¹⁵³ and damage to property.¹⁵⁴

2. South Africa's adversarial industrial relations

However, violence inflicted by workers on others and destruction of property, is not a new phenomena but is old as trade unionism in South Africa. There is an argument that Anglo-American immigrants who came to work in South Africa following the

¹⁵¹ "Findings of COSATU Workers' Survey, 2012"

Available at:

<http://www.cosatu.org.za/docs/reports/2012/final%20workers%20surveys%20results%20August%202012.pdf> (accessed 15 September 2017)

¹⁵² *Ibid.*

¹⁵³ According to figures compiled by the South African Institute of Race Relations using print media reports by the end of 2012, Nearly 200 killed in strike action in 13 years, Some 181 fatalities occurred in strike violence between January 1999 and October 2012 and a further 313 people were injured.

Sethlatswe B "Nearly 200 killed in strike action in 13 years" 21 January 2013 *South African Institute of Race Relations*.

Available at: <<http://irr.org.za/reports-and-publications/media-releases/Strike%20violence.pdf/view>> (accessed 15 September 2017)

¹⁵⁴ *Ibid.*

discovery of diamond and gold, contrary to a conciliatory of the European continent, imported a militant adversarial industrial relations.¹⁵⁵ During the 1913 strikes Crawford of the Amalgamated Society of Engineers (ASE), urged the strikers to be militant, to sabotage and destroy machinery.¹⁵⁶ During the 1922 striking white workers, frustrated by the reluctance of management to meet their demands resorted to intimidation tactics and unleashed violence against scab labour. Scab labour, not only included Africans, but consisted of semi-skilled and unskilled white Afrikaners.¹⁵⁷ The angry mobs beat up the strike breakers, burnt their belongings and made life hell for their families.¹⁵⁸

Early on in the life of African trade unions, there was a stark realisation that a struggle of workers on the shop floor was inextricably wider struggle for liberation. It was for this reason that the National Union of Mineworkers (NUM), was formed in 1982 and it embraced ANC four "pillars" of action armed struggle, mass mobilisation, international solidarity, and underground operation.¹⁵⁹

Cyril Ramaphosa, COSATU general secretary, in his keynote address at Cosatu's launch rally in Durban in 1985 said: ¹⁶⁰

We all agree that the struggle of workers on the shop floor cannot be separated from the wider struggle for liberation. The Important question we have to ask ourselves is how is COSATU going to contribute to the struggles for liberation. As unions we have sought to develop a consciousness among workers, not only of racial oppression, but also of their exploitation as a working class. As unions we have influenced the wider political struggle. Our struggles on the shop floor have widened the space for struggles in the community. Through interaction with community organisations, we have developed the principle of worker controlled democratic organisation. But our main political task as workers is to develop organisation among workers as

¹⁵⁵ Fn 35 above.

¹⁵⁶ Fn 36 above.

¹⁵⁷ *Idem* 2.

¹⁵⁸ Raina J "Workers have the right to strike" Industrial Global Union (24 June 2014) Available at: <<http://www.industriall-union.org/workers-have-the-right-to-strike>> (accessed 18 July 2017)

¹⁵⁹ Fafuli M "The Role of NUM in Transforming The Mining Industry in SA" International Mining History conference held at Gold Reef City in Johannesburg 17-20 April 2012. Available at: <<http://www.num.org.za/News-Reports/Speeches/Reports/token/download/ItemId/5.>>(accessed 23 September 2017)

¹⁶⁰ Plaut M (1986) "The Political Significance of COSATU" Transformation 2 Debate Available at: <<http://transformationjournal.org.za/wp-content/uploads/2017/02/397-350-1-PB.pdf>> (accessed 24 September 2017)

well as a strong worker leadership. He have, as unions, to act decisively to ensure we. as workers, lead the struggle.

The speech is loaded with meaning as it illustrates the causal link between workers struggle, community struggle and political struggle. Furthermore, the significance of the aforesaid speech in light of freedom of association showed that the manner in which community advanced their economic and political interests largely influenced the manner in which workers advanced their interests in the workplace.

South Africa in the 1980s and 1990s, rural and urban areas alike, experienced high incidents of political violence with an estimated twenty thousand lives believed to have been lost to political violence in the last decade of white rule.¹⁶¹ Political violence arose, inter alia, as a result of inter party rivalry.¹⁶² Violence was also visited on people who were classified as informers and collaborators (otherwise known as “Impimpis” or “amagundwane”) of the National Party apartheid government.¹⁶³ For instance, some of the methods used during the struggle for liberation to cripple apartheid government included work stayaways and consumer boycotts and anyone found in defiance would at times be hit, their houses petrol bombed¹⁶⁴ or forced to drink cooking oil or eat laundry soap.¹⁶⁵

3. Strikes post 1994 democratic dispensation and how they impact freedom of association.

According to Ngcukaitobi, “in post apartheid South Africa, despite workers being granted constitutionally entrenched rights to engage in collective bargaining and strike action, industrial action is similarly characterized by considerable violence and

¹⁶¹ Finnegan (1995) xi (preface)

¹⁶² See “Further submissions and responses by the African National Congress to questions raised by the Commission for Truth and Reconciliation 12 May 1997” Available at: <<http://www.justice.gov.za/trc/hrvtrans/submit/anc2.htm>> (accessed 27 September 2017)

¹⁶³ See “Truth and Reconciliation Commission Report The Volume 7: Victims Findings” This volume contains a list of names of victims of political conflict and violence. The list includes people who died, lost their homes and sustained injuries. Available at: <http://www.justice.gov.za/trc/report/finalreport/victims_10to300_vol7.pdf> (accessed 24 July 2017)

¹⁶⁴ Finnegan (1995) 89.

¹⁶⁵ *Idem* 144.

intimidation”.¹⁶⁶ Relying on “frustration aggression theory”¹⁶⁷ to justify violent behaviour, Ngcukaitobi regard “perceived collusion between police either the employer or the state, apparent intransigence of management, and the protracted duration of the strike” as among some of the factors responsible for triggering violent conduct.¹⁶⁸ However, it seems as if the culture of violence experienced in the 1980s and early part the 1990s did not end with the end of apartheid but has somehow made its way to our industrial relations. It is for this reason that Botha and Germishuys argue that acts of “intimidation, violence and a total disregard for the rule, are relevant in evaluating the current state of labour relations and industrial action in South Africa”.¹⁶⁹ The sad reality is that “strikes in South Africa are not characterised by orderly picket lines with neat placards and workers singing Kumbaya, eating sandwiches and drinking tea, as they picket in a country where the right to strike is protected by the constitution”.¹⁷⁰ In reality, labour seem to have not yet experienced a change in mindset appreciative of the fact that we are now living in a Constitutional democracy which guarantee every citizen human rights and which conversely places an obligation on others to respect those rights. For every right that a person has there is usually a responsibility that is connected to that right.

In what sounds like the terror of the 1980s, reports illustrate that strike-related violence continues to be a destructive feature of industrial action.¹⁷¹ In 2010, during the public sector strike, the government had to deploy the army to hospitals as numerous acts of violence and intimidation, including blocking entrances, disrupting surgery, beating, stabbing and kidnapping of nurses were reported.¹⁷² In 2011, a strike led by South African Transport and Allied Workers Union (SATAWU)

¹⁶⁶ Ngcukaitobi “Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana” (2013) 34 *Industrial Law Journal* 846.

¹⁶⁷ According to this theory when people perceive that they are being prevented from achieving a goal, their frustration is likely to turn to aggression.

¹⁶⁸ Fn 166 above.

¹⁶⁹ Botha and Germishuys “The Promotion of Orderly Collective Bargaining and Effective Dispute Resolution, the Dynamic Labour Market and The Powers of the Labour Court (1)” (2017) 80 *THRHR* 352.

¹⁷⁰ Motala M (2014) “Why strikes are so violent” 14 July 2014 *Cape Times*. Available at: <<https://www.iol.co.za/news/opinion/why-strikes-are-so-violent-1719501>> (accessed 23 July 2017)

¹⁷¹ See Department of Labour, Industrial Action Reports (IAR) from 2010-2016

¹⁷² Smith D “South African nurses beaten during state worker strikes” 6 September 2010 *The Guardian*. Available at: <<https://www.theguardian.com/world/2010/sep/06/southafrica>> (accessed 23 July 2017)

demanding a 20% increase over the next two years and the banning of labour brokers turned violent in Johannesburg CBD. Striking workers wielding knobkerries smashed the windows of 10 trucks, pulled drivers whom were on duty out of their vehicles and forced them to join the march.¹⁷³ This followed the infamous 2006 SATAWU security guard strike whereby six men were thrown from a train on the Benoni, Satawu organiser was shot dead in the Cape Town township of Langa and two security guards who were shot on April 5 and April 19.¹⁷⁴

On 12, 13 and 14 August 2012, days before 34 striking miners were shot by police on 16 August, 10 people died, among them were Mr Mabelane, Mr Fundi, Mr Mabebe and Mr Langa, employees based at Lonmin mine whom were not participating in the strike.¹⁷⁵ These employees were killed after Lonmin called on its employees to go to work during the strike, even though it knew that it was not safe. One Mr Twala, a Lonmin supervisor, was killed on the 14th August 2012, accused of being an informer (impimpi because during his tenure at Lonmin he subjected some of the strikers to disciplinary action at work.¹⁷⁶ According to the strikers' testimony at Farlam Commission they killed non-striking employees because that they wanted to send a message to the people who were not aware of the strike, that there was a strike and "so that others would come and join them and support the strike".¹⁷⁷

During the Western Cape Farm Workers Strike 2012-2013,¹⁷⁸ farmer workers, acting on their own accord, burnt vineyards, destroyed farmer's cars and property, blocked roads and set alight tyres.¹⁷⁹ This despite farm the fact that only three percent of an

¹⁷³ "Strike violence in Johannesburg CBD" 14 February 2011 *News 24*
Available at: < <https://www.news24.com/SouthAfrica/News/Strike-violence-in-Johannesburg-CBD-20110214>> (accessed 23 July 2017)

¹⁷⁴ Makgetla T "The most violent post-apartheid strike" 28 April 2006.
Available at: <<https://mg.co.za/article/2006-04-28-the-most-violent-postapartheid-strike>> (accessed 23 July 2017)

¹⁷⁵ Marikana Commission of Inquiry: Report on matters of public, national and international concern arising out of the tragic incidents at the Lonmin mine in Marikana, in the North West Province, at 512.

¹⁷⁶ *Idem* 171.

¹⁷⁷ *Idem* 620.

¹⁷⁸ The strike started in De Doorns and soon spread to other areas in the Western Cape, including Clanwilliam, Citrusdal, Robertson, Wolseley, Worcester, Grabouw, Villiersdorp, Ashton, Somerset West and Swellendam. Farmworkers who were mainly seasoned workers and employed via brokers demanded, among others, a wage increase from R69 to R150, an 8 hour working day, women demanded equal pay to men and paid maternity leave.

¹⁷⁹ "The Western Cape Farm Workers Strike 2012-2013" *South African History Online*.

estimated 121 000 workers employed in the fruit and wine industries belonged trade union, namely women's led trade union named Sikhulu Sonke (meaning "We grow together"), and the independent Commercial, Stevedoring, Agricultural and Allied Workers Union (CSAAWU) and The Bawsi Agricultural Workers Union of South Africa (BAWUSA).¹⁸⁰

In the first 2 weeks of the 2014 month-long strike in the metals and engineering sector, about 246 cases of intimidation were reported, 50 violent incidents occurred and 85 cases of vandalism were recorded.¹⁸¹ They were claims of people assaulted, companies looted and forced shutdown at firms in the apex industrial area of Benoni.¹⁸²

However, strike violence poses a breach, actual and potential, to not only freedom of association, but, inter alia, human dignity,¹⁸³ life,¹⁸⁴ assembly, demonstration, picket and petition,¹⁸⁵ freedom of trade, occupation and profession,¹⁸⁶ labour relations,¹⁸⁷ and housing.¹⁸⁸ The Constitutional Court in *Ahmed Raffik Omar v. The Government of South Africa and Others CCT 47/04 [2005] ZACC 17* while deciding on a case of domestic violence at paragraph 17 held that:

Available at: <<http://www.sahistory.org.za/article/western-cape-farm-workers-strike-2012-2013>> (accessed 23 July 2017)

¹⁸⁰ Human Rights Watch (2011) "South Africa: Farmworkers' Dismal, Dangerous Lives Workers Protected by Law, but Not in the Fields" 23 August 2011. Available at: <<https://www.hrw.org/news/2011/08/23/south-africa-farmworkers-dismal-dangerous-lives>> (accessed 11 September 2017)

¹⁸¹ Stupan (2014) "Briefing Paper Draft Labour Relations Amendment Bill proposed: Containing violence and intimidation during strike actions" 27 November 2014 Available at: <http://capechamber.co.za/wp-content/uploads/2014/11/LRA-A-B-Proposal-for-comment_26Nov2014.pdf?> (accessed 11 September 2017)

¹⁸² "Fear grows as NUMSA strike continues" Eyewitness News 04 July 2014 Available at: <<http://ewn.co.za/2014/07/04/Numsa-strike-marred-by-violence-and-vandalism>> (accessed 11 September 2017)

¹⁸³ S 10 of the Constitution, therefore we all have a duty to treat people with respect and dignity

¹⁸⁴ S 11 of the Constitution, we have a duty not to place other people's lives in danger which would be at risk when we strike carrying dangerous weapons.

¹⁸⁵ S 17 of the Constitution, we have a duty to participate in strikes in a peaceful manner in line with Code of Good Practice- Picketing.

¹⁸⁶ S 22, we have a duty to refrain from bullying, or intimidating others in the exercise of their profession.

¹⁸⁷ S 23, we have a duty to allow workers who chose not to participate in any industrial action an opportunity to carry on working.

¹⁸⁸ S 26, we have a duty to respect other people's property their home demolished.

..Section 12(1)(c) provides that everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from public or private sources. This right must be understood in conjunction with the rights to dignity, life, equality (which includes the full and equal enjoyment of all rights and freedoms) and privacy...

Nevertheless, workers who, for whatever reason, during any periods of industrial action choose not take part or are hired as replacement labour are considered collaborators. These workers are then, as outlined in the Congress of South African Trade Unions (COSATU) Workers' Survey above, subjected to various types of violence. This is a source for concern if one takes into account that according to the Department of Labour, Strikes Statistics database, from 2005 to 2015 South Africa experienced an annual average of 85 strike incidents per annum.¹⁸⁹ The question is if freedom of association encompasses a positive freedom of association and a negative freedom of association, conversely concluding that the right to strike also implies a concomitant right not strike, why then are non-strikers freedom not to associate with strikers violated at a whim by striking workers. This is in light of the view that at present the only permissive legislative provisions which can limit the right to freedom of association as per Section 36: Limitations on rights¹⁹⁰ are those stipulated at sections 25 and 26 of the Labour Relations Act.¹⁹¹

As earlier stated, the right to freedom of association is one which is constitutionally¹⁹² and statutorily¹⁹³ provided for and allows workers, inter alia, to form and join a trade union, to participate in the activities and programmes of a trade union and to strike. According to Okene "the right to participate in trade union activities, including the

¹⁸⁹ "Department of Labour, Industrial Action Report (IAR) 2015"
Available at: <<http://www.labour.gov.za/DOL/documents/annual-reports/industrial-action-annual-report/2015/industrial-action-report-2015>> (accessed 27 September 2017)

¹⁹⁰ The rights in the Bill of Rights can be limited if this is reasonable and justifiable in an open and democratic society that is based on human dignity, equality and freedom.

These are the factors that a person or court must be taken into account if a right is to be limited:

- (a) the nature of the right;
- (b) the importance of the purpose of limiting the right;
- (c) how much the right will be limited;
- (d) the relation between the limitation and its purpose;
- (e) whether there are better ways to achieve the same purpose.

¹⁹¹ Act 66 of 1996.

¹⁹² See ss 18 and 23 of the Constitution of South Africa.

¹⁹³ See ss 4(1) and (2) of the LRA.

right to strike, flows from the right of workers to associate for trade union purposes".¹⁹⁴

For a while trade unions engaging in strike violence seemed to operate without¹⁹⁵ impunity with little or no consequences for their destruction of lives and property stemming from their actions. However, since a decision of *Garvis & Others v SATAWU & others*¹⁹⁶ our Courts seem to have adopted a hardline stance on strike violence, interdicting such strike action and at times ordering punitive damages against trade unions concerned. In response to the scourge of violence associated with strikes, the Supreme Court of Appeal in *Garvis* at paragraph 50 said: "In the past the majority of the population was subjected to the tyranny of the state. We cannot now be subjected to the tyranny of the mob".

On 16 May 2006 South African Transport and Allied Workers Union (SATAWU), organised a protest march in the Cape Town City Bowl in terms of the Regulation of Gatherings Act 205 of 1993. The gathering escalated into a full scale riot leading to the destruction, damage and loss of property of the Respondents. This gathering was the culmination of a protracted strike action in the course of which some 50 people lost their lives as a result of strike related violence.

The Respondents in this case, mainly small business owners along the route of the march who had suffered the brunt of the damage, maintained that they sustained loss as a result of the riot and claimed damages from SATAWU in terms of section 11 of the Regulation of Gatherings Act 205 of 1993. SATAWU challenged the constitutionality of section 11(2)(b) of the Act on the basis that it was contradictory, irrational and inconsistent with the constitutional right to assemble, demonstrate and picket.¹⁹⁷ SATAWU submitted that section 11(2)(b) places great a burden on trade unions and other organisations and that, faced with extensive statutory liability for

¹⁹⁴ Okene "Aspects of the right to participate in trade union activities" (2012) 4 *Port Harcourt Law Journal* 324.

¹⁹⁵ A Court will, so it was submitted, not give a judgment in terms of which strikers are allowed, without impunity, to terrorise and harm non-striking co-workers.

¹⁹⁶ (2010) 31 ILJ 2521.

¹⁹⁷ S 17 of the Constitution provides that everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.

riot damage, they would be deterred from organising marches, protests and other gatherings for fear of financial ruin.

However, the High Court, Supreme Court of Appeal and the Constitutional, all held that the constitutional right to assemble and demonstrate is constitutionally protected and guaranteed so long as it is exercised peacefully. The SCA accepted that assemblies, pickets, marches and demonstrations are essential instruments of dialogue in society. However, The SCA held that the struggle for workers' rights should take place within legal limits and with due regard to the rights of others.

The aversion to strike violence has become so palpable to a point that In *FAWU obo Kapesi and Others v Premier Foods Ltd t/a Ribbon Salt River*,¹⁹⁸ the court held that the employer could choose to dismiss violent strikers for operational reasons as oppose to misconduct. The court held:

*Strikes that are marred by this type of violent and unruly conduct are extremely detrimental to the legal foundations upon which labour relations in this country rest.... Such conduct further completely negates the rights of non-striking workers to continue working, to dignity, safety and security and privacy and peace of mind.*¹⁹⁹

This follows a strike that was marred by acts of violence including harassment and intimidation of non-striking employees. Non-strikers were threatened with physical harm and death, one female non-striker was dragged from her home at night and assaulted with pangas and sjamboks, vehicles and homes were petrol bombed and destroyed, a witness was shot and killed, threats to kill senior management were made and delivery vans were held up and the daily takings were robbed as were personal possessions and money of the drivers and staff. The magnitude of acts of violence was so perverse that the Court at paragraph 33 said that “an employer may resort to dismissals on the basis of operational requirements in circumstances where

¹⁹⁸ (2010) 31 ILJ 1654 (LC).

¹⁹⁹ *Idem* para 2.

the operational requirements of the business so requires but where misconduct prompted or underlies the dismissals.”²⁰⁰

It is evident that in instances where strikes are not peaceful, the Labour Court has always been, and probably always will be, sympathetic to employers and readily grants interdicts.²⁰¹ Fergus argues that in as much as the right to strike is constitutionally protected, strike violence threatens other fundamental rights and since there is no hierarchy of rights, there is an obligation by our courts to “balance competing constitutional rights”²⁰² before intervening in labour matters to a point of granting interdicts. Botha and Germishuys argue that a threat to life should on its own serve as a “justifiable reason for considering and implementing limitations on the right to strike”.²⁰³ According to Du Toit *et al*, when defining a right the law must define its limitations and therefore courts are crucial in helping to determine the legality of a strike.²⁰⁴

Section 68 of the LRA empowers the Labour Court with exclusive jurisdiction to interdict any person from participating in a strike or lock-out that does not comply with section 64 (unprotected strike).²⁰⁵ However, according to Van Eck and Kulinga, it is debatable whether the Labour Court can interdict a strike that is otherwise protected or which declares an otherwise protected strike to lose protection²⁰⁶ because such orders will not pass constitutional scrutiny.²⁰⁷ Section 68 further empowers the Labour Court to order the payment of just and equitable compensation for any loss suffered as a result of an unprotected strike or any conduct committed in contemplation or in furtherance of an unprotected strike or lock-out.²⁰⁸ Manamela* and Budeli further opine that the employer may apply to the Labour Court or High Court for an order restraining any person from committing

²⁰⁰ *Idem* para 37.

²⁰¹ See *Woolworths (Pty) Ltd v SACCAWU & Others* (2006) 27 ILJ 1234 (LC). at 1236.

²⁰² Fergus “Reflections on the (Dys)functionality of strikes to collective bargaining: Recent developments” (2016) 37 ILJ 1551.

²⁰³ Botha and Germishuys (2017) 80 *THRHR* at 365.

²⁰⁴ Du Toit and Ronnie (2012) at 197.

²⁰⁵ S 68(1)(a) of the LRA.

²⁰⁶ See *National Union of Food Beverage Wine Spirits & Allied Workers v Universal Product Network (Pty) Ltd* 2016 37 ILJ 476 (LC)

²⁰⁷ Botha and Lephoto “An Employer’s Recourse to Lock-Out and Replacement Labour: An Evaluation of Recent Case Law” (2017) 20 *PER/PELJ* 6.

²⁰⁸ S 68(1)(b) of the LRA.

violent acts of misconduct.²⁰⁹ A mandatory order may also be issued to direct the union to intervene and take all reasonable steps to stop unlawful acts.²¹⁰

Striking employees and unions participating in a protected strike are protected from civil claims for damages courtesy of sections 67(2) to (6) of the Labour Relations Act,²¹¹ which provides amongst other things, that a protected strike and conduct in furtherance thereof is not a delict or a breach of contract and civil proceedings may not be instituted against participants because of the participation therein. However, this protection does not apply to conduct during a protected strike that constitutes an offence.

Francis J in *Mondi Limited - Mondi Kraft Division v Chemical Energy Paper Printing Wood and Allied Workers Union (CEPPWAWU) and Others*²¹² at paragraph 28 held that the that the “Labour Court does have jurisdiction to adjudicate delictual claims arising out labour disputes as envisaged in section 67 of the Act.” This after a claim by the union that LRA does not confer jurisdiction to Labour Court to decide on delictual damages if it is in the context of a protected strike. Francis J held that he fails “to understand why the Labour Court is permitted to hear delictual claims in unprotected strikes but where the strike is protected and the act complained of is an offence, it does not have the requisite jurisdiction.”²¹³

The Labour Court’s exclusive jurisdiction over labour matters and power to interdict unprotected strikes and strike violence is also provided for in sections 157(1)²¹⁴ and

²⁰⁹ Manamela and Budeli (2013) *CILSA* at 324.

²¹⁰ *Ibid.*

²¹¹ The Court in interpreting S 67, S 67 deals with strikes or lock out in compliance with the Act. It provides that:

2. A person does not commit a defect or a breach of contract by taking part in-

(a) a protected strike or a protected lock-out; or

(b) any conduct in contemplation or in furtherance of a protected strike or a protected lock-out.

6. Civil legal proceedings may not be instituted against any person for-

(c) participating in a protected strike or a protected lock-out; or

(d) any conduct in contemplation or in furtherance of a protected strike or a protected lock-out.

8. The provisions of subsections (2) and (6) do not apply to any act in contemplation or in furtherance of a strike or a lock-out, if that act is an offence.

²¹² (D622/2002) [2005] ZALC 84 (24 June 2005)

²¹³ *Idem* para 26.

²¹⁴ S 157 (1) states that “Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.”

158(1)²¹⁵ of the LRA. Thus, an employer can obtain an interdict from the Labour Court prohibiting employees from committing violence during a protected strike. The interdict will be an interim one (*rule nisi*) and the parties must return on the return date, where the respondent union must show cause why the interim order must not be made final.

However, to a point of daring the courts, there are instances where unions have failed to obey interdicts and continued unleashing violence. In *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Worker Union & others*, despite an interim order was obtained by the applicant preventing the strikers from engaging in such unlawful conduct and before the return day of the final order, FOSAWU continued with their criminal acts which included the emptying of dirt bins outside the employer's property, burning tyres on the roads, blocking roads, and throwing bricks at police vehicles, assaulting patrons and non-striking employees, malicious damage to the employer's property and the property of patrons of Montecasino.²¹⁶

Applicants filed supplementary affidavits asking that the union and its members be held liable for the costs incurred by their actions as there was no denial that they had engaged in such conduct. Even though the court did not award punitive damages per se, it however, ordered the respondents to pay the costs for the proceedings.²¹⁷ This was a departure from two general principles adopted by the court when it comes to proceeding before Labour Court. The first general principle that costs should follow the result is not applicable to the Labour Court in terms of section 162 of the LRA, it compels the Court to consider the requirements of law as well as fairness.²¹⁸ The

²¹⁵ S 158(1) states that the Labour Court may make any appropriate order, including (i) the grant of urgent interim relief; (ii) an interdict; (iii) an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of this Act; (iv) a declaratory order; (v) an award of compensation in any circumstances contemplated in this Act; (vi) an award of damages in any circumstances contemplated in this Act; and (vii) an order for costs;

²¹⁶ See also *Verulam Sawmills (Pty) Ltd v AMCU* (J1580/15) [2015] ZALCJHB 359.

²¹⁷ See also *South African Post Office Ltd v Tas Appointment and Management Services CC and Others* [2012] 6 BLLR 621 (LC); *Mangaung Local Municipality v SAMWU* (2003) 23 ILJ 405 (LC).

²¹⁸ See *NUM v East Rand Gold and Uranium Co Ltd* 1992(1) SA 700 (AD) at 738J-739G.; *Alpha Pharm Western Cape (Pty) Ltd v National Education Health and Allied Workers Union and Others* (C1008/2012) [2013] ZALCCT 14, para 21.; *City of Cape Town v South African Municipal Workers Union* (C 429/2007) [2008] ZALC 30; [2008] 7 BLLR 618 (LC) ; (2008) 29 ILJ 1886 (LC) (19 March 2008), para 21.

second general principle involves unprotected strikes as the FOSAWU strike was protected.²¹⁹

Inasmuch as the Labour Court is amenable to award compensation or damages in instances where the strike is unprotected or is protected but strikers somehow resort to criminal conduct, the quantum of the compensation²²⁰ that the court awards is not always commensurate to amount claimed by applicants in relation to a loss suffered. In *Mangaung Municipality v SAMWU* [2003] JOL 10582 (LC), despite the fact that the employer had sued for losses of approximately R270 000 only awarded the employer an amount of R25 000 as compensation. In *Supreme Springs, division of Met Industrial Ltd v MEWUSA and Others* (J 2067/10) [2011] ZALCJHB 231 (10 August 2011), the applicant claimed to have suffered a loss in revenue of some R1.05 million but the union was ordered to pay a fine of R100 000 suspended for five years. In *Algoa Bus Company v SATAWU & Others* [2010] 2 BLLR 149 (LC), applicant sought an award of R465 000 but was awarded only R100 000. The court ordered that the R100 000 be repaid in instalments of R50 per month.²²¹

Conclusion

According to Manamela and Budeli, the “importance of the right to form and join a trade union, to bargain collectively and to strike as the main components of the right

²¹⁹ See *Mutual Construction Company (Pty) Ltd v Federated Mining Union*, [1997] 11 BLLR 1470 (LC) at 1472. where Landman AJ, as he then was, said:

‘An order of costs is imperative, not only to compensate the applicant but to stress the point that unprocedural strikes are contrary to the ethos of the new labour dispensation and ought not to be tolerated.’

²²⁰ In *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union* [2002] 1 BLLR 84 (LC) at 89. The court in considering the requirements that a claimant must satisfy in order to claim compensation held:

‘It is manifest that in relation to a strike, three requirements must be satisfied before the question, whether compensation as contemplated in sub-section 1(b) is to be awarded, and if so, in what amount, arise for determination. In the first instance, it must be established that the strike does not comply with the provisions of Chapter IV of the Act. Secondly, the party invoking the remedy must establish that it has sustained loss in consequence of the strike. Thirdly, it must be demonstrated that the party sought to be fixed with liability participated in the strike or committed acts in contemplation or in furtherance thereof. This much is evident from the provisions of sub-section 1(a) which, in its delineation of the nature of the acts which might legitimately form the subject matter of an interdict or restraint, identifies who might be held accountable therefore. The Legislature plainly intended to embrace the same class in relation to the Court’s competence to award compensation.’

²²¹ *Ibid.*

to freedom of association”.²²² However, there can never be a true freedom of association in a climate of violence and fear where workers are unable to freely express their views nor exercise the right to choose to support or not to support a particular cause championed by a trade union. Strike violence threatens, inter alia, the right to freedom and security of the person, the right to trade and property. This goes against the ideals of our Labour Relations Act of promoting ‘labour peace and the democratisation of the workplace’²²³. It is against this backdrop that Botha and Germishuys suggest that trade unions should invest a portion of their resources educating their members about “the right to strike, limitations on the right to strike as well as consequences that will follow the abuse of the right to strike”²²⁴ as this forms part of their social responsibility.²²⁵

²²² Fn 6 above..

²²³ S 1 of the LRA 66 of 1995.

²²⁴ Botha and Germishuys “The Promotion of Orderly Collective Bargaining and Effective Dispute Resolution, the Dynamic Labour Market and The Powers of the Labour Court (2)” (2017) 80 *THRHR* 536. See also Wallis M “Now You Foresee It, Now You Don't - SATAWU v Garvas & Others (2012) 33 *ILJ* 2257

²²⁵ Botha “Responsible unionism during collective bargaining and industrial action: Are we ready yet? 2015 *De Jure* 336..

CHAPTER FIVE

PRINCIPLE OF MAJORITARIANISM

6. Introduction
 7. Principle of majoritarianism
 8. Extension of collective agreements non-agent/bargaining parties
 9. The notion of negative freedom of association in international law.
 10. Conclusion
-

1. Introduction

South Africa's labour relations jurisprudence is, largely due to historical reasons and to a lesser extent political considerations promote majoritarianism democracy. However, this poses a challenge if one takes into account that South Africa is pluralist country whereby society associates along ethnic, economic, ideological, religious, or cultural lines. Our trade union movement is a case in point whereby the prevailing view is that trade unions are not independent but are aligned along political and ideological lines. The question is to what extent can majoritarianism principle exist in a pluralist trade union environment without limiting the minority's freedom of association. Is it possible to achieve "industrial peace and the democratization of the workplace" on a purely majoritarianism ticket?

2. Principle of majoritarianism

It is settled law that for trade unions to exist as legal entities largely depend on the patronage of their members. This patronage comes, inter alia, in the form union subscriptions and solidarity during industrial actions. It is for this reason that trade unions regularly embark on aggressive recruitment campaigns to recruit new members as they have realised that there is strength in numbers. The view among labour law scholars is that the Labour Relations Act 66 of 1995 (LRA) promote a majoritarianism narrative.²²⁶ Majoritarianism is a principle of labour law that refers to

²²⁶ See Baskin & Satgar *New Labour Relations* 12; Cohen T "Limiting Organisational Rights of Minority Unions: *POPCRU v Ledwaba* 2013 11 BLLR 1137 (LC)" (2014) 17 *PER / PELJ*; Kruger J

the situation whereby members of a trade union constitute the majority of an employer's workforce.²²⁷ Although there is no indication in the LRA as to what constitute majority, the principle has been to confer registered trade unions that have fifty per cent plus one of members represented in the workplace a majority status.²²⁸ Chapter 3 of LRA confers organisational rights to a recognised trade union depending on the level of representivity in the workplace with the majority trade unions enjoying additional organisational rights vis-a-vis minority trade unions.²²⁹ This despite, as argued by Esitang and Van Eck, that Section 4 of the LRA does not prescribe threshold requirements as a prerequisite for the enjoyment of the right to freedom of association.²³⁰ According to Theron et al organisational rights is the label given to an array of rights afforded to union in the LRA.²³¹

Section 18 of the LRA affords majority unions an additional right to conclude collective agreements with an employer that establish a threshold of representivity.²³² The threshold set, could be used to obtain one or numerous statutory organisational rights, in particular, right to access workplace, deduct trade union subscriptions or levies and leave for trade union activities. However, this regulation mechanism is not without controversy as at times majority trade union concludes threshold agreements with employers with potentially disastrous effect to

& Tshoose CI "The impact of the Labour Relations Act on minority trade unions: A South African Perspective" (2013)16 *PER / PELJ*; Botha MM and Germishuys W "The Promotion of Orderly Collective Bargaining and Effective Dispute Resolution, the Dynamic Labour Market and The Powers of the Labour Court (1)" (2017) 80 *THRHR* 351-369.

²²⁷ (2013) 34 *Obiter* 600 at 610.

²²⁸ Van Niekerk *et al* *Law @ Work* (2016) 377, defines majority unions as " those registered unions that on their own, or in combination with any one or more unions, have as their members the majority of the employees employed by the employer in a workplace. This requires that at least 50 per cent plus one of the employees employed in the workplace must be members of the union(s)".

²²⁹ LRA confers a majority union a right to access workplace (sec 12); Deduct trade union subscriptions or levies (13); elect trade union representatives (sec 14); Leave for trade union activities (sec 15) and disclosure of information (16) and a sufficiently represented union a right to access workplace (sec 12) and to deduct trade union subscriptions or levies (13) only.

See sections 14(1), 16(1), 18(1), 25, 26, 32(1)(a) and (b), 32(3)(a), (b), (c) and (d); 32(5) and 78(b) of the LRA

²³⁰ Esitang and Van Eck "Big Kids on the Block Dominating Minority Trade Unions: Reflections on Thresholds, Democracy and ILO Conventions" in *World Congress XXI: (15-18 September 2015 Cape Town)* 1-25, at 4.

²³¹ Theron Godfrey and Fergus 'Organisational collective bargaining rights through the lens of Marikana' (2015) 36 April *ILJ* 853.

²³² S 18(1) of the *LRA*. In 2015 the legislature amended section 21 of the LRA to include subsections (8A) to (8D). These provisions allow the arbitrator to grant the organisational rights to a registered union that does not meet the threshold concluded according to section 18 of the LRA, by majority unions and an employer.

minority unions and non-union members' constitutional right²³³ to freedom of association.²³⁴ Theron et al argue that unreasonably high threshold undermine workplace democracy and may lead to labour conflict.²³⁵

Moreover, in other instances, majority trade unions are known to conclude unreasonably high threshold agreements with the sole aim of cementing their dominant positions, effectively preventing smaller unions to gain entry into the workplace and reducing them to mere spectators without organisational rights. One such agreement was the one signed between the National Union of Mineworkers (NUM) and Impala Platinum Mine (Implats) in 2007. This agreement made provision for a 50% plus one member threshold for recognition at Category 3-9 bargaining unit,²³⁶ "practically making Implats a closed shop where minority unions have no rights".²³⁷ Van Eck and Esitang are of the view that such arrangements may potentially violate the basic rights of employees and their trade unions as other employees will not be able to vote for a trade union representative of their choice.²³⁸ It is for this reason that Baskin and Satgar, view our LRA as favouring the majoritarian principle at the expense of small, minority and craft based unions.²³⁹

Notwithstanding controversy regarding application of the principle of majoritarianism in other instances, it is, however, a principle that has been endorsed by our courts. The Labour Appeal Court at paragraph 19, in *Kem-Lin Fashions CC v Brunton* 2001 22 ILJ 109 (LAC) explains the majoritarian principle and stated:

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

²³³ Ss 18 and 23 of the Constitution.

²³⁴ See *South African Post Office Ltd v Commissioner Nowosenetz* 2013 2 BLLR 216 (LC); *Uasa & Amcu v BHP Billiton Energy Coal SA Ltd* (J354/13) [2013] ZALCJHB 26; [2013] 6 BLLR 602 (LC); (2013) 34 ILJ 2118 (LC); *Police and Prisons Civil Rights Union v Ledwaba NO and Others* (2014) 35 ILJ 1037 (LC).

²³⁵ Theron et al (2015) 36 ILJ 849 at 856.

²³⁶ Category 3-9 bargaining unit was made up low skilled workers.

²³⁷ "The rise and rise of Amcu" 18 August 2012 *City Press*.

Available at: <<https://www.news24.com/Archives/City-Press/The-rise-and-rise-of-Amcu-20150429>>(accessed 23 March 2017)

²³⁸ Van Eck and Esitang "Minority Trade Unions and the Amendments tot eh LRA: Reflections on Thresholds, Democracy and ILO Conventions" (2016) 35 ILJ 769.

²³⁹ Baskin and Satgar *New Labour Relations* 12. See *Fakude v Kwikot (Pty) Ltd* [2013] 6 BLLR 580 (LC).

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.

This view was reiterated in the Constitutional Court at paragraph 46 in *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others* (2017) 38 ILJ 831 (CC) further held:

It is majoritarianism that underlies the statute's countenancing of both agency shop agreements (deductions for majority union fees from all employees, both members and non-members), and closed shop agreements (collective agreement may oblige all employees to be members of the majority trade union). This is not to say that these provisions are invulnerable to constitutional attack. It is only to point to them as piquantly instancing the scheme of the statute as a whole.

However, majoritarianism principle, in the strictest sense, is fairly new in our labour law jurisprudence as from the formation of the Union of South Africa in 1910 to the passing of the 1979 Labour Relations Act, trade unions comprising mainly of Whites, and to a lesser extent Coloureds and Indians dominated the labour relations spectrum. This despite the fact that African workers formed the bulk of the working population. Africans, Indians, Chinese and Coloureds workers, were through discriminatory labour laws, systematically excluded from meaningful participation in labour relations as registered trade unions.

The majoritarianism principle began to gather momentum shortly after amendments to the Labour Relations Act in 1979 to a point that the Industrial Court began to pronounce on cases where the wishes of the majority held sway. In *Ramolesane & Another v Andres Mentis & Another* (1991) 12 ILJ 329 (LAC), at 336A, Van Schalkwyk J said the following:

"By definition, a majority is, albeit in a benevolent sense, oppressive of a minority. In those circumstances, therefore, there will inevitably be groups of people, perhaps even fairly large groups of people, who will contend, with justification, that a settlement was against their interests. None the less, because of the principle of majoritarianism, such decision must be enforceable against them also."

In light of the pervasive nature of majoritarianism principle in our labour relations, one of the legal questions underlying debates around freedom of association and trade unions, involves circumstances, if any, when individuals or minorities' freedom

of choice should be subordinated to that of a group in pursuit of dominant groups' interests. The argument being that freedom of association cases bring into conflict two competing views of the world: rights-oriented liberalism which hold freedom of the individual, including freedom of choice, to be central in politics and that it is necessary to protect individuals from being harmed by others, and communitarianism, which places the interest of communities and societies above those of the individual and that these groups act as a buffer between the government and the individual.²⁴⁰ In *Sørensen & Rasmussen v. Denmark*,²⁴¹ the European Court of Human Rights Court handing down judgment in a case dealing with the so-called "negative freedom of association" succinctly said that:

*although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.*²⁴²

The whole dichotomy revives the argument on whether freedom of association is an individual right or collective right. La Forest J²⁴³ considers freedom of association as fundamentally an individual right whereby an individual's interests to improve his terms and conditions of employment can only be realised though in association with others.²⁴⁴ However, he argues that freedom of association does not "constitutionalize the objectives and activities of an association or organization, nor does the fact of association in itself confer additional rights on individuals".²⁴⁵ Trade unions as a collective arguably play a crucial role in the workplace, however, a problem arises when their influence adversely affect individual freedom to a point that individual autonomy suffers at the behest of the majority of the collective.

²⁴⁰ "The Freedom (Not) to Associate, The issue: When does the First Amendment protect an organization's right to exclude certain persons as members?" Available at: <<http://law2.umkc.edu/faculty/projects/ftrials/conlaw/association.htm>> (accessed 19 September 2017)

²⁴¹ (App nos 52562/99 and 52620/99) Judgment of 11 January 2006.

²⁴² See also para 58 of *Sørensen v. Denmark*.

²⁴³ Former Justice of the Supreme Court of Canada who together with Sopinka and Gonthier held that there was a violation of freedom of association although justified in terms of limitation clause in *Lavigne v Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, a leading Supreme Court of Canada decision on freedom of association under section 2(d) of the Canadian Charter of Rights and Freedoms.

²⁴⁴ La Forest, G.V., "Labour Law and the Charter in the Supreme Court of Canada". Available at: <https://ciaj-icaj.ca/wp-content/uploads/documents/import/1991/LAFORE-E.ED.pdf?id=1552&1509613448>. (accessed 23 October 2017)

²⁴⁵ *Ibid.*

Therefore, in an attempt to mitigate against the abuse of section 18 of the LRA by employers and majority trade unions, amendments to section 21 of the LRA were effected. Prior to the amendments, a majority union was entitled to all five statutory organisational rights while a sufficiently representative union could attain rights envisaged in sections 12, 13 and 15 of the LRA. However, the amendments, inter alia, broaden the discretion of Commissioners in respect of conditions under which organisational rights may be granted. A Commissioner can grant organisational rights envisaged in sections 12, 13 and 15 to a union which represents a significant interest or a substantial number of employees, despite a threshold agreement in certain circumstances.²⁴⁶ This can only be done if all the parties to the collective agreement are given an opportunity to participate in the arbitration proceedings. Furthermore, amendments grant rights, available to a majority union, also to the “most representative union” in a workplace²⁴⁷ as long as this union has rights envisaged in sections 12, 13 and 15. However, the jury is still out on whether these amendments will achieve the desired results. This in light of the power some unions wield in the workplace and a tendency, at times, for unions not to honour existing agreements.²⁴⁸

3. Extension of collective agreements non-agent/bargaining parties

Section 23 (2) of the LRA provides that every worker to form and join a trade union, to participate in its activities and programmes and to strike. The Constitution further gives the right for every trade union, employers’ organisation and employer to engage in collective bargaining²⁴⁹ and of importance s 23 (6) stipulates that National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1). Provisions regarding security arrangement

²⁴⁶ S 21(8C) of the LRA.

²⁴⁷ S 21(8A) of the LRA.

²⁴⁸ See *Uasa & Amcu v BHP Billiton Energy Coal SA Ltd* (J354/13) [2013] ZALCJHB 26.

²⁴⁹ These rights although analogous with political rights, one cannot imagine a situation whereby a citizen would be compelled to join a political party by virtue of that political party being in the majority.

According s 19 of the Constitution (1) Every citizen is free to make political choices, which includes the right—

(a) to form a political party;
(b) to participate in the activities of, or recruit members for, a political party; and
(c) to campaign for a political party or cause.

constitute a departure from the Interim Constitution which expressly excluded such arrangements

Therefore in order to give effect to s 23 (6) of the Constitution, LRA makes provision for two controversial security agreements, namely agency shop and closed shop agreements. In a situation where employees who are not members of a representative trade union are benefiting from the activities of that union, the representative trade union(s) may conclude an agency shop agreement with the employer or employers' organisation.²⁵⁰ This means that the employer agrees to deduct an agency fee from the wages of such employees, with or without employee's authorisation, to help pay the costs the union incurs when bargaining on behalf of non-members. Employees who for political, religious and other reason (conscientious objectors) do not want their dues paid into a fund administered by the Department of Labour and not the union.²⁵¹

Furthermore, representative trade union and an employer or an employers' organisation may conclude a collective agreement providing for a 'closed shop' which requires all employees covered by the agreement to be members of the union.²⁵² No union which is party to a closed-shop agreement may refuse membership to an employee or expel an employee unless this is done in accordance with the union's constitution and the reason for the refusal or expulsion is fair.²⁵³ It is not unfair to dismiss an employee for refusing to join a union which is party to a closed-shop agreement,²⁵⁴ or who is refused membership by the union on fair grounds,²⁵⁵ or who is expelled from the union on fair grounds.

The two union security arrangements are derivatives of majoritarianism principle. The Constitutional Court at paragraph 46 in *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others*²⁵⁶ further held:

²⁵⁰ S 25(1)

²⁵¹ S 25(4)(b)

²⁵² S 26(1)

²⁵³ Ss 26(5)(a) and (b)

²⁵⁴ S 26 (6)(a)

²⁵⁵ S 26 (6)(b)

²⁵⁶ (2017) 38 ILJ 831

It is majoritarianism that underlies the statute's countenancing of both agency shop agreements (deductions for majority union fees from all employees, both members and non-members), and closed shop agreements (collective agreement may oblige all employees to be members of the majority trade union). This is not to say that these provisions are invulnerable to constitutional attack. It is only to point to them as piquantly instancing the scheme of the statute as a whole.

A closer look of the labour legislation from 1910 to 1994 indicates that although the concept of closed shop and agency shop²⁵⁷ was in common use in industry neither of them appeared in labour legislation.²⁵⁸ Prior to the substitution of para (x) in section 24(1) of the Act by section 6 of Act 51 of 1982, there was no reference in any South African statute to closed shop agreements. The effect of the substitution was to make provision for forms of closed shop in industrial council agreements.²⁵⁹

However, the closed shop principle and to a lesser extent its derivative, agency shop,²⁶⁰ are not new practices but are as old as the advent of trade unions in the 1880s.²⁶¹ In 1911, the South African Typographical Union (SATU) embarked on a series of strikes in response to attempts by employers to circumvent closed shop agreement by importing overseas printers.²⁶² Two of the union leadership, H.W. Sampson and T.G. Strachan,²⁶³ represented the Labour Party in Parliament and together robustly lobbied to have closed shop incorporated into Industrial Conciliation Act (ICA) of 1924.²⁶⁴ Despite the fact that closed shop provisions were not incorporated into the ICA, they were, however, given credence when closed shop was "institutionalised within the industrial apparatus",²⁶⁵ in the form industrial council agreements and also through common law.²⁶⁶

²⁵⁷ In *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd* (97/92) [1993] ZASCA 158; 1994 (1) SA 162 (AD); [1994] 1 All SA 453 (A) (30 September 1993) at page 17 citing Report of the National Manpower Commission on the Closed Shop in the Republic of South Africa states that the object of this type of arrangement is usually to meet objections (conscientious, religious or other) to compulsory trade union membership

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.*

²⁶⁰ *Idem* 15.

²⁶¹ See *Amalgamated Clothing & Textile Workers Union of SA v Veldpun (Pty) Ltd* (1993) 14 ILJ 1431 (A) paragraph A-B

²⁶² Hadland "The South African Newspaper and Printing Industry and its Impact on the Industrial Conciliation Act of 1924" (2005) 50 *Historia* 155.

²⁶³ *Idem* 159.

²⁶⁴ *Idem* 150.

²⁶⁵ *Idem* 154

²⁶⁶ See *Mathews & Others v Young* 1922 AD 492; *R v Daleski* 1933 TPD 47.

Yet, in the same vein as Colour Bar Acts, closed shops were used by trade unions for nefarious purposes, inter alia, to ward off competition from rival population groups and other unions. In 1937, South African Typographical Union (SATU) claiming to be the sole representative of workers in printing industry, used the closed shop provision against its rival, the African Printing Workers' Union.²⁶⁷ Still in 1937, the South African Mine Workers' Union or MWU in an effort to ward off competition from the *Afrikanerbond van Mynwerkers*, or ABM, concluded a closed shop agreement with the Chamber of Mines.²⁶⁸ ABM was established in 1937 by Afrikaner workers who were fuelled by rise in Afrikaner nationalism and disillusioned by lack of transformation in the executive of the African Mine Workers' Union or MWU. Despite the fact that by 1936 Afrikaners made up 90% of the MWU membership they did not have any representation in the union's executive. ABM was eventually disbanded as white miners were forced to join MWU.

Closed shop security arrangement was one of the issues addressed by the Wiehahn Commission in 1979. The Wiehahn Commission despite being divided on the issue, recommended for the retention of the closed shop agreement.²⁶⁹ The majority of the commissioners feared that the abolition thereof would cause widespread opposition and mistrust as the closed shop was a common practice in South African labour relations.²⁷⁰ To support this argument, the Commission cited 49 industrial agreement which included closed shop clauses covering about 346,000 white workers.²⁷¹ Nevertheless, the commission was opposed to the conclusion of private closed-shop agreement outside the parameters of the Act. Commissioners²⁷² opposed to the continuation of closed shop argued that it will further promote job reservation,

²⁶⁷ *Ibid.*

²⁶⁸ Visser (2016) 44 *Scientia Militaria* 211-212.

²⁶⁹ "The Wiehahn Report and the Industrial Conciliation Amendment Act: A New Attack on the Trade Union Movement in South Africa",

Available at:

http://www.aluka.org/action/showMetadata?doi=10.5555/AL.SFF.DOCUMENT.nuun1979_27

(accessed 9 July 2017)

²⁷⁰ Para. 3.101 of the Wiehahn Commission Report

²⁷¹ *Ibid.*

²⁷² Minority view: Commissioners Botes, du Toit, Mokoatle, Steenkamp and Sutton:

powerful trade union bureaucracy at the expense of both the employer and of the other employees and deter trade union plurality.²⁷³

As a result of the Wiehahn Commission report, section 24(1)(x) of the Labour Relations Act 1982 amendments permitted agreements that could be termed closed shop to be completed at the industrial council. In essence, section 24(1)(x) of the Act, made provision for a post-entry closed-shop agreements. Parties to the industrial council which wished to include a close shop provision in its agreement had to show a higher level of representativeness. Section 48(8) of the Act authorised the Minister not to publish the agreement unless on the day agreement was signed, trade union had to show that more than half of the employees who would be affected by the closed shop clause were already paid up members. Failure to abide by the terms of such an agreement was a criminal offence. Furthermore, in terms of section 78 of the Labour Relations Act, no employer was permitted to demand an employee not to become or remain a member of a trade union as a condition of employment. Such agreements were automatically void. Consequently a dismissal in compliance with the provisions of a closed-shop contained in an industrial council agreement would therefore not be an unfair labour practice.

Shortly after the promulgation of the Labour Relations Act 1982, the newly established Industrial Court began to decide on cases where the closed shop provision was an issue. In one of the first cases on closed shops the Industrial Court, in *Mynwerkers Unie v O 'Okiep Copper Co Ltd & another*,²⁷⁴ held that closed shops are an accepted practice in South African industrial relations and are not, in principle, an unfair labour practice.²⁷⁵

In *Mazibuko & others v Mooi River Textiles Ltd (1989) 10 ILJ 875 (IC) 1989 ILJ* court had to determine whether or not a non-statutory closed-shop agreement²⁷⁶ constitutes an unfair labour practice in terms of terms of s 46(9) of the Labour Relations Act. This after Mooi River Textiles Ltd, at the insistence of Amalgamated

²⁷³ Para.3.103 of the Wiehahn Commission report.

²⁷⁴ (1983) 4 ILJ 140 (IC).

²⁷⁵ See also *Black Allied Workers Union & others v Initial Laundries (Pty) Ltd (1988) 9 ILJ 272 (IC)*.

²⁷⁶ A non-statutory closed-shop agreement is a private agreement between an employer and a trade union not concluded in terms of s 24(1)(x) and 48 of the Labour Relations Act 1982 amendments.

Clothing & Textile Workers Union of SA (ACTWUSA) which made up 90% of employees in the bargaining unit, dismissed 13 members of Textile & Allied Workers Union (TAWU). The 13 dismissed employees were, in fact, the only TAWU members in respondent's employ. During the mediation process it became apparent that ACTWUSA was not prepared to consent to the applicants' returning to work unless respondent agreed to institute a closed shop in favour of ACTWUSA which would have required the applicants to become members of ACTWUSA or be dismissed.

Paragraph (j) of the definition of an unfair labour practice in section 1 of the Act reads as follows:

Subject to the provisions of this Act the direct or indirect interference with the right of employees to associate or not to associate, by any other employee, any trade union, employer, employers' organization, federation or members, office-bearers or officials of that trade union, employer, employers' organization or federation, including, but not limited to, the prevention of an employer by a trade union, a trade union federation, office-bearers or members of those bodies to liaise or negotiate with J employees employed by that employer who are not represented by such trade union or federation.

The Industrial Court in *Mazibuko* case found private closed shop agreements contravened section 66(1)(c) in two ways, firstly where an employee was victimized by reason of the fact that he was a union member and secondly where an employee was victimized by reason of the fact that the employee was a member of a particular union. The court further held that any agreement or practice which obliged an employee to be a member of a particular union or which provided that an employee would be dismissed if he belonged to a particular union interfered with the guaranteed right to associate or not to associate. Any such agreement was irreconcilable with the freedom to associate or not to associate therefore it is unfair and illegitimate.²⁷⁷ In *Mazibuko & others v Mooi River Textiles Ltd* (1989) 10 ILJ 875 (IC), at paragraph 885E-F court held that:²⁷⁸

Any non-statutory agreement (whether it was entered into prior to 1 September 1988 when para (j) was introduced or thereafter) which interferes directly or indirectly with an employee's right to associate or not to associate, would constitute to an unfair labour practice. Even those who willingly entered

²⁷⁷ The Industrial Court reached the same conclusion in *Radio Television Electronic & Allied Workers Union v Tedalex (Pty) Ltd* (1990) 11 ILJ 1272 (IC) and *Cape Town Municipal Professional Staff Association v Municipality of the City of Cape Town* (1994) 15 ILJ 348 (IC), even though these cases were based on the repealed para (j) of the definition of an unfair labour practice.

²⁷⁸ See *FAWU v Sam's Foods (Grabouw)* (1991) 12 ILJ 1324 (IC) at 1326D.

into such an agreement and not only those who were not parties to it would be entitled to seek relief.

It is worth noting that the repealed Paragraph (j) of the definition of an unfair labour practice in section 1 of the Act explicitly made provision for a “negative” freedom of association. What is of significance is that post the repeal, Courts continued to recognise negative freedom of association and recognised freedom of association as a basic fundamental human right. In *Cape Town Municipal Professional Staff Association v Municipality of the City of Cape Town*,²⁷⁹ the Industrial Court at 353 I held:²⁸⁰

In our view what is popularly known as the 'freedom of association' is one of the very basic of civil liberties. It includes amongst others the freedom to associate for instance in the political sphere, the religious sphere and also the labour sphere. In all cases, we say, the 'freedom of association' is manifested inter alia in two forms namely the 'right to associate' and the 'right not to associate'. We say that these two concepts in fact are but one and the same thing - any differences perceived are those of form and not of substance.

The Industrial Court even concluded that ILO, through Conventions 87 and 98, recognises both the positive and negative right of association, “the existence of the principle of 'freedom of non-association' is expressly admitted, but for very obvious reasons (that have nothing to do with principle) not protected.”²⁸¹

It is worth noting that the judgment confirming negative freedom of association where handed down before the 1996 constitutional era. There is a strong argument among legal scholars that sections 25 and 26 of the LRA may be in conflict with the constitutional right to freedom of association as they limit a worker's freedom to belong to a union of his choice. Therefore an aspect that requires consideration is whether or not section 18 of the 1996 Constitution, as read with section 23, should be understood to imply the negative right to association. This in light of the fact that the language used in the two sections does not expressly guarantee the freedom to refrain from associating. The inquiry becomes relevant if one looks into the notion of

²⁷⁹ (1994) 15 ILJ 348 (IC).

²⁸⁰ See also *Radio Television Electronic & Allied Workers Union v Tedelx (Pty) Ltd* (1990) 11 ILJ 1272 (IC) at 1281C.

²⁸¹ 1994) 15 ILJ 348 (IC) at 354BC.

freedom and the argument that the “notion of a freedom implies some measure of freedom of choice²⁸² as to its exercise”.²⁸³

However, a close scrutiny of Chapter 2 of our Constitution, leaves one with a sense that freedom of choice is accorded more to political associations²⁸⁴ than to trade unions. The significance of this statement becomes more pronounced when one looks into a country like South Africa where trade unions are highly politicised and at times are affiliated to political parties.²⁸⁵ Therefore a distinction between political associations and trade unions becomes murky and cosmetic. In theory, labour organisations are independent bodies reporting only to their members but, in practice, they are highly influenced by political parties leading to the argument that post-1994 COSATU subordinated itself to ANC political whims, rather than pursuing shopfloor advances.²⁸⁶

In *Mzoku and Others v Volkswagen SA (Pty) Ltd and Others*, (2001) 22 ILJ 1575 (LAC) at para 55. with specific reference to Section 23 the Court held as follows:

... where the union is a representative union that enjoys majority status in a workplace or in a sector such union may conclude a collective agreement with the employer, or, employers, in the case of a sector, which binds even those employees who are not its members and those who may have been its members but have since resigned as well as those employees who will be employed by the employer or employers during the currency of such collective agreement.

²⁸² Black’s law Dictionary defines freedom of choice as an unfettered right to do what one wants when one wants as one wants, except where it infringes or prevents another from doing what that one wants, and do so on. Also excluded is doing something that would harm one’s self or another.

²⁸³ See also paragraph 54 of *Sorensen v Denmark*.

²⁸⁴ S 19 of the Constitution deals with political rights. It states that:

19. (1) Every citizen is free to make political choices, which includes the right—
- (a) to form a political party;
 - (b) to participate in the activities of, or recruit members for, a political party; and
 - (c) to campaign for a political party or cause.

²⁸⁵ COSATU is a member of a tripartite alliance with ANC and SACP, The National Party maintained a close relationship with Mynwerkers unie from 1948 when it assumed power to 1994.

²⁸⁶ On 08 November 2014, the National Union of Metalworkers of South Africa (NUMSA) was expelled from COSATU. Numsa was expelled, inter alia, for its stance against the government National Development Plan which it views as a neoliberal programme which entrenches existing property relations and attacks the working class and the poor in the interests of mining and finance capital. In response Numsa called for withdrawal of its electoral and political support for the ANC during the 2014 general elections.

See <http://www.numsa.org.za/article/numsa-press-statement-expulsion-cosatu/>

In *Workers Union of SA v Crouse NO and Another*, (2005) 26 ILJ 1723 (LC) at para 28, it was held that:

.... Our law is currently more in line with the prescriptions of the International Labour Organization which permit freer competition among unions by making registration a mere ministerial process, but providing additional benefits and inducements to majority unions in the form of organizational rights, the power to bind minorities through collective agreements, the right to closed shops and so on.

Union security arrangements such as closed and agency shop have been part of our labour relations since the turn of the 19th century. Normally agreements of this nature are entered into by a majority union in the workplace. However, in the early part of our history they were used by craft unions whom were in the minority to exclude semi-skilled and unskilled from joining craft unions and also to ward off competition from rival unions. They were used as an extension to Colour Bar legislation which reserved certain jobs for skilled, mainly white workers.²⁸⁷ Closed and agency remain the only limitation to freedom of association justifiable in terms of section 23 of the Constitution.

4. The notion of negative freedom of association in international law

The concept of freedom of association is widely acknowledged as a fundamental right in international law and has been given effect through legislation, court decisions, or international agreements. The evidence from around the world suggests that closed shop provisions may be in conflict with the right to freedom of association. According to Bedard, approximately 101 countries around the world have wholly outlawed closed-shop provisions through legislation, court decisions, or international agreements with Canada and Australia being the only exceptions.²⁸⁸

However, in Australia the situation has since changed as Labour relations reforms championed by both Conservative (or Coalition) and Labour governments alike in the

²⁸⁷ Suchard "Labour relations in South Africa:retrospect and prospect" (1982) 12 *Africa Insight* 92.

²⁸⁸ Bedard RJ (1997) "Foreword: Closed-Shop Provisions Violate the Charters of Rights and Freedoms" In Mihlar F (ed) (1997) *Unions and Right-to-work Laws: The Global Evidence of Their Impact on Employment* Vancouver: Fraser Institute at xv-xvi.

Available at:
< <https://www.fraserinstitute.org/sites/default/files/UnionsandRightToWorkLaws.pdf>>
(accessed 03 September 2017)

last fifteen years have culminated in a shift from enterprise bargaining which was overwhelmingly collective in nature to one which favour an individualist orientation.²⁸⁹ These changes began with the *Workplace Relations Act 1996*,²⁹⁰ which effectively established a freedom of association regime. One of the objects of Part XA of the *Workplace Relations Act 1996*, entitled, Freedom of Association, is according to section 298A(a) “to ensure that employers, employees and independent contractors are free to join industrial associations of their choice or not to join industrial associations”.

Nevertheless, legislative provisions explicitly dealing with the freedom to join and not to join the union have been existence since the early part of the twentieth century. In Switzerland, the employment contract is governed by Arts. 319-362 of the Code of Obligations (CO), which became effective as early as in 1911.²⁹¹ Article 356a(1) of the Code of Obligations and still in force reads:²⁹²

Any clause in a collective employment contract or individual agreement between the contracting parties intended to compel an employer or employee to join a contracting association is void.

As early as 1921, the closed-shop was outlawed in Belgium. According to Article 1 of the *Law of May 1921* concerning the right to associate and still in force, reads:²⁹³

Freedom of association in all areas is guaranteed. No person shall compel or impede another from joining any association.

²⁸⁹ Forsyth (2007) 99.

²⁹⁰ The Workplace Relations Act 1996, replaced the previous Labour Government's Industrial Relations Act 1988. In 2005, the Workplace Relations Amendment Act 2005 introduced the Work Choices changes to Australian labour law. The Act was repealed on 1 July 2009 by the Fair Work Act 2009 passed by the Rudd Labour Government.

²⁹¹ “National labour law profile: The Swiss Confederation”

Available at:

<http://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158921/lang-en/index.htm> (accessed on 04 September 2017)

²⁹² “Federal Act on the Amendment of the Swiss Civil Code of 30 March 1911 (Status as of 1 January 2017)”

Available at:

<<https://www.admin.ch/opc/en/classified-compilation/19110009/201704010000/220.pdf>> (accessed 04 September 2017)

²⁹³ “Belgium: Freedom of association, collective bargaining and industrial relations”

Available

<http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=63899&p_classification=02> (accessed 04 September 2017)

at:

In 1947, the Congress of the United States adopted the Taft-Hartley Act (61 Stat. 136), also known as the Labor Management Relations Act of 1947. Section 14(b) of this Act reads:

Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by state or territorial Law.

The Italian Constitution adopted in 1947, makes provision for freedom of association. Article 18 declares that “citizens have the right to form associations freely” and this principle is confirmed by Article 39 declaring that “labour union organisation is free”²⁹⁴ The right concerning the right not to join any union as well as the illegality of union security arrangement is said to be drawn from Article 15 of the so-called Statute of Workers’ Rights (Act N. 300 of 30 May 1970).²⁹⁵

There is also evidence from around the world that suggests that freedom of association should be construed to include the freedom not to join a union; courts of law from many countries have issued decisions to this effect. In the United States of America (USA) closed shops, union shops and agency shops²⁹⁶ were all permitted under Section 8a(3) of the National Labor Relations Act of 1935 (NLRA), also known as the Wagner Act. However, in 1947, the Congress of the United States adopted the Taft-Hartley Act (61 Stat. 136), also known as the Labor Management Relations Act of 1947.

²⁹⁴ “Marco Biagi, Report on six national case studies in the field of freedom of association” Available at: http://training.itcilo.it/actrav_cdrom1/english/global/LISTS/MARCO.HTM (accessed 04 September 2017)

²⁹⁵ “National Labour Law Profile: Italy” Available at http://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158903/lang--en/index.htm (accessed 04 September 2017)

²⁹⁶ Nowak mentions five different types of union security arrangements (a) closed shop agreement whereby the employer agrees to hire only union members; (b) Union shop agreement where the employer does not require employees pre-employment to be union members but the employee must join the union within a set time period (such as 30 days) and must remain union member during the term of the agreement or face dismissal; (c) Agency shop agreement - The employer does not require an employee to be union at any point in time, however, all non-union employees must pay union dues equivalent to union members;(d) Maintenance of membership agreement does not require an employee to join a trade union, however, it requires an employee to remain a member once having voluntarily joined a trade union;(e) Dues checkoff agreement does not require an employee to join a trade union but requires an employer to deduct dues directly from the employees’ salaries and remit them directly to the unions. Nowak C (2001) “Labor Unions: Union Security Agreements” at 2-4 Available at: <http://digitalcommons.law.msu.edu/king/10> (accessed 07 September 2017)

In *Lincoln Federated Union v. Northwestern I and M.*,²⁹⁷ 335 U.S. 525 (1949) and in *American Federation of Labor AFL v. American Sash Door Company.*, 335 U.S. 525 (1949), the Supreme Court of the United States the Supreme Court of the United States declared the Taft-Hartley Act constitutional. In both cases the labour unions challenged the constitutionality of Nebraska and North Carolina "Right to Work" statutes. They argued that these statutes abridged freedom of speech and the right of unions and their members "peaceably to assemble", illegally impair obligations of contracts, deny unions and their members equal protection of the laws, they deprive employers, unions or members of unions of their liberty without due process of law.

Union shops and agency shops are still permitted under Section 8(a)(3) of the NLRA as amended; however, Section 14(b) authorizes States to exempt themselves from Section 8(a)(3) and to enact right-to-work laws prohibiting union or agency shops²⁹⁸ and in those states, union membership for covered employees is purely voluntary.²⁹⁹ According to Borron Jnr, the Taft-Hartley Act does not ban the union shop,³⁰⁰ but by Section 14 (b) it expressly sanctions state "Right to Work" laws which prohibit the union shop as well as other forms of "compulsory unionism and union monopoly".³⁰¹ These sentiments were expressed In *National Labor Relations Board v. General Motors Corporation*,³⁰² where the US Supreme Court explained that the Taft-Hartley Act amendments were intended to accomplish twin purposes, one of which is to abolish closed shop to eliminate serious abuses of compulsory unionism and the other being the recognition by Congress that in the absence of a union-security provision many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost.

²⁹⁷ *Lincoln Union v. Northwestern Co.*, 335 U.S. 525 (1949)

²⁹⁸ As of 2017, 28 states have passed the right-to-work law, giving employees the choice to associate with union parties.

²⁹⁹ Williams MS & Halcoussis DA "Unions and Democracy: When Do Nonmembers Have Voting Rights?" (2014) *9 J. Bus. & Tech. L.* 214.

³⁰⁰ This refers to the fact that the company can hire anyone it wishes to, but upon hiring, or after a short probationary period, the employee joins the union and must pay dues through payroll deductions. This deduction is called a mandatory check-off.

³⁰¹ Borron Jr.PG "The Case for the Right to Work Act" (1954) *15 La. L. Rev* 71.
Available at: <<http://digitalcommons.law.lsu.edu/lalrev/vol15/iss1/17> (accessed 08 September 2017)

³⁰² 373 U.S. 734 (1963)

The issue of whether freedom of association include a negative freedom not to associate was decided in two of the leading cases in Canada about the subject. In *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, the Supreme Court of Canada had to address, among others, whether the right to freedom of association provided for the Charter³⁰³ include the right not to associate. The appellant was protesting against the obligation to pay union dues and the use of those dues for political purposes by unions, arguing that this practice had the effect of associating him with causes he did not support.³⁰⁴

In *Lavigne* case the judges were split on whether the freedom of association included the freedom not to associate. Justices La Forest, Sopinka and Gonthier³⁰⁵ found that the right did include the freedom not be forced to associate. They at page 318 held that:

Forced association will stifle the individual's potential for self-fulfillment and realization as surely as voluntary association will develop it. Moreover, society cannot expect meaningful contribution from groups or organizations that are not truly representative of their memberships' convictions and free choice. Instead, I can expect that such groups and organizations will, overall, have a negative effect on the development of the larger community. One need only think of the history of social stagnation in Eastern Europe and of the role played in its development and preservation by officially established "free" trade unions, peace movements and cultural organizations to appreciate the destructive effect forced association can have upon the body politic. Recognition of the freedom of the individual to refrain from association is a necessary counterpart of meaningful association in keeping with democratic ideals.

Justice MacLachlin at page 217 despite finding that payments did not violate section 2 she, however, indicated that she was inclined to think that freedom of association included the right not to be compelled to associate:

³⁰³ S 2(d) of the Canadian Charter of Rights and Freedoms guarantees freedom of association as a "Fundamental Freedom."

³⁰⁴ To support his case, the applicant relied, among others, on the US case of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) where the U.S. Supreme Court held that while the public sector employers had a legitimate interest in requiring employees to be represented by a union, but held that agency fee payers could not be compelled to contribute to any union activities not related to employment representation. The court noted that "contributing to an organization for the purpose of spreading a political message is protected by the First Amendment" and that "a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment".

³⁰⁵ Fn 244 above.

I am inclined to the view that the interests protected by s 2(d) [the right to freedom of association] goes beyond being free from state-enforced isolation In some circumstances, forced association is arguably as dissonant with self-actualization through associational activity as is forced expression. For example, the compulsion to join the ruling party in order to have any real opportunity of advancement is a hallmark of a totalitarian state. Such compulsion might well amount to enforced ideological conformity, effectively depriving the individual of the freedom to associate with other groups whose values he or she might prefer.

Justices Wilson and L'Heureux-Dubé at page 215 and Cory JJ at page 252, disagreed. They thought that the purpose of freedom of association was simply to “protect the collective pursuit of common goals”

That minority view was firmly rejected in a subsequent Supreme Court decision called *R v Advanced Cutting & Coring Ltd.* [2001] 3 S.C.R. 209. In the *Advance Cutting* case eight of the nine judges agreed that freedom of association included the right not be forced to associate but the right is not absolute as its limitation could be justified in terms of section 1 of the Canadian Charter of Rights and Freedoms.³⁰⁶

The situation in Europe regarding the negative freedom of association has become more pronounced, thanks largely to the European Court of Human Rights. Established on 21 January 1959, the European Court of Human Rights (ECtHR) is a regional human rights judicial body³⁰⁷ with jurisdiction to decide complaints submitted by individuals and States concerning violations of the European Convention on Human Rights,³⁰⁸ which principally concerns civil and political rights.³⁰⁹ The European Court of Human Rights (ECtHR), beginning with *Le Compte v. Belgium*, 43 Eur. Ct. H.R. (ser. A) (1981) and *Young v. United Kingdom*, 44 Eur. Ct. H.R. (ser. A)

³⁰⁶ Section 1 of the Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

³⁰⁷ ECtHR has jurisdiction to hear cases involving 47 member states of the Council of Europe, an international organisation whose stated aim is to uphold human rights, democracy, rule of law in Europe and have ratified the European Convention on Human Rights.

³⁰⁸ The European Convention on Human Rights is an international treaty under which the member States of the Council of Europe promise to secure fundamental civil and political rights, not only to their own citizens but also to everyone within their jurisdiction. The Convention, which was signed on 4 November 1950 in Rome and came into operation in 1953.

³⁰⁹ “European Court of Human Rights”
Available at: <<http://www.ijrcenter.org/european-court-of-human-rights/>>(accessed 10 September 2017)

(1981) in the 1980s to *Sibson v. United Kingdom*, 258 Eur. Ct. H.R. (ser. A)(1993) and *Sigurjonsson v. Iceland*, 264 Eur. Ct. H.R. (ser. A) (1993) in the 1990s, decided on whether or not article 11 of European Convention for the Protection of Human Rights and Fundamental Freedoms³¹⁰ infer negative freedom of association. This despite the fact that the language used in article 11 of does not expressly guarantee the freedom to refrain from associating nor does the Convention directly address the closed shop question.³¹¹

Article 11 provides in full:

- 1) *Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*
- 2) *No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state.*

In *Le Compte v. Belgium*,³¹² one of the applicants, Dr Le Compte was suspended from practising medicine for two years for an offence against professional discipline.³¹³ He claimed that his suspension violated Article 11, "inhibited freedom of association which implied freedom not to associate and went beyond the limits of the restrictions permitted under paragraph 2 of Article 11 (art. 11-2). He also claimed that the very existence of the Ordre had the effect of eliminating freedom of association".³¹⁴

The Court disagreed. It held that a public-law association that a state creates to regulate a profession for the protection of the general interest is not governed by

³¹⁰ Nov. 4, 1950, art. 11, 213 U.N.T.S. 221 [hereinafter Convention for the Protection of Human Rights].

³¹¹ Shea C M. "The Case of Young, James, and Webster: British Labor Law and the European Convention on Human Rights," (1982) 15 *Cornell International Law Journal* 506.
Available at: <http://scholarship.law.cornell.edu/cilj/vol15/iss2/7> (accessed 17 September 2017)

³¹² 43 Eur. Ct. H.R. (ser. A) (1981).

³¹³ *Idem* para 13 involve "improper publicity" (ongoorloofde publiciteit) and "contempt (beledigingen) of the Ordre": as a result of three interviews to magazines and sent a letter to the President of the Provincial Council.

³¹⁴ *Idem* para 43.

Article II. Having rejected the application of Article 11 to the association in question, the Court at paragraph 44 stated:

...the existence of the Ordre and the resultant obligation on practitioners to be entered on its register and to be subject to the authority of its organs clearly have neither the object nor the effect of limiting, even less suppressing, the right safeguarded by Article 11 para.1 (art. 11-1); and that there is thus no reason to examine the case under paragraph 2 of Article 11 (art. 11-2) or to determine whether the Convention recognises the freedom not to associate.

In *Young v. United Kingdom*, 44 Eur. Ct. H.R.(ser. A) (1981), the applicant employees Young, James and Webster whom were employed by British Rail asked the European Court of Human Rights to consider the issues of freedom of association and the right to an effective remedy. This followed their termination from employment after declaring that they did not wish to become Members of either, National Union of Railwaymen ("NUR"), the Transport Salaried Staffs' Association ("TSSA") or the Associated Society of Locomotive Engineers and Firemen ("ASLEF"). During the time of their employment British legislation changed to allow for the termination of unionized employees who were not Members of the union in any British workplace where the union and employer negotiated a "Closed Shop" collective agreement. Employment with British Rail required that employees belong to one of the unions.

The Court held that the United Kingdom had violated Article 11 by compelling Young, James, and Webster either to join a union, or to risk dismissal and the concomitant loss of livelihood. In this decision the Court addresses but does not reach a firm conclusion regarding the issue raised by the Applicants that Article 11 - Freedom of Association implies a "negative right" to not associate. However in dictum that would lay the base for subsequent cases covering the matter, the Court held that even if it is assumed that Article 11 does not directly protect the negative right of association, by omission of Article 20 paragraph 2 of Universal Declaration of Human Rights, Court at paragraph 52 stated:

... it does not follow that the negative aspect of a person's freedom of association falls completely outside the ambit of Article 11 To construe Article 11 as permitting every kind of compulsion in the field of trade union

membership would strike at the very substance of the freedom it is designed to guarantee.

The Court further strayed away from discussing the relevance of closed shop system in relation to the Convention, however, it limited its examination to the effects of that system on the applicants.³¹⁵ The Court at paragraph 55 stated:

Assuming that Article 11 (art. 11) does not guarantee the negative aspect of that freedom on the same footing as the positive aspect, compulsion to join a particular trade union may not always be contrary to the Convention.

However, a threat of dismissal involving loss of livelihood is a most serious form of compulsion ...to join a particular trade union.....In the Court's opinion, such a form of compulsion, in the circumstances of the case, strikes at the very substance of the freedom guaranteed by Article 11 (art. 11). For this reason alone, there has been an interference with that freedom as regards each of the three applicants.

The Court held that the “notion of a freedom implies some measure of freedom of choice as to its exercise”. Therefore freedom of action or choice is drastically reduced by compulsion to belong to a particular union.³¹⁶ What is of significance is the courts conclusion on the principle of majoritarianism. The Court noted that “although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position”.³¹⁷

Following the decision in *Young, James, and Webster*, the British Court of Appeal has continued to rely on the Convention when it is not directly in conflict with the domestic law.³¹⁸ According to Bedard the European Court of Human Rights decision on *Young, James, and Webster* played a crucial role towards eliminating closed-shop union provisions in Great Britain.³¹⁹ Employment Acts adopted by the British

³¹⁵ “a threat of dismissal involving loss of livelihood” became the overarching principle adopted by the Court in subsequent cases where the issue of “negative freedom” or compulsion was an issue. This despite the fact that the Court in *Le Compte* case reached a different conclusion although the applicants in this case faced a loss of livelihood.

³¹⁶ See also para 54 of *Sørensen and Rasmussen v Denmark*, App no 52562/99, App No 52620/99, (2008) 46 EHRR 29.

³¹⁷ *Idem* para 58.

³¹⁸ In *Cheall v. Association of Professional Executive Clerical and Computer Staff* 1982 Indus. Cas. R. 543; *Taylor v. Co-operative Retail Services.* 1982 Indus. Cas. R. 600.

³¹⁹ Bedard (n 2 above) xvii.

Parliament in 1982, 1988 and 1990 gradually outlawed the provision of closed-shop and mandatory union dues in Great Britain.³²⁰

In *Sigurjonsson v. Iceland*, 264 Eur. Ct. H.R. (ser. A) at 25 (1993)³²¹ a divided court, majority eight to one, held that Article 11 implicitly guarantees the freedom of an individual not to be compelled to associate with others against his will. The Court declined to decide, however, whether that negative freedom is equal in strength to the expressed positive right.³²² However, the Court relied instead on international "common ground,"³²³ and on its own interpretation of the Convention as a "living instrument which must be interpreted in light of present-day conditions" and in the process read a negative right into Article 11 of the Convention.³²⁴ The court further held that, depending on the circumstance of a case, a negative right of association must be inferred from Article 11 in instances where a form of compulsion leaves the aggrieved with limited options but to join a particular group even though its contrary to his opinions.³²⁵

5. Conclusion

The question is to what extent can majoritarianism principle exist without limiting the rights of minorities to freely associate. Closed and agency shop are essentially nothing but by products of majoritarianism. It looks like of the two security

³²⁰ S 1 (1) of the Employment Act of 1990 states:

It is unlawful to refuse a person employment:
because he is or is not a member of a trade union or
because he is unwilling to accept a requirement

to take steps to become or to remain or not to become a member of a trade union;

(ii) to make payments or suffer deductions in the event of his not being a member of a trade union.

³²¹ Sigurjonsson, a Reykjavic taxi driver, was stripped by the government of his taxi license for failure to pay union dues. Sigurjonsson had obtained a license to operate a taxi on October 24, 1984. The license was issued on the condition that Sigurjonsson join the Frami Automobile Association (Frami) and to pay membership fees which he did until August, 1985. After an unsuccessful constitutional challenge of Iceland's licensing statute, Sigurjonsson filed an application with the European Commission of Human Rights (Commission), later European Court of Human Rights, claiming that the obligation to join Frami violated Article 11 of the Convention.

³²² See parag 6 of dissenting opinion of Judge Sørensen, joined by Judges Thór Vilhjálmsson and Lagergren of *Young, Webster* case; See also para 55 of *Sørensen v. Denmark*.

³²³ A negative right is covered in Article 20 para. 2 of the Universal Declaration; Article 11 para. 2 of the Community Charter of the Fundamental Social Rights of Workers, adopted by the Heads of State or Government of eleven member States of the European Communities on 9 December 1989; A recommendation unanimously adopted by the Parliamentary Assembly of the Council of Europe to insert a sentence to this effect into Article 5 of the 1961 European Social Charter.

³²⁴ See paragraph 35

³²⁵ See paragraph 44

arrangements, there is some level of tolerance to agency shop, perhaps due intolerance to a free rider phenomena, than to closed shop. Closed shop arrangements are on the decline as there seem to be a realisation among countries that champion human rights that closed shop provisions violate workers freedom not to associate. *Young v. United Kingdom* almost 37 years ago appears to herald the beginning of the end of the closed shop in Europe to a point that Nordic countries, known for their democratic socialism are beginning to be caught in the tide wave. *Sigurjonsson* ended closed shop in Iceland so was *Sørensen and Rasmussen* in Denmark. In the same vein in South Africa closed agreements are on decline.

CHAPTER SIX

CONCLUSION AND RECOMMENDATION

"Without freedom of mind and of association a man has no means to self-protection in our social order." ³²⁶

As demonstrated in this study, in South Africa there is a constitutional and statutory recognition of a right to freedom of association. Section 18 of the Constitution gives this forms a skeleton of this concept while section 23 of the Constitution and Chapter 2 of the LRA gives it meat. There seem to be a universal recognition that freedom of association encompasses the right to join, otherwise known as a positive right, and the right not to be compelled to join, otherwise known as a negative right. Despite constitutional and statutory recognition, the greatest restriction to freedom of association is not constitutional nor statutory but behavioural. Violence and intimidation by workers on those workers who hold a contrary view remain the biggest threat to freedom of association.

It is trite that the right to strike is part and parcel of collective bargaining. However, it is incumbent upon those who decide to make use of strike action to convince employers to accede to their demands to exercise maximum restraint and ensure strikes are peaceful because once a strike becomes violent it ceases to be functional to collective bargaining.³²⁷ Therefore there is a need to reconsider our collective bargaining model, as it stands, it is economically unsustainable³²⁸ and is characterised by bad faith bargaining from both spectrums, labour and employer alike. We cannot afford to have a situation whereby the only language the employer understands is strike. In the same vein we cannot afford to have a situation whereby a strike becomes the first and only arsenal labour has at its disposal to effect concessions from an employer. Botha suggests that when it comes to strikes, a "stricter application of the 'ultima ratio' and proportionality principles" is necessary.³²⁹

³²⁶ *Harold Laski Liberty in the Modern State* (London: George Allen & Unwin Ltd, (1948) 195.

³²⁷ Botha and Germishuys (2017) 80 *THRHR* 531-532. See also Manamela & Budeli 2013 *CILSA* 323.

³²⁸ Botha 2015 *De Jure* 328 at 336.

³²⁹ Botha "Can the *ultima ratio* and proportionality principles possibly curb unprotected industrial action in South Africa? (2016) 79 *THRHR* 387-388.

Therefore it is critical that South African authorities provide an enabling environment for freedom of association in which unionised and non-unionised workers flourish. However a scenario whereby unionised and non-unionised workers are subjected to acts of criminality by virtue of their choice to support or not to support a trade union activity, is unacceptable. Violation of rights of workers who chose to exercise their negative freedom of association is contrary to both the Constitution and international standards. The Committee on Freedom of Association (CFA)³³⁰ has, while investigating attacks on trade unionists and trade union premises in the 1980s,³³¹ found that "a genuinely free and independent trade union movement cannot develop in a climate of violence and uncertainty".³³² This principle is applicable now as it was then in the 1980s.

Recommendations

In *South African Post Office Ltd v Tas Appointment and Management Services CC and Others (JÂ 112/12) [2012] ZALCJHB 11*, La Grange, J at paragraph 17, lamenting on the role of the police during strike violence said:

.....it would appear that the police may have adopted an attitude that without an interdict they could not always take action against the strikers. If this is the case, it is completely erroneous. The police do not need a court order to intervene when faced

When it comes to strike action, Botha suggests proportionality test using the following criteria: "(1) the strike action should be suitable to the demands being made (the employer must be able to meet the demands); (2) the strike must be necessary and used as measure of last resort where all other measures have failed; and (3) the strike must be reasonable taking into account the rights and interests directly and indirectly affected by the strike action (*proportionality strictu sensu*)."

³³⁰ Committee on Freedom of Association (CFA) was established by ILO in 1951 for the purpose of examining complaints about violations of freedom of association, whether or not the country concerned had ratified the relevant conventions. CFA was established to ensure compliance with Conventions Nos. 87 and 98 on freedom of association and collective bargaining.

Available at: <<http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/lang--en/index.htm>>

³³¹ See Paragraph 686 of the Report of the Fact-Finding and Conciliation Commission on Freedom of Association concerning the Republic of South Africa, INTERNATIONAL LABOUR OFFICE, GB.253/15/7 253rd Session, *Governing Body, Geneva, May-June 1992 International Labour Office, Geneva, 1992, 9706n/v.4*

CFA on paragraph 686 said:

The ILO's principles on freedom of association make it clear that: A climate of violence such as that surrounding the murder or disappearance of trade union leaders constitutes a serious obstacle to the exercise of trade union rights; such acts require severe measures to be taken by the authorities; and that Situations involving murder and other acts of violence, where trade unionists are involved, are sufficiently serious to warrant severe measures being taken by the authorities to restore a normal situation.

³³² Digest 75.

with conduct which is prima facie criminal in nature, simply because that conduct takes place in the context of industrial action.

The functions of the police are clearly spelled in Section 205 (3) of Constitution of the Republic of South Africa to include: to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law. However, there are serious reservations on the effectiveness of public order policing, especially with regard to its practice and response. This in light of reports of police inaction while acts of assault and intimidation of permanent and replacement workers, members of the public takes place in their presence.³³³ It is not clear whether or not their inaction in the face of chaos is a result of poor training or fear. However, The Farlam Commission found that Public Order Policing in South Africa is inadequately trained and cannot handle armed³³⁴ protestors.³³⁵

According to research conducted by the Social Change Research Unit of the University of Johannesburg, in 1995, there were 42 Public Order Policing units with 11,000 members and in 2013 there were only 23 with 4,642 members.³³⁶ The decision to reduce the number of personnel in these units is attributed to a shift in police focus after apartheid, from crowd management to crime combating and prevention.³³⁷ However at the same time there has been a sharp rise in the number of protest action and unrest which are accompanied by serious provocation, intimidation, public violence and even elements of criminality reaching about 13,000 incidents in 2013.³³⁸ This is problematic as most pickets take place outside of employer's premises as the employer usually locks out employees after receiving a notice to strike. Furthermore employers do not have capacity to deal with violent

³³³ Magwedze H "Police to probe video showing harassment of uber driver in front of cops" 03 August 2017 *Eyewitness News*.

Available at: <http://ewn.co.za/2017/08/03/police-to-probe-video-showing-harassment-of-uber-driver-in-front-of-cops>> (accessed 23 October 2017)

³³⁴ It has become a common occurrence that despite Code of Good Practice: Picketing stating that picketers can carry placards, chant slogans, and sing and dance that strikers carry sticks and other objects that could easily be used as a weapon.

³³⁵ Para 547 Farlam Commission of Inquiry.

³³⁶ South African Police Service Data on Crowd Incidents: A Preliminary Analysis, Page 15-16) Available at:< <https://africacheck.org/wp-content/uploads/2015/06/South-African-Police-Service-Data-on-Crowd-Incidents-Report.pdf>> (accessed 23 October 2017)

³³⁷ Davis R "Public Order Policing: SAPS demands more muscle" 03 September 2014 *Daily Maverick*. Available at:< <https://www.dailymaverick.co.za/article/2014-09-03-public-order-policing-saps-demands-more-muscle/#.WI3KbK6WbIU>> (accessed 23 October 2017)

³³⁸ *Ibid.*

strike hence their reliance on police. Therefore there is a need to strike a balance between crowd management and crime combating and prevention.³³⁹ South African Police Services need to increase the number of Public Order Police, train and develop the existing ones to effectively deal with crowd violence.³⁴⁰

There is a need to review Section 64 of the LRA and make it more onerous to engage in strike action.³⁴¹ Since most strike are likely to happen in public outside of workplace there is a need to incorporate The Regulation of Gatherings Act 205 of 1993 provisions into Section 64 regarding the identification key role-players. The Regulation of Gatherings Act places emphasis on organizers and conveners of gathering to comply with all sections of the Act and to take responsible steps to ensure the gathering occurs in an orderly and peaceful manner. Under section 12 of this Act the organizers can be held liable for failure to take adequate steps to control participants of the gathering and to ensure compliance with all conditions set out in the approval of the gathering. The Act allows for criminal prosecution of organizers/conveners if they failure to meet their obligation.³⁴² Identification of organisers and conveners is crucial as trade union leadership is known for making bare denials about their members' involvement in criminal acts during strikes. There is a general failure to take accountability for the conduct of its members³⁴³ to even a

³³⁹ According to Dr Johan Burger public order incidents and serious crime are the dual threats to South Africa. Therefore there is no need to pay attention on one at the expense of the other. Dube P "Summary:Justice, Peace, Safety and Security: International and South African Perspectives" *Centre for Constitutional Rights*
Available at: <<http://www.cfcr.org.za/index.php/component/content/article?id=380:summary-justice-peace-safety-and-security-international-and-south-african-perspectives>> (accessed 23 October 2017)

³⁴⁰ CFA Report on SA at paragraph 684 said:

...A new attitude must be adopted by police if they are to win back confidence on the part of COSATU and like victims of violence and loss. To the extent that the old attitudes survive in the police, they must be regarded with the utmost gravity. They require deliberate, sustained and strenuous efforts aimed at overcoming the threat they pose to life, safety and orderly society.

³⁴¹ Dispute with the employer, they need to refer the dispute to the CCMA for conciliation if the dispute is unresolved a certificate is issued, then after 30 days of referring the issue for conciliation the trade union gives the employer 48 hours notice in writing of the proposed strike.

³⁴² Botha and Germishuys (2017) 80 *THRHR* at 539, argue that high levels of strike violence in South Africa it is incumbent for our courts to hold people liable for strike violence.

³⁴³ In *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union & others* (2012) 33 ILJ 998 (LC), Van Niekerk J, at para 14 said:

"This court must necessarily express its displeasure in the strongest possible terms against the misconduct that the individual respondents do not deny having committed, and against *unions that refuse or fail to take all reasonable steps to prevent its occurrence*. Had the applicant not specifically confined the relief sought to an order for costs on the ordinary scale, *I would have had no hesitation in granting an order for costs as between attorney and own client.*"

In *2Food (Pty) Ltd v Food & Allied Workers Union & others* (2013) 34 ILJ 2589 (LC), Steenkamp J at 2591 H-I. held:

suggest imposition of strict liability in holding trade unions civilly and criminally liable.³⁴⁴

Yet, even in those instances where trade unions have been held accountable for conduct of their members, there has been a somewhat a reluctance by the Labour Court to order compensation or damages that would serve as a deterrent.³⁴⁵ There are cases where the Court, despite proof of actual loss, has in the name of ordering compensation that is just and equitable for any loss suffered has awarded compensation or damage that was a fraction of what the applicant claimed.³⁴⁶ Due consideration should also be accorded to “employer’s rights to trade and property”.³⁴⁷

This extends to cases where there was a clear contempt of court and lives lost.³⁴⁸ According to Digest “the absence of judgements against the guilty parties creates, in practice, a situation of impunity, which reinforces the climate of violence and insecurity, and which is extremely damaging to the exercise of trade union rights.”³⁴⁹ Therefore, our Courts, in cases where actual loss is proved, need to award compensation or damages that is commensurate to the loss and should order that payment should be effected in short period, if not, employer should apply for attachment order.³⁵⁰

“The time has come in our labour relations history that trade unions should be held accountable for the actions of their members. For too long trade unions have glibly washed their hands of the violent actions of their members.”

³⁴⁴ Botha (2016) 79 *THRHR* 369 at 370..

³⁴⁵ Does awarding R100 000 compensation, repaid in instalments of R50 per month when the employer suffered loss of R465 000 serve as a deterrent. See *Algoa Bus Company v SATAWU & Others* [2010] 2 BLLR 149 (LC),

³⁴⁶ In *Supreme Springs, division of Met Industrial Ltd v MEWUSA and Others* (J 2067/10) [2011] ZALCJHB 231 (10 August 2011), the applicant claimed to have suffered a loss in revenue of some R1.05 million but the union was ordered to pay a fine of R100 000 suspended for five years provided that they do not engage in similar conduct.

³⁴⁷ Fn 344 above.

³⁴⁸ In *Security Services Employers’ Organisation & others v SATAWU & others* (2007) 28 ILJ, 1134 (LC), a protracted strike that cost 50 lives and court sentenced union officials to imprisonment for 6 months, suspending sentences in each case for 5 years

³⁴⁹ Para 52 of 1996 Digest

³⁵⁰ Since *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union & others* (2012) 33 ILJ 998 (LC), FOSAWU has not embarked in strike action in all Tsogo Sun Casinos. Tsogo Sun has 13 casinos as well as over 100 hotels in South Africa,

Cyril Ramaphosa, COSATU general secretary, in his keynote address at Cosatu's launch rally in Durban in 1985 said:³⁵¹

...as unions we have influenced the wider political struggle. Our struggles on the shop floor have widened the space for struggles in the community. Through interaction with community organisations, we have developed the principle of worker controlled democratic organisation. But our main political task as workers is to develop organisation among workers as well as a strong worker leadership. We have, as unions, to act decisively to ensure we as workers, lead the struggle.

This keynote address has become somewhat paradoxical in that as much as unions have experienced the development of a strong worker leadership but that has been at the expense of worker controlled democratic organisation. Unions are now characterised by a shop steward and union bureaucracy which has replaced organisers who ought to be accountable to their mass membership and in the process have become detached to shop floor issues.

Seseane Jr. opines that the new leadership of the trade union movement “use worker resistance to capitalist repression as a bargaining chip in order to secure a better place for themselves at the table with the ANC, without insisting on a new economic dispensation.”³⁵² Due to their privileged position³⁵³ they make the strike action the first option in industrial disputes.³⁵⁴ The principle of worker controlled democratic organisation becomes even more relevant when it comes to decision to embark on a strike. It is said that workers do not embark on strike easily as a strike, due to the principle of no work no pay, has disastrous implications on the pockets of ordinary workers. Yet such an important decision is left at the whim of union leadership who during the strike action are going to receive their full salary at the end of the month. The ballot by members before a strike takes place was a requirement

³⁵¹ Fn 160 above.

³⁵² Seseane T. “South African unions vie for control of militant workers” 21 February 2014 *World Socialist Website*. Available at: <<https://www.wsws.org/en/articles/2014/02/21/saf2-f21.html>> (accessed 24 October 2017)

³⁵³ Frans Baleni.

³⁵⁴ In *Xstrata SA (Pty) Ltd v AMCU & Others* (J1239/13) [2014] ZALCJHB 58 (25 February 2014), Tlhotlholemaje AJ at para 35 held: “It has become noticeable that unions are readily and easily prepared to lead employees out on any form of industrial action, whether lawful or not. The perception that a union has no obligation whatsoever to control its members during such activities, which are invariably violent in nature cannot be sustained.”

under the old Labour Relations Act.³⁵⁵ However, COSATU was vehemently opposed to its inclusion in the Labour Relations Act.³⁵⁶ Therefore, it is only through a ballot that a union will be able to objectively determine if the members are either in favour of or against a proposed strike. If the majority supports the strike, the strike will take place and that would lead to less intimidation of non-strikers.³⁵⁷

³⁵⁵ S 65(2)(b) of the Labour Relations Act 28 of 1956.

³⁵⁶ Rycroft A 'Strikes and Amendments to the LRA' (2015) 36 *ILJ* 1 at 7. See also Botha and Germishuys (2017) 80 *THRHR* at 538.

³⁵⁷ Ernest Tenza Mlungisi (2016) *The liability of trade unions for conduct of their members during industrial action*, Unpublished dissertation, University of South Africa. See also Botha "Responsible unionism during collective bargaining and industrial action: Are we ready yet? 2015 *De Jure* 345.

BIBLIOGRAPHY

BOOKS

- Baskin J (1999) *Striking Back: A History of COSATU* Johannesburg: Ravan
- Bendix S (1996) *Industrial Relations in South Africa* Juta & Co Ltd
- Brassey M et al (1987) *The New Labour Law: Strikes, Dismissals and the Unfair Labour Practice in South African Law* Cape Town: Juta
- Creighton WB. 'Freedom of association' in R. Blanpain et al. (eds) (1990) *Comparative Labour Law and Industrial Relations in Industrial Market Economies*, Deventer Boston: Kluwer Law and Taxation Publisher
- Halton Cheadle "Labour Relations" in Cheadle et al *South African Constitutional Law: The Bill of Rights* (LexisNexis 2002, looseleaf)
- Davies P & Freedland M (1983) *Kahn-Freund's Labour and the Law* 3rd ed Stevens
- Drew A (2007) *Between empire and revolution: A life of Sidney Bunting, 1873–1936 (Empires in perspective)* London: Pickering & Chatto
<http://www.sahistory.org.za/sites/default/files/allison_drew_between_empire_and_revolution_a_libook4me.org_.pdf> (accessed on 13 July 2017)
- Finnemore M & Van der Merwe R (1989) *Introduction to Industrial Relations in South Africa* Lexicon Publishers (Pty) Ltd
- Hepple A (1957) *A trade union guide for South African workers, S.A. Congress of Trade Unions* Johannesburg
<http://www.historicalpapers.wits.ac.za/inventories/inv_pdf/A3393/A3393-E3-2-02-jpeg.pdf> (accessed 21 July 2017)
- Kearney JA (2003) *Representing Dissension: Riot, Rebellion and Resistance in the South African English Novel* Pretoria: University of South Africa
<http://uir.unisa.ac.za/bitstream/handle/10500/19443/Kearney_JA_1868882047_Section3.pdf?sequence=3&isAllowed=y> (accessed on 17 July 2017)
- Laski H (1948) *Liberty in the Modern State* London: George Allen & Unwin Ltd
- Nel PS & Van Rooyen PH (1989) *South African Industrial Relations: Theory and Practice* Pretoria: Academica
- Padayachee et al (1985) *Indian Workers and Trade Unions in Durban: 1930 – 1950. Report Number 23, August 1985* Westville: University of Durban
<https://opendocs.ids.ac.uk/opendocs/bitstream/handle/123456789/4591/Padayachee_Indian_Workers_1985.pdf?sequence=1> (accessed 27 July 2017)

Reuben A (1976) *"The Study of History: What is the Past"* in *Man is the Measure*
New York: Free Press
<<http://www.amyscott.com/The%20Study%20of%20History%20Abel.pdf>> (accessed
12 July 2017)

Simons HJ and Simons RE (1969) *"Class and colour in South Africa 1850-1950"*
Penguin African Library
<<http://psimg.jstor.org/fsi/img/pdf/t0/10.5555/al.sff.document.crp3b10034.pdf>>
(accessed on 10 July 2017)

Van Niekerk A and Smit N (eds) (2016) Van Niekerk A Christianson MA McGregor M
Smit N Van Eck BPS Law @ Work 3rd ed Lexis Nexis.

Van Niekerk A and Smit N (eds) (2018) Christianson M, MacGregor M, Smith N and
Van Eck S Law@Work 4th ed LexisNexis.

JOURNAL ARTICLES

Alexander R and Simons HJ (1959) "Job reservation and the trade unions"
Enterprise 4.
<http://www.historicalpapers.wits.ac.za/inventories/inv_pdfo/AD1137/AD1137-G1-001-jpeg.pdf> (accessed on 13 July 2017)

Borron Jr.PG "The Case for the Right to Work Act" (1954) *15 Louisiana Law Review* 66-
<<http://digitalcommons.law.lsu.edu/lalrev/vol15/iss1/17>> (accessed 08 September
2017)

Botha MM "Responsible unionism during collective bargaining and industrial action:
Are we ready yet? 2015 *De Jure* 328.

Botha MM "Can the *ultima ratio* and proportionality principles possibly curb
unprotected industrial action in South Africa? (2016) 79 *THRHR* 369.

Botha MM and Lephoto M " An Employer's Recourse to Lock-Out and Replacement
Labour: An Evaluation of Recent Case Law" (2017) 20 *PER / PELJ* 3.

Botha MM and Germishuys W "The Promotion of Orderly Collective Bargaining and
Effective Dispute Resolution, the Dynamic Labour Market and The Powers of the
Labour Court (1)" (2017) 80 *THRHR* 351.

Botha MM and Germishuys W "The Promotion of Orderly Collective Bargaining and
Effective Dispute Resolution, the Dynamic Labour Market and The Powers of the
Labour Court (2)" (2017) 80 *THRHR* 531.

Chinguno C "Marikana: fragmentation, precariousness, strike violence and solidarity"
(2013) 40(138) *Review of African Political Economy* 639.
<https://www.academia.edu/5791228/Marikana_fragmentation_precariousness_strike_violence_and_solidarity> (accessed 05 April 2017)

Cohen T and Matee L “Public Servants’ Right to Strike in Lesotho, Botswana and South Africa - A Comparative Study” (2014).17 *Potchefstroom Electronic Law Journal* 1631.

David L “A Principled Approach to the Positive/Negative Rights Debate in Canadian Constitutional Adjudication (2014) 23 *Constitutional Forum constitutionnel*.
<https://journals.library.ualberta.ca/constitutional_forum/index.php/constitutional_forum/article/view/21754> (accessed 24 March 2017)

Du Toit D and Roger R. “The Necessary Evolution of Strike Law.” Roux, Rochelle Le. *Reinventing Labour Law*. Cape Town: Juta & Co. Ltd. (2012) 201.

Fergus E “Reflections on the (Dys)functionality of strikes to collective bargaining: Recent developments” (2016) 37 *Industrial Law Journal* 1537.

Freund B (1985) “Lewis Jon: Industrialisation and trade union organisation in South Africa, 1924–55: The rise and fall of the South African Trades and labour Council” 117.
<http://disa.ukzn.ac.za/sites/default/files/pdf_files/LaMar85.0377.5429.010.005.Mar1985.21.pdf> (accessed 20 July 2017)

Hadland A, *The South African Newspaper and Printing Industry and its Impact on the Industrial Conciliation Act of 1924* (2005) 50 *Historia* 149.

Harington JS, McGlashan MD and Chelkowska EZ “A century of migrant labour in the gold mines of South Africa” (2004) 104 *The Journal of The South African Institute of Mining and Metallurgy* 65.

Hirson B “*The General Strike of 1922*” Searchlight South Africa, Vol. 3, No.3, October 1993 at 89.
<<https://www.marxists.org/history/etol/revhist/supplem/hirson/1922.html>> (accessed 20 July 2017)

Jones P “Human Rights, Group Rights, and Peoples' Rights” Feb.1999 21 *Human Rights Quarterly* 82.

Limb P “The Anti-Apartheid Movements in Australia and Aoteroa/New Zealand”. In *The Road to Democracy in South Africa* (2008) 3 *International Solidarity* 910.
<http://www.sadet.co.za/docs/RTD/vol3/vol_3chapter%2011.pdf> (accessed on 17 July 2017)

Manamela E and Budeli M “Employees' Right to Strike and Violence in South Africa” (2013) 46 *Comparative and International Law Journal of Southern Africa* 308.

Ngcukaitobi T “Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana” (2013) 34 *Industrial Law Journal* 836.

Nicol M “Legislation, registration, emasculation” (1980) 5 *South African Labour Bulletin* 44.

Plaut M and Ward D “ *Black trade unions in South Africa*” (1982) Bertrand Russell 8.
<http://www.historicalpapers.wits.ac.za/inventories/inv_pdf/AK2117/AK2117-J3-15-AP2-001-jpeg.pdf> (accessed 26 July 2017)

Rycroft A ‘Strikes and Amendments to the LRA’ (2015) 36 *Industrial Law Journal* 1.

Shea C M "The Case of Young, James, and Webster: British Labor Law and the European Convention on Human Rights," (1982) 15 *Cornell International Law Journal* 489.

<<http://scholarship.law.cornell.edu/cilj/vol15/iss2/7> > (accessed 17 September 2017)

Sithole J & Ndlovu S “The revival of the labour movement, 1970–1980” 2006) 2 *The Road to Democracy in South Africa* 191.

<<http://sadet.co.za/docs/RTD/vol2/volume%20%20-%20chapter%205.pdf>>
(accessed 23 July 2017)

Theron J ‘Trade Unions and the law: Victimisation and self-help remedies’ (1997) *Law Democracy and Development* 18.

Theron J Godfrey S and Fergus E ‘Organisational collective bargaining rights through the lens of Marikana’ (2015) 36 April *ILJ* 849.

Suchard H “Labour relations in South Africa:retrospect and prospect” (1982) 12 *Africa Insight* 89.

Ulrich N and van der Walt L “South Africa, labor movement” (2009) *International Encyclopedia of Revolution and Protest* ed. Immanuel Ness Blackwell Publishing 3090.

<https://lucienvanderwalt.files.wordpress.com/2015/04/ulrich_van_der_walt_-_south_africa_labor_movement.pdf> (accessed on 13 July 2017)

Van der Walt L “The First Globalisation and Transnational Labour Activism in Southern Africa: White Labourism, the IWW, and the ICU, 1904–1934” (2007) 66 *African Studies* 225.

<https://libcom.org/files/van_der_walt.pdf> (accessed 15 June 2017)

Van Eck BPS and P Smit “International perspectives on South Africa’s unfair dismissal law” (2010) 43 *Comparative and International Law Journal of Southern Africa* 46.

Van Eck S and Kujinga T "The Role of the Labour Court in Collective Bargaining: Altering the Protected Status of Strikes on Grounds of Violence in National Union of Food Beverage Wine Spirits & Allied Workers v Universal Product Network (Pty) Ltd (2016) 37 ILJ 476 (LC)" *PER / PELJ* 2017(20).

Van Eck BPS and Esitang GT. “Minority Trade Unions and the Amendments tot eh LRA: Reflections on Thresholds, Democracy and ILO Conventions” (2016) 35 *Industrial Law Journal* 763.

Van Zyl-Hermann, D. White Workers in the Late Apartheid Period: A Report on the Wiehahn Commission and Mineworkers' Union Archival Collections (2016) 43 *History in Africa* 258.

Visser W P "The political, economic and social consequences of the discovery of minerals for labour in South Africa, 1867 – 1926" (1996) 32 *Yesterday & today = Gister & vandag* 32.
<<https://dspace.nwu.ac.za/handle/10394/6619>> (accessed 30 July 2017)

Visser WP "The South African labour movement's responses to declarations of martial law, 1913-1922." (2003) 31 *Scientia Militaria: South African Journal of Military Studies* 143.
<<http://scientiamilitaria.journals.ac.za/pub/article/view/157>> (accessed 12 June 2017)

Visser WP "From MWU to Solidarity-A trade union reinventing itself" (2006) 30 *The South African Journal Labour Relations* 19.
<http://www.academia.edu/2874672/From_MWU_to_Solidarity-A_trade_union_reinventing_itself.> (accessed 10 May 2017)

Visser WP "Politics Under Conditions of War: the effect of the War Measures Acts on Political Struggles within the South African Mine Workers' Union, 1939-1947" (2016) 44 *Scientia Militaria - South African Journal of Military Studies* 219.
<<http://scientiamilitaria.journals.ac.za/pub/article/view/1168/1184>> (accessed on 30 July 2017)

Wallis M "Now You Foresee It, Now You Don't - SATAWU v Garvas & Others (2012) 33 *ILJ* 2257

Williams MS and Halcoussis DA "Unions and Democracy: When Do Nonmembers Have Voting Rights?" (2014) 9 *Journal of Business & Technology Law* 213.

THE INTERNET

"The rise and rise of Amcu" 18 August 2012 *City Press*.
<<https://www.news24.com/Archives/City-Press/The-rise-and-rise-of-Amcu-20150429>>(accessed 23 March 2017)

"A history of the South African Constitution 1910-1996"
<<http://www.sahistory.org.za/article/history-south-african-constitution-1910-1996>>
(accessed 11 June 2017)

"The Turn to the Masses"
<<http://www.sacp.org.za/docs/history/fifty3.html>> (accessed 03 July 2017)

Davenport J "The Rand's first strike" *Mining Weekly* (5 July 2013)
<<http://www.miningweekly.com/article/the-rands-first-industrial-action-2013-06-27>>
(accessed 03 July 2017)

Davenport J “The miners strike that led to chaos on Joburg’s Market Square” Mining Weekly (19 July 2013)
<<http://www.miningweekly.com/print-version/the-miners-strike-that-led-to-conflict-on-joburgs-market-square-2013-07-12>> (accessed 03 July 2017)

Raina J “Workers have the right to strike” Industrial Global Union (24 June 2014)
<<http://www.industrialunion.org/workers-have-the-right-to-strike>> (accessed 18 July 2017)

Rebecca Davis R “Public Order Policing: SAPS demands more muscle” Daily Maverick (03 September 2014)
<<https://www.dailymaverick.co.za/article/2014-09-03-public-order-policing-saps-demands-more-muscle/#.WI3KBK6WblU>> (accessed 23 July 2017)

“1922 White Miner’s Strike”
<http://www.lrs.org.za/salhap/e-books_docs/The%201922%20White%20Mineworker's%20Strike.pdf> accessed 12 July 2017

“Chinese workers: Migrants across the world”
<<http://www.sahistory.org.za/sites/default/files/file%20uploads%20Chapter%2014.pdf>> (accessed on 17 July 2017)

Potenza E “All That Glitters - Bound to strike back”
<<http://www.sahistory.org.za/archive/all-glitters-bound-strike-back-emilia-potenza>> (accessed 21 July 2017)

“Council of Non-European trade unions (CNETU)”
<<http://www.sahistory.org.za/topic/council-non-european-trade-unions-cnetu>> (accessed 21 July 2017)

“Rise and fall of NECTU”
<http://disa.ukzn.ac.za/sites/default/files/pdf_files/FwJul85.1562.7624.000.039.Jul1985.16.pdf> (accessed 21 July 2017)

The Parallel Union Thrust Memorandum” Issued by FOSATU on 8 November 1979
<<http://www.sahistory.org.za/sites/default/files/DC/LaMar80.0377.5429.005.006.Mar1980.11/LaMar80.0377.5429.005.006.Mar1980.11.pdf>> (accessed 22 July 2017)

Memorandum concerning the withdrawal of the Republic of South Africa from membership of the International Labour Organisation, submitted by the South African Congress of Trade Unions, 11th May, 1962. Issued by: The South African Congress of Trade Unions, JOHANNESBURG.
<http://www.historicalpapers.wits.ac.za/inventories/inv_pdfo/AD1137/AD1137-Ef8-1-4-001-jpeg.pdf> (accessed on 29 July 2017)

Smith D “South African nurses beaten during state worker strikes” 6 September 2010 *The Guardian*.
< <https://www.theguardian.com/world/2010/sep/06/southafrica>> (accessed 23 July 2017)

“Strike violence in Johannesburg CBD” 14 February 2011 *News 24*
<<https://www.news24.com/SouthAfrica/News/Strike-violence-in-Johannesburg-CBD-20110214>> (accessed 23 July 2018)

Makgetla T “The most violent post-apartheid strike” 28 April 2006.
<<https://mg.co.za/article/2006-04-28-the-most-violent-postapartheid-strike>>
(accessed 23 July 2017)

“The Western Cape Farm Workers Strike 2012-2013” *South African History Online*.
<<http://www.sahistory.org.za/article/western-cape-farm-workers-strike-2012-2013>>
(accessed 23 July 2017)

Magwedze H “Police to probe video showing harassment of uber driver in front of cops” 03 August 2017 *Eyewitness News*.
<<http://ewn.co.za/2017/08/03/police-to-probe-video-showing-harassment-of-uber-driver-in-front-of-cops>> (accessed 23 October 2017)

Sethlatswe B “Nearly 200 killed in strike action in 13 years” 21 January 2013 *South African Institute of Race Relations*.
<<http://irr.org.za/reports-and-publications/media-releases/Strike%20violence.pdf/view>> (accessed 15 September 2017)

Seseane T. “South African unions vie for control of militant workers” 21 February 2014 *World Socialist Website*.
<<https://www.wsws.org/en/articles/2014/02/21/saf2-f21.html>> (accessed 24 October 2017)

The role of communism in the struggle of workers’ rights”
<<https://www.marxists.org/history/erol/ncm-5/bacu-2/resolution2.htm>> (accessed 22 July 2017)

“Afrikanerdom teen kommunisme”
<http://www.boerevryheid.co.za/forums/archive/index.php/t-11827.html>> (accessed 22 July 2017)

“1946 African Mineworkers Strike”
<<http://www.sahistory.org.za/topic/1946-african-mine-workers-strike>> (accessed 23 July 2017)

“Apartheid South Africa, Suppression of Communism Act 44 of 24 June 1950”
<http://www.rebirth.co.za/apartheid_suppress_communist.htm> (accessed 23 July 2017)

“Suppression of Communism Act, No. 44 of 1950 approved in parliament”
<<http://www.sahistory.org.za/dated-event/suppression-communism-act-no-44-1950-approved-parliament>> (accessed 23 July 2017)

Bannings and Proscriptions”
<<http://www.sacp.org.za/main.php?ID=3945>>(accessed 26 July 2017)

“Brief History of SACTWU”
<http://www.sactwu.org.za/union-history> (accessed 26 July 2017)

The anniversary of the South African Tin Workers' Union, Silver jubilee 1937 – 1962
<http://www.historicalpapers.wits.ac.za/inventories/inv_pdfo/AD1137/AD1137-Ef7-6-2-001-jpeg.pdf> (accessed 26 July 2017)

“1973 Durban Strikes”
<<http://www.sahistory.org.za/article/1973-durban-strikes>> (accessed 15 June 2017)

“History of trade unions in South Africa”
<<https://www.southafrica.to/history/TradeUnions/TradeUnionHistory.php>> (15 June 2017)

“Police to probe video showing harassment of uber driver in front of cops”
Eyewitness News (03 August 2017)
<<http://ewn.co.za/2017/08/03/police-to-probe-video-showing-harassment-of-uber-driver-in-front-of-cops>> (accessed 23 October 2017)

“The Urban Training Project (UTP)”
<<http://www.sahistory.org.za/topic/urban-training-project-utp>> (15 June 2017)

Ledwaba L (2016) “The forgotten Marikana widow” 03 June 2016 Sowetan.
<<http://www.sowetanlive.co.za/news/2016/06/03/the-forgotten-marikana-widow>>
(accessed 16 November 2016)

ARTICLES, PAPERS, REPORTS AND SEMINARS

Dau-Schmidt, Kenneth G. and Ellis, Benjamin C, "The Relative Bargaining Power of Employers and Unions in the Global Information Age: A Comparative Analysis of the United States and Japan" (2010). Articles by Maurer Faculty. Paper 1332.
<<http://www.repository.law.indiana.edu/facpub/1332>> (accessed 23 March 2017)

Dube P “Summary:Justice, Peace, Safety and Security: International and South African Perspectives” *Centre for Constitutional Rights*
<http://www.cfcr.org.za/index.php/component/content/article?id=380:summary-justice-peace-safety-and-security-international-and-south-african-perspectives>> (accessed 23 October 2017)

Dugard J “Kaleidoscope:International Law and the South African Constitution” 1997) 8 *European Journal of International Law* 77.
<<http://www.ejil.org/pdfs/8/1/1426.pdf>> (accessed 20 July 2016)

Duncan D “The Regulation of Working Conditions for Africans, 1918 – 1948”
University of the Witwatersrand, Johannesburg History Workshop, 6-10 February 1990.
<<http://wiredspace.wits.ac.za/bitstream/handle/10539/7794/HWS-103.pdf?sequence=1&isAllowed=y>> (accessed 23 July 2017)

Esitang and Van Eck "Big Kids on the Block Dominating Minority Trade Unions: Reflections on Thresholds, Democracy and ILO Conventions" in *World Congress XXI*: (15-18 September 2015 Cape Town) 1-25, at 4.

Flanagan R J "*Labour Standards and International Competitive Advantage*", in: *International Labour Standards: globalization, Trade, and Public Policy*. Robert J Flanagan and William B Gould IV (Ed) Stanford University Press. 2003.
<https://www.iza.org/iza/en/papers/transatlantic/1_flanagan.pdf> (accessed on 4 March 2016)

Gregory et al "*The Liberation Struggle and Liberation Heritage Sites in South Africa*" (2013) 156.

Hyslop J "The Imperial working class makes itself 'white': White labourism in Britain, Australia and South Africa before the First World War", Seminar paper presented on the 11 October 1999 at Richard Ward building.
<<http://wiredspace.wits.ac.za/jspui/bitstream/10539/8782/1/ISS-193.pdf>>(accessed 16 July 2017)

La Forest G.V,"Labour Law and the Charter in the Supreme Court of Canada"
<<https://ciaj-icaj.ca/wp-content/uploads/documents/import/1991/LAFORE-E.ED.pdf?id=1552&1509613448>> (accessed 23 October 2017)

Mathews S "Freedom and State Security in the South African Plural Society": The Alfred and Winifred Hoernle Memorial Lecture, 1971, Natal Witness (Pty) Ltd.
<<http://www.sahistory.org.za/sites/default/files/DC/boo19710000.001.058/boo19710000.001.058.pdf> > (accessed 13 July 2017)

Nowak C (2001) "*Labor Unions: Union Security Agreements*" at 2-4
<<http://digitalcommons.law.msu.edu/king/10>> (accessed 07 September 2017)

Sengenberger W "The International Labour Organization: Goals, functions and political impact" 2013.
<<http://library.fes.de/pdf-files/iez/10279.pdf>> (accessed on 30 March 2016).

The Wiehahn Report and the Industrial Conciliation Amendment Act: A New Attack on the Trade Union Movement in South Africa.
<http://www.aluka.org/action/showMetadata?doi=10.5555/AL.SFF.DOCUMENT.nuun1979_27> (accessed 23 July 2017)

Van Schoor WP "The Origin and Development of Segregation in South Africa AJ. Abrahamse Memorial Lecture, Cathedral Hall, Cape Town, 5 October 1950.
<<http://www.sahistory.org.za/archive/document-51-w-p-van-schoor-origin-and-development-segregation-south-africa-j-abrahamse-memor>> (accessed on 13 July 2017)

Visser WP “*Urbanization and Afrikaner Class Formation: The Mine Workers’ Union and the Search for a Cultural Identity*” Paper presented at the African Urban Spaces Conference, 28-30 March 2003, University of Texas at Austin.
<[https://www.academia.edu/6459922/Urbanization and Afrikaner class formation The Mine Workers Union and the search for a cultural identity](https://www.academia.edu/6459922/Urbanization_and_Afrikaner_class_formation_The_Mine_Workers_Union_and_the_search_for_a_cultural_identity)> (accessed 13 July 2017)

O’Quigley A “*The 1913 and 1914 White Workers’ Strikes*” African Studies Seminar Paper, presented in October 1978.
<<http://wiredspace.wits.ac.za/handle/10539/9576>> (accessed 16 June 2017)

Report of the Fact-Finding and Conciliation Commission on Freedom of Association concerning the Republic of South Africa, INTERNATIONAL LABOUR OFFICE, GB.253/15/7 253rd Session, Governing Body, Geneva, May-June 1992 International Labour Office, Geneva, 1992, 9706n/v.4

Simons J & Simons R (1987) “*One hundred years of job reservation on the South African mines.*” Geneva: International Labour Organisation.
<http://staging.ilo.org/public/libdoc/ilo/1987/87B09_317_engl.pdf> (accessed on 11 July 2017)

South African Police Service Data on Crowd Incidents: A Preliminary Analysis
<<https://africacheck.org/wp-content/uploads/2015/06/South-African-Police-Service-Data-on-Crowd-Incidents-Report.pdf>> (accessed on 23 September 2018)
Wiehahn, NE. *The Complete Wiehahn Report*. Johannesburg: Lex Patria, 1982. Print.

The Wiehahn Commission Report: A Summary by Southern African Labour and Development Research Unit (1979).

“Statement on The Wiehahn Commission Report and Its Implications Issued by FOSATU after its Central Committee Meeting on the 18 and 19 May 1979”
<http://disa.ukzn.ac.za/sites/default/files/pdf_files/LaMar80.0377.5429.005.006.Mar1980.5.pdf> (accessed 23 July 2017)

“The Freedom (Not) to Associate, The issue: When does the First Amendment protect an organization’s right to exclude certain persons as members?”
<<http://law2.umkc.edu/faculty/projects/ftrials/conlaw/association.htm>> (accessed 19 September 2017)

THESIS

Ernest Tenza Mlungisi (2016) *The liability of trade unions for conduct of their members during industrial action*, Unpublished dissertation, University of South Africa

Hermanus Roelof Willem Troskie (1998) *A comparative survey of the law relating to strikes in South Africa and the Netherlands*, Unpublished dissertation, University of South Africa

TABLE OF CASES

South Africa

2Food (Pty) Ltd v Food & Allied Workers Union & others (2013) 34 ILJ 2589 (LC)

Ahmed Raffik Omar v. The Government of South Africa and Others CCT 47/04 [2005] ZACC 17

Alpha Pharm Western Cape (Pty) Ltd v National Education Health and Allied Workers Union and Others (C1008/2012) [2013] ZALCCT 14

Algoa Bus Company v SATAWU & Others [2010] 2 BLLR 149 (LC)

Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others (2017) 38 ILJ 831 (CC)

Cape Town Municipal Professional Staff Association v Municipality of the City of Cape Town (1994) 15 ILJ 348 (IC)

City of Cape Town v South African Municipal Workers Union (C 429/2007) [2008] 7 BLLR 618 (LC)

FAWU obo Kapesi and Others v Premier Foods Ltd t/a Ribbon Salt River (2010) 31 ILJ 1654 (LC)

Mangaung Local Municipality v SAMWU (2003) 23 ILJ 405 (LC)

Mathews & Others v Young 1922 AD 492

Mazibuko & others v Mooi River Textiles Ltd (1989) 10 ILJ 875 (IC) 1989 ILJ

Mondi Limited - Mondi Kraft Division v Chemical Energy Paper Printing Wood and Allied Workers Union (CEPPWAWU) and Others. D622/2002 [2005] ZALC 84 (24 June 2005)

Mutual Construction Company (Pty) Ltd v Federated Mining Union, [1997] 11 BLLR 1470 (LC)

Mynwerkers Unie v O 'Okiep Copper Co Ltd & another (1983) 4 ILJ 140 (IC)

Mzeku and Others v Volkswagen SA (Pty) Ltd and Others, (2001) 22 ILJ 1575 (LAC)

National Employers' Association of South Africa ('NEASA') and Others v Minister of Labour and Others (JR75/15) [2017] ZALCJHB 136 (26 April 2017)

National Employers Association of South Africa (NEASA) v Metal And Engineering Industries Bargaining Council (MEIBC) and Others (JA02/2015) (2015) 36 ILJ 2032 (LAC)

National Employers Association of South Africa and Others v Minister of Labour Metal And Engineering and Others (JR860/13) [2014] ZALCJHB 524 (12 December 2014)

National Union of Metal Workers of South Africa v Bader BOP (Pty) Ltd and Minister of Labour 2003 (2) BCLR 182 (CC)

National Union of Metalworkers of SA & others v Bader Bop (Pty) Ltd & another (2003) 24 ILJ 305 (CC)

NUM v East Rand Gold and Uranium Co Ltd 1992(1) SA 700 (AD)

Pan American World Airways Inc v SA Fire and Accident Insurance Co Ltd 1965 (3) SA 150 (A)

R v Daleski 1933 TPD 47

Radio Television Electronic & Allied Workers Union v Tedelelex (Pty) Ltd (1990) 11 ILJ 1272 (IC)

Ramolesane & Another v Andres Mentis & Another (1991) 12 ILJ 329 (LAC)

Re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC)

Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union [2002] 1 BLLR 84 (LC)

SA National Defence Union v Minister of Defence & Another (1999) 20 ILJ 225 (CC,

Supreme Springs, division of Met Industrial Ltd v MEWUSA and Others (J 2067/10) [2011] ZALCJHB 231 (10 August 2011)

Security Services Employers' Organisation & others v SATAWU & others (2007) 28 ILJ, 1134 (LC)

South African Post Office Ltd v Tas Appointment and Management Services CC and Others [2012] 6 BLLR 621 (LC)

Supreme Springs, division of Met Industrial Ltd v MEWUSA and Others (J 2067/10) [2011] ZALCJHB 231 (10 August 2011)

Verulam Sawmills (Pty) Ltd v AMCU (J1580/15) [2015] ZALCJHB 359.

Woolworths (Pty) Ltd v SACCAWU & Others (2006) 27 ILJ 1234 (LC).

Xstrata SA (Pty) Ltd v AMCU & Others (J1239/13) [2014] ZALCJHB 58

United States

Aboud v. Detroit Board of Education, 431 U.S. 209 (1977)

American Federation of Labor AFL v. American Sash Door Company., 335 U.S. 525 (1949).

Lincoln Federated Union v. Northwestern I and M., 335 U.S. 525 (1949)

National Labor Relations Board v. General Motors Corporation 373 U.S. 734 (1963)

Canada

Lavigne v Ontario Public Service Employees Union (1991) 2 S.C.R. 211.

R. v. Advance Cutting & Coring Ltd., 2001 SCC 70, [2001] 3 SCR 209.

United Kingdom

In Cheall v. Association of Professional Executive Clerical and Computer Staff 1982 Indus. Cas. R. 543

Taylor v. Co-operative Retail Services.' 1982 Indus. Cas. R. 600.

European Court of Human Rights Cases

Le Compte v. Belgium, 43 Eur. Ct. H.R. (ser. A) (1981)

Young v. United Kingdom, 44 Eur. Ct. H.R. (ser. A) (1981)

Sibson v. United Kingdom, 258 Eur. Ct. H.R. (ser. A)(1993)

Sigurjonsson v. Iceland, 264 Eur. Ct. H.R. (ser. A) (1993)

Sørensen and Rasmussen v Denmark, App no 52562/99, App No 52620/99, (2008) 46 EHRR 29.

ACTS

South Africa

Active Service Voters' Act 37 of 1941

Black Labour Relations Regulation Act 48 of 1953

Black Labour Relations Regulations Amendment Act 70 of 1973

Black Labour Relations Regulation Amendment Act 84 of 1977

Constitution of the Republic of South Africa 108 of 1996

Defence Special Pensions and Moratorium (War Measures') Act 29 of 1940

Industrial Conciliation Act 11 of 1924

Industrial Conciliation Act No 11 of 1924

Industrial Conciliation Act 36 of 1937

Industrial Conciliation Amendment Act 41 of 1959
Industrial Conciliation Amendment Act 18 of 1961
Industrial Conciliation Amendment Act 43 of 1966;
Industrial Conciliation Further Amendment Act 61 of 1966
Industrial Conciliation Amendment Act 104 of 1967
Industrial Conciliation Amendment Act 21 of 1970
Industrial Conciliation Amendment Act 94 of 1979
Industrial Conciliation Amendment Act 95 of 1980
Labour Relations Act, 28 of 1956
Labour Relations Amendment Act 57 of 1981
Labour Relations Amendment Act 51 of 1982
Labour Relations Amendment Act 2 of 1983
Labour Relations Amendment Act 81 of 1984
Labour Relations Amendment Act 83 of 1988
Labour Relations Amendment Act 9 of 1991
Labour Relations Act 66 of 1995.
Military Service Act 2 of 1945
Mines and Works Act 12 of 1911
Native Labour Regulation Act 15 of 1911
Railway Regulation Act of 1908
Riotous Assemblies and Criminal Law Amendment Act 27 of 1914
Soldiers and War Workers' Employment Act No. 40 of 1944
Suppression of Communism Act 44 of 1950
War Measures' Act 13 of 1940;
War Measures' (Amendment Act) 32 of 1940
War Measures' Act 9 of 1942
War Service Voters' Act 34 of 1943
War Measures' Act 13 of 1946
War Measures' Act (Amended) 26 of 1946;
War Measures' Repeal Act No. 30 of 1947.

Australia

Workplace Relations Act 1996
Industrial Relations Act 1988.

Workplace Relations Amendment Act 2005

Fair Work Act 2009

Switzerland

Code of Obligations (CO), which became effective as early as in 1911

Belgium

Freedom of Association Act of May 1921

United States

Labor Management Relations Act of 1947.

National Labor Relations Act of 1935

Labor Management Relations Act of 1947.

Italy

Statute of Workers' Rights (Act N. 300 of 30 May 1970)

International law instruments

Abolition of Forced Labour Convention 105 1957

African Charter on Human and Peoples' Rights (ACHPR) 1981

American Convention on Human Rights (ACHR) 1969

Community Charter of Fundamental Social Rights of Worker (CCFSRW) 1989

Convention concerning Employment of Women during the Night 1921

Discrimination (Employment and Occupation) Convention 111 of 1958

Universal Declaration of Human Rights 1948

Equal Remuneration Convention 100 of 1951

European Convention on Human Rights (ECHR) 1950

European Social Charter (ESC) 1996

European Union Charter of Fundamental Rights (EUCFR) 2000

Forced Labour Convention 29 1930

Freedom of Association and Protection of the Right to Organise Convention 87 of 1948

International Covenant on Civil and Political Rights (ICCPR) 1966

International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966

Minimum Age Convention 138 1973

Right to Organise and Collective Bargaining Convention 98 of 1949

Worst Forms of Child Labour Convention 182 1999

Council of Europe, Recommendation CM/Rec (2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe, 10 October 2007,

Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, International Labour Organization 2006

