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REVISITING THE DEFINITION OF 'WORKPLACE' AND THE IMPACT THEREOF AS A POSSIBLE LIMITATION ON THE CONSTITUTIONAL RIGHTS OF MINORITY TRADE UNIONS.

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This one is for you Lehumo le Moshopyadi.

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ABSTRACT

The right to freedom of association is the cornerstone of collective bargaining. It is a precondition for the realisation of a number of other rights, including the right to organise, to engage in collective bargaining and to strike. These rights as contained in the Bill of Rights though not absolute and may be limited in terms of the Constitution of the Republic of South Africa in terms of a law of general application, such limitations must be reasonable and justifiable. South African courts have an obligation to interpret labour provisions in accordance with international law and customs. This paper examines whether settlement definition of 'workplace' can be regarded as a reasonable and justifiable limitation to the right to strike within the ambits of internationally and constitutionally acceptable labour norms.

CHAPTER 1

INTRODUCTION

1. Introduction to the study

The Labour Relation Act[1] (LRA)was a successful legislation introduced to provide an opportunity for employers and employees to break with the intense adversarialism that had governed the employment relations in the past and promoted a well canvassed collective bargaining[2] for greater co-operation at the workplace. Collective bargaining is widely accepted as the primary means of determining terms and conditions of employment in South Africa[3] and it has been underlined by the legacy of cheap adversarialism between employers and organised labour. [4] Collective bargaining is one of the means by which employees can participate in decision-making in management of organisations to influence issues of pay and terms of conditions of employment at the workplace.[5] The LRA provided a framework within which employers, employers' organisations, trade unions and employees can bargain collectively to determine issues of mutual interest and formulate employment policies. Just like its predecessor (the Labour Relations Act of 1956), it makes no express provision for a duty to bargain. However, collective bargaining is an adversarial process, which involves negotiation between parties with conflicting interests seeking to achieve mutually acceptable compromises. [6]

The Constitution[7] grants every worker a fundamental right to fair labour practices and afford rights such as the freedom of association, the right to organise and strike with the

[1] Labour Relations Act, Act 66 of 1995 as amended [hereinafter 'the Labour Relations Act'].
[2] S 1 (d)(i)-(ii) of the Labour Relations Act, Act 66 of 1995 as amended.
[3] 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).
[4] Du Toit " Collective bargaining and worker participation" 2000 *ILJ* 1544.
[5] Ibid. See also Gold and Weiss "Employment and industrial relations in Europe (1999) and *Rand Tyre and Accessories (Pty) Ltd v Industrial Council for the Motor Industry (Transvaal) Minister for Labour & Minister for Justice 1941 TPD 108*
[6] Godfrey *et al* Collective bargaining (2010) 1.
[7] The Constitution of the Republic of South Africa, 1996 [hereinafter the Constitution].

main objective of promoting collective bargaining.[8] In addition thereto, the Constitution also provides for the limitation of the Bill of Rights[9] wherein fundamental rights may be limited by laws of general application, if the limitation is reasonable and justifiable. The limitation to the right to freedom of association, to organise and the right to engage in collective bargaining are severe limitations bearing in mind the possible impact they have on minority trade unions. According to Rautenbach the nature of the limitation includes the method used to limit the right.[10] What is reasonable and justifiable in one instance is not necessarily reasonable and justifiable in another. It is submitted that any factor in the non- exhaustive list in section 36(1) of the Constitution, 1996 will still need to be viewed in the context of the circumstances of the society the Constitution envisages. South African society displays a history of inequality based on apartheid policies, whereas the Constitution, 1996 models the protection of all forms of minority interests and imperatively does not indicate which minority interests are to be protected and which are not. The LRA of must give effect to minority trade union rights in the workplace in a manner similar to the way the constitution respects minority political parties. In other words, a workplace democracy should conform to the model that the Constitution promotes. The establishment of thresholds of representivity for trade unions must be seen within this content and due regard to the principles of the Constitution and with international standards. The impact of threshold agreements on minority trade unions was properly dealt with in the case of Police and Prisons Civil Rights Union v Ledwaba.[11] It is a relief that this decision Ledwaba in a way supports that the principle of majoritarianism should not be interpreted to permit the suppression of minority trade unions.

The purpose of this study is to revisit the statutory definition of 'workplace' as interpreted by the courts to be a reasonable justifiable limitation on minority trade union's fundamental right to freedom of association and the right to strike. The focus in this dissertation is not on the right to strike. However, it is imperative to note that the right to

[8] S 23 (2)(c) of the Constitution.
[9] S 36 of the Constitution.
[10] Rautenbach (2012) 311.
[11] *Police and Prisons Civil Rights v South African Correctional Services Workers' Union and others 2019 (1) SA 73 (CC).*

strike is at the center of the fundamental right to freedom of association and is also an essential component of collective bargaining.[12]

The study revisits the statutory definition of 'workplace' as interpreted by the Constitutional Court to be a reasonable justifiable limitation on minority trade union's fundamental right to strike *vis-à-vis* the applicable international standards of bargaining. The defining source of South African labour law lies in Section 23 of the Constitution, which guarantees a universal right to 'fair labour practices' as well as a right of all 'workers' to 'engage in collective bargaining'.[13]

1.2. Research problem

Prior to the promulgation of the Labour Relations Act, the exploitation of workers was a feature of life in South Africa for decades. Apartheid thrived on cheap labour and workers had to contend with the migrant labour system, passes and influx control, job reservation, poverty wages and oppressive laws. The purpose of labour law was traditionally articulated by Sir Otto Khan Freund as the countervailing force to counteract the inequality of bargaining power between an employer and isolated employee or worker.[14] In any employment relationship there is unequal bargaining power. The only means by which employees can counteract this power is if they act collectively to enforce their employment rights. The settlement of 'workplace' definition by the Constitutional Court present serious challenges to this approach of labour law and most importantly, towards the constitutional rights of minority trade unions.[15]

The Constitution provides certain rights to trade unions, amongst others, the right to freedom of association.[16] Workers' right to freedom of association is the fundamental labour right and is essentially an "enabling" right which entitles workers to form and join workers' organisations of their own choice in order to promote common organisational

[12] S 23 (1)(d) of the Labour Relations Act provides that a collective agreement binds employees who are not members of the trade union or trade unions party to the agreement if the employees are identified in the agreement, the agreement expressly binds the employees and the trade union or those trade unions have as their members the majority of employees employed by the employer at the workplace.

[13] Du Toit: *ILJ* (2007) 28 1405

[14] Davis and Freedland (1983) 12.

[15] *Association of Mineworkers and Construction Union v Chamber of Mines of South Africa 2017 (3) SA 242 CC, 2017 6 BCLR 700 (CC)* (hereafter *AMCU v Chamber of Mines*).

[16] S 23 of the Constitution.

interests. The right to freedom of association for workers is a means of facilitating the realisation of further rights, rather than just a right in itself. It is therefore referred to as a "shorthand expression for a bundle of rights and freedoms relating to membership of associations of workers and employers".[17] Without the right to freedom of association, workers are at risk of being isolated and powerless.

The Labour Relations Act came into effect on 11 November 1996 with an objective to bring labour law into conformity with the Constitution and the International Labour Organisation Committee of Freedom of Association (the 'ILO'). One of the primary purposes of the Labour Relations Act is to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution. The Labour Relations Act was promulgated in furtherance of section 23(5) of the Constitution. An important purpose thereof is to provide a regulatory framework for collective bargaining in South Africa.[18] The Labour Relations Act remedied an important deficiency of its predecessor, the 1956 Labour Relations Act regarding the rules and principles governing collective bargaining.[19] One of the most significant changes in the new Labour Relations Act was that it now provided for legislated organisational rights.[20] Interpretation of the Labour Relations Act requires proper effect to its primary objects and to ensure that the provisions of the Act are in compliance with the Constitution and in line with the international labour jurisprudence.

The Labour Relations Act defines the 'workplace" as the place or places where the employees of an employer work, and to this is added that if an employer carries on or conducts two or more operations that are independent of one another by reasons of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation.[21] Employees are prohibited to participate in a strike, or any conduct in contemplation or in

[17] Budeli *FJLlH* (2009)15(2) 57-74.
[18] S 1(c)(i) of the Labour Relations Act 66 of 1995 as amended.
[19] Grogan (2007) 11.
[20] Bendix (2001) *81.*
[21] S 213(c) of the Labour Relations Act provides that workplace in all other instances means the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation.

furtherance of a strike if bound by a collective agreement that prohibits a strike or lockout in respect of the issue in dispute.[22] It therefore critical that the definition concept of 'workplace' as interpreted by the Constitutional Court to be a reasonable justifiable limitation to the right to strike be revisited, most significantly the challenges posed towards minority trade union specifically with regard to the provisions of Section 23(1) (d) of the Labour Relations Act and the Bill of Rights[23] as a result of that interpretation. The critical question is the extent within which definition of 'workplace' as interpreted by the Constitutional Court can limit the fundamental rights of minority trade union in terms of Section 36(1) of the Constitution in that, the Constitutional Court's interpretation of workplace include all operations of the employer that are independent of one another by reason of their size, function or organization. This interpretation will deprive the minority trade unions of their constitutional rights to freedom of association, the right to strike and the right to collective bargaining as enshrined in the Bill of rights and it will continue to promote majoritarianism at the expense of minority trade union's rights to freedom of association.

1.3. Aims and objectives

It is critical to cautiously revisit the notion that 'workplace' in terms of Section 213 of the Labour Relations Act refers to all the localities where the employees of an employer work. Proper determination of what constitutes 'workplace' will afford the employees statutory protections and rights afforded by the Constitution and labour legislation. The study will carefully reconsider the constitutionality of the definition of 'workplace' as a possible limitation to minority trade union fundamental rights in terms of Section 23(1)(d) of the Labour Relations Act. The objectives on this research can be summarised as follows:

(a) To revisit the statutory definition of 'workplace' in the Labour Relations Act;

(b) To reflect on the fundamental rights of employees at the 'workplace' in line with the international labour standards;

(c) To evaluate the impact of statutory definition of 'workplace' as settled by the Constitutional Court on minority trade unions' fundamental rights;

[22] S 65 (1) (a) of the Labour Relation Act.

[23] S 18 of the 1996 Constitution of Republic of South Africa, the section provides that everyone has the right to freedom of association and s23 states that every worker has the right to form and join trade union, to participate in the activities and programs of a trade union and to strike (hereafter the 1996 Constitution.

(d) To determine whether Constitutional Court settlement on the definition of 'workplace' is apposite and consistent with section 23 of the Constitution and international labour standards; and

(f) To reflect on the extent within which employees' constitutional rights can be limited by the statutory definition and/or interpretation of 'workplace' and the lawfulness thereof.

1.4. Literature review

Prior to the Constitutional Court judgement in the matter of *AMCU v Chamber of Mines of South Africa,*[24] the possibility that Section 23 (1)(d) of the Labour Relations Act could be unconstitutional had been raised.[25] The new developments leaves one to reflect on the relevance of Kahn-Freund's *dictum* in the new labour law dispensation and further requires serious consideration on the significant role of the International Labour Organisation (ILO), the Constitution, the Labour Relations Act and other employment legislations in defining the purpose of labour law today and its protection against all employees. Kahn-Freund states that where collective bargaining fails, "power stands against power".[26]

In 2013, the Chamber of Mines of South Africa, a registered employer's organisation, acting on behalf of its members in the gold mining sector concluded a collective agreement with three unions which represented the majority of workers in the sector. The Association of Mineworkers and Construction Union (AMCU) did not participate in the negotiations and rejected the offer in which the negotiations culminated. AMCU did not participate in a strike that preceded the reaching of an agreement and did not sign the collective agreement. The material terms of the wage agreement amongst others provided that in terms of section 23(1)(*d*) of the LRA the agreement binds all other employees in the workplace of each respective employer. Further, the agreement *inter alia* provided that no party bound by the agreement would for the duration of the

[24] *Association of Mineworkers and Construction Union v Chamber of Mines of South Africa (JA103/2014) 2016 ZALAC 11 (24 March 2016), 2016 ILJ 1333 (LAC), 2016 9 BLLR 872 (LAC).*

[25] Du Toit, Potgieter et al Bill of Rights Compendium (2014) 34 4B-40; see also Van Niekerk et al (2012) 406; see also Du Toit et al (2006) 306; see also Brassey and Cooper (1988) 30-38; and see also Bishop and Woolman (eds) (2013] 53-51.

[26] Kahn-Freund (1972) 55. Also see Davies and Freedland (1983) 69 and Rycroft *IJCLLIR* (2014) 201.

agreement call for any strike or lockout in support of demands or proposals to amend wages and other conditions of employment. Since 2001, collective agreements concluded in this way have been applied in terms of section 23(1)(*d*) to employees who have not been members of unions party to the agreement and also to non-union members. Three of the gold mines represented by the Chamber of Mines, namely Harmony Gold Mining Company, AngloGold Ashanti Limited and Sibanye Gold Limited, owned more than one mine. AMCU did not have a majority membership at all the mines of these companies, but it had a majority membership at five individual mines. AMCU did not consider itself to be bound by the agreement and notified the three companies that its members would strike from 23 January 2014. The Chamber of Mines of South Africa referred a dispute to the Labour Court and sought to declare a strike called by the AMCU unprotected.

The Chamber of Mines argued that AMCU members were prohibited from striking as they were bound by a collective agreement concluded in 2013 between the Chamber of Mines, on behalf of Harmony Gold Mining Company Limited, AngloGold Ashanti Limited and Sibanye Gold Limited on the one hand, and the National Union of Mineworkers Trade Union (NUM), Solidarity Trade Union (Solidarity) and United Association of South Africa Trade Union (UASA) on the other. At the time the agreement was concluded, the three trade unions (NUM, Solidarity and UASA) collectively represented the majority of the employees at each workplace and consequently, the agreement had been extended to employees who were not members of NUM, Solidarity or UASA. AMCU argued that it was not bound by the collective agreement in question as it was the majority union at a number of the employers' individual mines.

In order to determine whether AMCU represented the majority of the employees the meaning of the 'workplace' had to be considered. The Constitutional Court confirmed the findings of the Labour Court and the Labour Appeal Court[27] judgments on constitutionality of S23(1)(d) of the LRA and held that the 'workplace' did not refer to a single place where employees work, but also to all localities where the employees of an employer's work. As a result, AMCU did not constitute independent operations and the

[27] *Association of Mineworkers and Construction Union v Chamber of Mines of South Africa (JA103/2014) 2016 ZALAC 11 (24 March 2016), 2016 ILJ 1333 (LAC), 2016 9 BLLR 872 (LAC).*

collective agreement was thus validly extended to AMCU members in terms of Section 23(1)(d).

One of the major functions of trade unions is to procure better working conditions and wages for its members.[28] Collective agreement binds employees who are not members of a registered trade union which is a party to the agreement either because their union is not a party to the agreement or because they are not members of any union. If the employees are identified in the agreement, the agreement expressly binds them, and the trade unions party to the agreement "have as their members the majority of employees employed by the employer in the workplace".[29] Vettori[30] argues that the most important instrument of serving the interest of the members of trade union is collective bargaining. She further argues that the primary role played by collective bargaining in South African labour law in terms of the Labour Relations Act is extended to non-distributive or non-production-related issues. The workplace definition has been criticised as being too wide and vague with Cheadle stating that it is evident from this definition that a workplace can be made up of one or more places of work and that each case will depend on its own facts.[31] The guiding principle is to interpret the statutory definition of workplace expansively and in line with the purpose of the Labour Relations Act, the Constitution and the international labour standards.

It could be that the problem is not in the definition of 'workplace' as per the provisions of Section 213 of the Labour Relations Act but, the manner in which it has been interpreted. Section 36 of the constitution provides that in order to determine whether a factual limitation is reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality, certain factors must be taken into account. The research shall consider all the factors contained in Section 36 being:-

(a) the nature of the right involved,

(b) the importance of the purpose of the limitation,

(c) the nature and extent of the limitation,

[28] ILO 2005 www.ilo.org 17-21; Muhammad *FEJP&B* (2010) 79-82.
[29] *Ibid*.
[30] Vettori (2005) 88-105.
[31] Cheadle, Le Roux etal (1994) 69 – 79.

(d) the relation between the limitation and its purpose, and

(e) alternative less intrusive ways to limit the right to decide whether the factual limitation is constitutionally justifiable.

We therefore in this study analyse the recent settlement of 'workplace' as a possible justifiable limitation of minority trade union right's to freedom of association, including but not limited to the right to engage in collective bargaining in line with the international labour standards.

1.5. Motivation

The introduction of the interim Constitution of 1994 had a profound effect on labour law. The South African Constitution Bill of Rights entrenches various rights that has to be taken into account when labour regulation is drawn up and implemented. These amongst others include labour rights. In addition to the provisions of Section 23(1) of the Constitution, the Constitution further provides that everyone has the right to fair labour practice and this include the right of employees to join and form trade unions.[32] The LRA primary purpose is to give effect to and regulate the fundamental rights conferred by Section 23 of the Constitution. Interpretation of the LRA requires proper effect to its primary objects and to ensure that its provisions are in compliance with the Constitution and in line with the public international law obligations. In South African National Defence Union v Minister of Defence and another[33], the Constitutional Court was faced with the question whether the prohibition of members of the defence force from protesting and joining trade unions was constitutional. Members of the South African National Defence Force and State Security Agency are excluded from the application of the LRA.[34]At the time, section 126(B) of the Defence Force Act[35] provided that:

"(1) a member of the Permanent Force shall not be or become a member of any trade union as defined…of the Labour Relations Act ...provided that this provision shall not

[32] S 23(2) of the Constitution of the Republic of South Africa, the section provides that (2) Every worker has the right— (a) to form and join a trade union; (b) to participate in the activities and programs of a trade union; and (c) to strike.

[33] *South African National Defence Union v Minister of Defence and another (1999) 20 ILJ 2265 (CC) at para 1.*

[34] S 2 of the Labour Relations Act.

[35] Defence Force Act 44 of 1957.

preclude any member of…from being or becoming a member of any professional or vocational institute, society, association or like body approved by the Minister."

The question arose whether soldiers can rely on workers' rights in terms of the Constitution even though they are excluded from the scope of application of the LRA. According to the majority opinion of the Court "everyone" in section 18 of the Constitution, 1996 is indicative of the fact that members of the defence force do have the right to lay claim to the right to freedom of association. In NEHAWU v University of Cape Town and others[36] the Constitutional Court held that fairness must be applied to both employees and employers.[37]

The Constitution protected the rights of all people, including the workers' right to freedom association at the workplace[38] which is not only one of the fundamental labour rights but also the cornerstones of liberal democracy.[39] In addition to the right to freedom of association is the right to strike which is also fundamental to sound industrial relations[40] and integral to the system of collective bargaining.[41] Without the right to strike, trade unions become pathetic, powerless bodies and the rule of management is absolute. Collective bargaining will also be compromised and there cannot be genuine collective bargaining but collective begging.[42] A strike consists of the simultaneous and co-ordinated withdrawal of labour by workers for the purpose of remedying a grievance between workers and an employer in respect of matters of mutual interest.

South Africa as a member of the ILO ratified a number of ILO Conventions. This means that the country's labour legislation and regulations have to comply with the ILO Constitution and those ratified Conventions. Amongst others, these obligations include upholding the rights to freedom of association which cannot exclude the right to engage

[36] *NEHAWU v University of Cape Town & Others(2003) 24 ILJ 95 (CC).*
[37] Van Niekerk, Smit et al (2017) Chapter 3 41.
[38] *Ibid.*
[39] Budeli "Understanding the right to freedom of association at the workplace: components and scope" (2007) 1.
[40] Myburgh ILJ (2004) 25, 962-966.
[41] *Ibid.*
[42] Pitt (1992) 251, the author quotes Grunfeld: "If one set of human beings is placed in a position of unchecked industrial authority over another set, to expect the former to keep the interests of the latter constantly in mind and, for example to increase the latter's earnings as soon as the surplus income is available … is to place on human nature a strain it was never designed to bear".

in collective bargaining.[43] The Constitution accords the International Law, a particular standard and requires the application of the International Law when interpreting South African legislation and in particular, the Bill of Rights.[44] International standards set by the ILO promotes the protective function of labour law to a certain extent and requires that national legislation must protect vulnerable employees.

The labour rights as entrenched in the Constitution have a significance role in the field of law which was characterised by injustices of the past. Majority black trade unions were left out to advance the needs of their members through the established platforms such as collective bargaining and forums due to element of segregation. The Constitution was able to provide every trade union with the right to organize and to engage in collective bargaining. However, the rights under section 23 are subjected to section 36(1) of the Constitution.[45] The Labour Relations Act prohibits a person from participating in a strike, or any conduct in contemplation or in furtherance of a strike, if that person is bound by a collective agreement that prohibits a strike in respect of the issue in dispute.[46] As we analyse the definition concept of 'workplace' as interpreted by the courts, it is imperative to distinct between who is governed by the collective agreement and what freedom does the individual governed by the collective agreement retain. It is therefore pivotal that we reconcile the fundamental principle of freedom of association and the right to fair labour practices within the context of the majoritarian framework created by the LRA.[47] The challenge is that the Labour Relations Act is not addressing minority trade unions' complaint in that private sectors are determining their fate in collective bargaining outcomes without their consent.

[43] Cheadle "Regulated Flexibility and Small Business: Revisiting the LRA and the BCEA" (2006).

[44] S 39(1) of the Constitution provides that when interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom, must consider international law and may consider foreign law and 233 of the Constitution provides that 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.

[45] S (1)(a)-(e) of the Constitution provides that the rights in the Bill 0f Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality an freedom, taking into account all relevant factors including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and less restrictive means to achieve the purpose.

[46] *Ibid.*

[47] Cohen *PERJ* (2014) 2209.

Macun[48] argues that commentators have often viewed the Labour Relations Act as favouring larger unions and as conferring clear advantages on unions with majority support at the establishment or industry level. This remains the case despite minority trade unions fulfilling an important role in the current labour system, especially when it comes to the balance of power in the employment arena. The recent interpretation of 'workplace' re-introduced the main concern that the Labour Relations Act favours trade unions with majority support and left the minority trade unions in limbo and vulnerable as they are unable to advance their members' interests through established platforms. Further, the interpretation as it stands pose some constitutional challenges on the minority trade union and continues to promote a system of collective bargaining in which the position of majority unions is enhanced while minority unions are marginalised.

1.6. Research methodology.

A comparative approach between South African statutory definitions of 'workplace' with other countries shall be considered. The importance of comparative methodology will assist this research to shed light on how this institution can be structured to work better by lessons from other countries. The research comparison on the definition of 'workplace' and its impact towards employees' fundamental rights between South Africa, Canada, Swedish, the American and German Federal Republic will be used. This will be done through legal research from statutes, international labour standards, texts, articles, journals and case law authorities.

The workplace is part of the socio-political milieu of South Africa. The policies that regulate this sector cannot be divorced from South Africa's history. The negotiation process that led to the Constitution elevated the element of compromise and gave recognition of minority political parties and proportional representation. The South African constitutional framework clearly does not endorse majoritarianism to the full extent. Rather it reflects a multi-party, proportional system and recognises minority interests. Minority parties have the right to voice their opinion. It is submitted that in essence, this is the model of constitutional democracy that the workplace needs to

[48].Macun *LD&DLJ* (1997) 69-81.

pursue. It is imperative to always reflect if the LRA gives effect to minority trade union rights in the workplace in a manner similar to the Constitution wherein it is enshrined that everyone including minority political parties must be respected. In other words, it is argued that a workplace democracy should conform to the model that the Constitution, promotes. The establishment of thresholds of representivity for trade unions must be seen within this content and due regard to the principles of the Constitution and international labour standards. [49]

1.7. Structure and chapters.

The Labour Relations Act accommodates majority trade union concerns at the expense of promoting genuine worker participation. Limitation of employee's fundamental rights by courts interpretations becomes arguably important and questions the effectiveness of collective bargaining. Certain court interpretations taken to limit access to organizational rights being a core ingredient of collective bargaining would fall foul of the provisions of equality and the core meaning of democracy and as such, constitute an unfair limitation of the rights entrenched in section 23 of the Constitution. The statement by Van Niekerk that, "the labour market is dynamic, and for that reason, labour legislation is never immune from critical reflection, and when necessary, revision[50]," is apposite. In revisiting the interpretation meaning of 'workplace' as settled by the courts, our chapters will be dealt with as follows:-

1.7.1. Chapter 1: Introduction to the study.

1.7.2. Chapter 2: The Constitutional Framework and Labour Relations.

1.7.3. Chapter 3: A Comparative Perspective on meaning of 'workplace' and the possible impact of limitations.

1.7.4. Chapter 4: Conclusion and Recommendations

[49] T.G. Esitang "The impact of threshold agreements on organisational rights of minority trade unions".
[50] Van Niekerk, Smit et al (2012) 15.

CHAPTER 2

THE CONSTITUTIONAL FRAMEWORK AND LABOUR RELATIONS

2.1. Introduction

Prior the advent of the labour legislation that creates a number of statutory bodies capable of exerting considerable influence on the development of labour law in South Africa, the sole sources of the rights and obligations of employees and their employers was the common law contract of employment.[51] This called for legislative intervention in the employment relationship as the common law contract was found to ignore the fact that the bargaining power between employer and employee is inherently unequal.[52] In the year 1977 the then government appointed the Wiehahn Commission of Inquiry into labour legislation which in 1979, the commission made a recommendation to the effect that there should be fundamental reforms on the system of industrial relations.[53] The most significant recommendations by Commission was to the effect that black employees be allowed to join registered trade unions and be directly represented on industrial councils or conciliation boards.[54] Most of the recommendations were accepted by the government with the hope to attain the success made under Industrial Conciliation Act, 1924 thereby making provision for new trade unions into the industrial relations system and being able to control them.[55] Despite the extension of trade union rights to black employees, the commission also recommended the enactment of a definition of unfair labour practice, and the establishment of the industrial Court.[56] The definition had a consequence of a comprehensive but not always consistent jurisprudence that emerged from the Industrial Court between 1980 and 1994, creating and defining both individual employment and collective bargaining rights.[57]

[51] Grogan (2017) 8.
[52] Van Niekerk, Smit *etal* (2017) 4.
[53] Report of the Commission of Inquiry into Labour Legislation (RP 47/1979).
[54] *Ibid* paragraphs 3.38, 3.72 and 3.153.2 of the Report.
[55] Du Toit Godfrey *etal* (2015) 10.
[56] Report of the Commission of Inquiry into Labour Legislation (RP 47/1979).
[57] Van Niekerk, Smit *etal* (2017) 13.

During the era of the Industrial Court, the 1956 Labour Relations Act never defined the term 'organisational rights' and the collective bargaining process was characterized by a multiplicity of trade unions at both plant and industry levels.[58] The advent of the democracy in South Africa heralded the coming of a new labour dispensation which has drastically changed from those which prevailed prior 1994. The entrenchment of the Bill of Rights had profound effects on South African legal system as a mechanism for citizens to challenge any actions by the state which infringed those rights.[59] The drafters of the Constitution were also determined to avoid a repetition that has resulted in the abuse of trade union by entrenching labour rights under section of the Constitution. The black trade unions played a significant role to influence this milestone achievement. Provisions of section 23 of the Constitution are influential in the field of labour law in South Africa[60] as they establish a set of broadly expressed labour rights that accrue to a variety of parties including but not limited to employees and their respective trade unions.[61]

The Constitution in general guarantees freedom of association, the right of employees to form and join trade unions and to strike, and the right of trade unions, employers and employers' organisations to bargain collectively.[62] As a results of some statutory intervention on this rights, minority trade unions are faced with some difficulties to exercise their rights as its clear from Labour Relations Act provisions that it unequivocally promotes the policy of choice of majoritarianism.[63] With this background, it become imperative to explore the scope and application of section 23 of the Constitution towards minority trade unions and how they could be protected from any exclusion caused as a result of threshold established in the workplace by majority trade unions and employers. The concept 'every trade unions' and interpretation of the LRA in the Constitutional context needs to be thoroughly revisited.

[58] Esitang and Van Eck *ILJ* (2016) 765.
[59] Grogan (2017) 4.
[60] Le Roux *CLL* (2002) 91.
[61] Currie and De Waal (2013) 473
[62] S 18 and 23 of the Constitution.
[63] S 14(1); 16(1); 18(1); 25(1) and (2); 26(1) and (2); 32(1) (a) and (b); 32(3) (a), (b), (c) and (d); 32(5) and 78(b) of the LRA.

2.2. The constitution and labour rights

The advent of the Constitution with an entrenched Bill of Rights has had a profound effect on South African legal system as a mechanism for citizen to challenge and actions by the state which infringed those rights.[64] The right of freedom of association, the right to organize and the right to engage in collective bargaining are separately enshrined constitutional labour rights.[65] The drafters of the Constitution were so determined to avoid a repetition that has resulted in the abuse of trade union by entrenching labour rights under Sections 18 and 23 of the Constitution. Section 18 provides for freedom of association in a general sense. Section 23 of the Constitution sets out labour rights in skeletal outline and goes to great lengths to protect, amongst other matters, the right to form and join a trade union, the right of every trade union to organise and the right of every trade union to engage in collective bargaining.[66] Even though these rights are inter-related, they have a significance role in labour law and relations. Woolman *et al* regard the constitutional right to freedom of association as constituting a "bedrock of the related right to organize, bargain collectively and in the case of workers to strike."[67] Grogan makes the sound point that freedom of association underpins the rights to assemble, demonstrate and picket.[68] Cheadle concurs with Grogan in so far as the right to organize and the right to collective bargaining being incidents of the right to freedom of association.[69]

Trade unions and employers' organizations, respectively, are entitled to determine their own programs and activities, to organize, to join federations and with the addition of employers, to engage in collective bargaining.[70] Minority trade unions are also permitted to acquire organizational rights which will allow them to exercise its rights to freedom of association and to organize its members. The reasons for the association may vary and be motivated by, amongst others, personal, collective, political or economic interests of each organisation.[71] In furtherance of the objectives set out in section 23 of the Constitution,

[64] Grogan (2017) 4.
[65] *Ibid.*
[66] Kruger and Tshoose *PER* (2013) 286.
[67] Woolman and Bishop (2015) 53.
[68] Grogan (2010) 21.
[69] Cheadle, Davis etal (2016) 18.
[70] Currie and De Waal (2015) 474.
[71] Haysom in Cheadle et al (2015) 13.

the Labour Relations Act provides a regulatory framework for collective bargaining and organisational rights in keeping with international and constitutional obligations.[72] The Constitution however does not prescribe that workers and employers must bargain collectively or suggest expressly that a refusal by one or other of the parties to bargain constitutes an infringement of the other's constitutional rights.[73] As pointed out by Cohen, trade unions are the vehicles for effective collective bargaining, while the Labour Relations Act unequivocally promotes the policy choice of majoritarianism.[74] This raises the question of the constitutional rights of minority trade unions to engage in collective bargaining and as a result, they are faced with number of statutory obstacles under the Labour Relations Act.

As pointed out by Brassey, the Labour Relations Act's manifestation of workplace majoritarianism allows for a situation where majority trade unions tend 'to connive with employers to raise or lower the drawbridge as considerations of expediency dictate'.[75] In the same expression, Du Toit et al stated that the effect of setting threshold by agreement is intended or otherwise, might be to block such unions from getting a foothold in a workplace and that may potentially violate the basic rights of employees and their trade unions.[76] Minority trade unions continue to be vulnerable as they cannot through the established threshold, exercise their rights as entrenched in section 23 of the Constitution.

The provisions of section 1 of the Labour Relations Act significantly refers to one of the primary objects that it aims to give effect to the rights conferred by section 23 of the Constitution. The desire for democracy in the workplace continues to increase, and it seems natural that the same principles found in the larger society should also apply to the workplace. The Constitution provides for limitation of the rights in the Bill of rights.[77] Any limitation of these rights must be justifiable, reasonable in an open and democratic society based on human dignity, equality and freedom and, must be necessary without

[72] Cohen *PER* (2014) 2210.
[73] Currie and De Waal (2015) 486.
[74] Ibid fn 1 at 5.
[75] Brassey (2006) A3-23.
[76] Du Toit, Godfrey *et al* (2015) 261. Also see section 23(2) of the Constitution, sections 4 and 8 of the LRA.
[77] S 36 of the Constitution.

negating the essence of the constitutional right. This section confirms that labour rights protected by the Constitution, 1996 are not absolute.[78] The limitation to the right to freedom of association, to organise and the right to engage in collective bargaining are severe limitations as a result of possible impact such limitations have on minority trade unions. According to Rautenbach the nature of the limitation includes the method used to limit the right.[79]

2.3. Interpreting the Labour Relations Act in conformity with the Constitution.

Every law, including labour rights should be interpreted and applied in accordance with the Constitution.[80] The Labour Relations Act[81] directs any person applying the Act to interpret its provision in compliance with the Constitution[82], to give effect to and regulate the fundamental rights conferred by the Constitution[83], to give effect to the obligations incurred by South Africa as a consequence of its membership of the International Labour Standards[84], to provide a framework for collective bargaining and the formulation of industrial policy by trade unions, employers and employers' organisation[85], and to promote orderly collective bargaining at sectoral level, employee participation in decision-making and the effect resolution of labour disputes.[86] Although the Constitution makes provision for "international law" to be considered when interpreting the law, it does not necessarily mean that we must just follow the international law and disregard the history and circumstances of our own labour systems. Consideration of international law in the course of interpreting the Bill of Rights is to ensure that the country's unique circumstances prevail in a context in which international law applies. It therefore means that where the provisions of the Constitution are clear on a matter, it is unnecessary to consider the implications of international law.

[78] Esitang and Van Eck *ILJ (*2016) 774 and 775.
[79] Rautenbach (2012) 311.
[80] S 8 of the Constitution.
[81] S 3 of the Labour Relations Act.
[82] S 39 of the Constitution.
[83] S 1(a) of the Labour Relations Act.
[84] S 1(b) of the Labour Relations Act.
[85] S 1(c) of the Labour Relations Act.
[86] S 1(d)(i)-(iv) of the Labour Relations Act.

The Constitution guarantees everyone the right to fair labour practices. The decision in *National Union of Metalworkers of SA v Bader Bop (Pty)*[87] is a clear illustration of the principle of constitutional supremacy. In Bader Bop (Pty) Ltd, the trade union represented a minority of the employer's workers wherein they sought organisational facilities including the right to shop steward representation in the workplace and, the employer refused. Subsequent to referral of the dispute to conciliation, the trade union gave notice of its intention to strike and the employer sought to interdict the strike because it was unlawful. The employer argued that the Act confers the right to workplace representation to majority trade unions only, and a minority trade union could not demand nor strike over workplace representation. The Labour Court refused to grant the interdict. On appeal, the majority of the Labour Appeal Court held that it was unlawful for a minority trade union to strike over organisational rights. The trade union appealed against the decision to the Constitutional Court and the Constitutional court upheld the appeal. Judge O'Regan gave the judgment on behalf of the 'majority'. Judge Ngcobo concurred on the order but not on the approach adopted by the majority. The court argued that the interpretation of the Labour Relations Act advanced by the majority in the Labour Appeal court amounted to a limitation of the right to strike. It argued that there was no justification given for the limitation and on that ground alone, the Constitutional court should have upheld the appeal. However, the court decided to approach the issue from a perspective of the interpretative principle of Constitutionality. That principle directs that whenever there are two conflicting interpretations of a statute, the one that accords more with the Constitution should be preferred unless there is a clear legislative intention to limit the right. The court had then to determine whether the Labour Relations Act could sustain a construction that did not offend the right to strike. It approached its task by first commencing with an analysis of section 23 of the Constitution. Section 2 of the Constitution stipulates that the Constitution is the Supreme law of the Republic and therefore, any law or conduct, which is inconsistent with it, is invalid and the obligations imposed by it must be fulfilled. In line with the provisions of Section 2 of the Constitution and the approach adopted by the Constitutional Court in Bader Bop (Pty) Ltd matter, it

[87] *National Union of Metalworkers of SA v Bader Bop (Pty) 2003 ILJ 305 (CC).*

becomes very critical to investigate the manner in which courts interprets the labour law legislations.

As pointed out at Du Toit *et al*, the interpretation of a labour statute has significant parallels with the interpretation of a Constitution containing an entrenched Bill of Rights.[88] Such interpretation must be capable to cover the future obligations and fit in the development within the labour fraternity. Traditionally, both the purpose and object of a statute had to be defined from a variety of internal and external textual aids while 'interpretation' clauses, where they did appear, generally amounted to no more than a list of defined terms. The Labour Relations Act has moved away from this tradition and has linked its interpretation with the primary objects of the Act.[89] The Constitutional Court in the case of *NEHAWU v UCT*[90] has noted that the above section is an expression to interpret the provisions of the Labour Relations Act purposively. Ngcobo J stated that: *"The declared purpose of the LRA 'is to advance economic development, social justice, labour peace and the democratization of the workplace.' This is to be achieved by fulfilling its primary objects which includes giving effect to section 23 of the Constitution. It lays down the parameters of its interpretation by enjoining those responsible for its application to interpret it in compliance with the Constitution and South Africa's international obligations. The LRA must therefore be purposively construed in order to give effect to the Constitution. This is the approach that has been adopted by the LAC and the Labour Court in construing the LRA".*[91]

Benjamin pointed out, in respect of the purposive approach to interpretation, that it requires a statutory provision to be construed broadly to give effect to the Constitution and to the underlying purpose of the Labour Relations Act.[92] The purposive approach meets many of the criticisms directed at the literalist-cum-internationalist method.[93] In essence, interpreting the Labour Relations Act in conformity with the Constitution demands an interpretation that gives effect to the fundamental rights set out in section

[88] Du Toit, Godfrey *etal* (2015) 78-82.
[89] *Ibid*.
[90] *NEHAWU v UCT 2003(2) BCLR 154 (CC).*
[91] Above paragraph 41.
[92] Benjamin *ILJ* (2004) 798-799.
[93] Du Toit (2015) 75-80.

23 of the Constitution, while section 3(b) states that the Act must be interpreted 'in compliance with the Constitution'. The rights set out in section 23 provides a primary framework within which labour legislation must be interpreted. The essential values under section 23 are fairness at the individual level, freedom of association and the right to organise, collective bargaining and the right to strike.[94]

In *S v Makwanyane*[95] the Constitutional Court explained the principle of proportionality and stated that "the limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values. Different rights have different implications for democracy, and in the case of our Constitution, for an open and democratic society based on freedom and equality, means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests."

2.4. The meaning of every trade union in the constitutional context

Historically, workplace was characterized by elements of inequality between black and white employees, non-recognition of Blacks trade unions by the employers and this was rooted from the legacy of apartheid.[96] Post 1994 era heralded the coming of a new labour dispensation in South Africa and this was followed by the reforming labour legislation as required by the requirements of the interim Constitution.[97] The rights contained under section 27 of the interim Constitution were not adequately expressed under the 1956 Labour Relations Act. The incorporation of labour rights under Chapter 3 of the interim Constitution created new imperatives for the regulation of the labour market[98]. Unlike their predecessor the drafters of the 1996 Constitution paid greater attention to the rights of trade unions.

[94] *Ibid*.
[95] *S v Makwanyane 1995 (3) SA 391 (CC).*
[96] Steenkamp, Stelzner *etal ILJ* (2004) 25, 943.
[97] Du Toit Godfrey *etal* (2015) 19.
[98] Currie & De Waal (2013) 12-13.

Section 23 gives every trade union to amongst others, organise and engage in collective bargaining.[99] This provisions of Section 23 included minority trade unions. The Labour Relations Act on the other hand reflects this approach by granting several 'organisational rights' to registered trade unions designed to ensure that they are able to compete for members, remain financially stable and perform day to day function but, refrains from enforcing a duty to bargain in good faith, or at all. Du Toit *et al* stated that organisational rights are aimed at assisting unions to build up sufficient bargaining power to persuade employers to negotiate.[100] The main aim of organizational rights can therefore be said to be the promotion of industrial self-government and collective bargaining[101]. The Labour Relations Act confers organisational rights only on trade unions which satisfy the required threshold of representivity. On the other hand, for minority trade union to obtain some of organisational rights it must be by consent from the employer or through industrial actions which in turn, they lack the necessary muscles.

2.5. The fundamental right to freedom of association and collective bargaining

Co-operation between trade unions, organised industry and governments was critical for protection of workers' rights under capitalism.[102] This sense prompted the founding fathers of the ILO to establish the institution's tripartite structure, which would provide labour, business and government with an equal say in the process of standard setting.[103] South Africa was a signatory to the Treaty of Versailles in 1919, which led to the establishment of the ILO and was regarded as the "genesis of the international labour dimension.[104]

About 170 years ago Alexis de Toqueville wrote that no one and especially no legislator can attack the freedom of association without impairing the very foundation of society'.[105] The preamble to the ILO's Constitution records that the principle of freedom of association is among the means of improving the conditions of workers and ensuring

[99] SS 23 (4)(b) and (5) of the Constitution.
[100] Du Toit, Bosch et al (2015) 250.
[101] Van Niekerk, Smit et al (2017) 397.
[102] Hepple (2005) 29-33; Cheadle Conradie et al (2017) 7-9.
[103] *Ibid.*
[104] Davidov (2016) 16.
[105] De Toxqueville (1835) 222. See also Currie and De Waal (2013) 396.

peace. In 1944, the ILO adopted the Declaration of Philadelphia, which affirms the principle of freedom of association as one of the fundamental principles one which the ILO is based, and as an essential precondition to sustained progress[106]. The right to freedom of association according to Van Niekerk *et al,* is internationally recognised and protected, and has historically been linked to other rights such as freedom of expression, freedom of assembly and the right to dignity[107]. According to Alex de Tocqueville, the right to freedom of association is almost inalienable in its nature as the right to personal liberty[108]. Freedom of association is in fact, indispensable to democratic and accountable government, for it provides the constitutional basis of the right to form and join political parties, to take part in the activities of pressure groups and to meet with others to discuss matters of common concern. However, freedom of association is important not only to facilitate effective participation in civil and political society. It is equally important in the field of social and economic activity and is particularly significant as a basis for securing trade union freedom from interference by the state on the one hand and the government on the other hand[109]. In Olivier's words, the right to freedom of association in labour relations can be defined as those legal and moral rights of workers to form unions, to join unions of their choice and to demand that their unions function independently[110]. This right is determined and influenced by binding international law, government policy and regulations and binding collective agreements[111].

2.6. The concept of freedom of association.

Freedom of association, one of the cornerstones of liberal democracy, stems from a basic human need for society, community, and shared purpose in a freely chosen enterprise. It is an essential feature of (liberal or social) democratic society, protecting individuals form the vulnerability of isolation and ensuring the potential of effective participation in society.[112] Freedom of association is enshrined in both the ILO Conventions 87 of 1948 and 98 of 1949 as well as in the African Chapter on Human and Peoples' Rights.[113] In South

[106] Van Niekerk, Smit et al (2017) 389.
[107] *Ibid*.
[108] Ewing (1995) 239.
[109] *Ibid*.
[110] Olivier (1999) 5-60.
[111] *Ibid*.
[112] *Lavigne v Ontario Public Service Employees Union (1991) 81 DLR (4th) 545*. See also Ewing KD (1995) 239.
[113] Article 10.1 of the African Charter on Human and Peoples' Rights.

Africa, freedom of association in general is enshrined in the Bill of Rights.[114] The Labour Relations Act devotes an entire chapter to freedom of association. Much of it was determined by the need to comply with the interim Constitution and the relevant ILO Convention.[115]

The Preamble to Convention No 87 of 1948 declares that the recognition of freedom of association is a means to improve the conditions of workers and to ensure labour peace.[116] The mandate and function of the Committee on Freedom of Association is to contribute to the effectiveness of the general principles of freedom of association as one of the primary safeguards of peace and social justice is consistent with the Preamble.

Article 2 of ILO Convention No 87 of 1948 provides content to the meaning of the term freedom of association and provides that 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 choice without previous authorisation. The Committee of Experts on the Application of Conventions and Recommendations considers the right to freedom of association to be linked to freedom of assembly, which constitutes a fundamental aspect of trade union rights.[117]. The Committee of Experts on the Application of Conventions and Recommendations makes it clear that the authorities in member states are to refrain from interfering with the right to freedom of association unless it is threatening to public order.[118] Where there is a dispute as to the interference with said right the member country's national courts shall be the appropriate institution to determine such disputes relating to a clash between the right to freedom of association and public order.[119]

Article 3 of Convention No 87 of 1948 on the right to freedom of association provides that workers' and employers' organisations shall have the right to draw up their constitutions

[114] S 18 of the Constitution.
[115] Chapter IV of the LRA.
[116] Convention No 87 of 1948, Convention No 98 of 1949 and the Workers' Recommendation No 143 of 1971 (Recommendation No 143 of 1971)
[117] Report of CEACR (2013) 2 available at www.ilo.org/wcmsp5 /groups/public/@ed_ norm/.../ wcms_205472.pdf
[118] Coding CEACR Reports on ILO Convention No. 87 and 98: A proposed Methodology: Irini Georgiou and Lucio Baccaro- January 2006
[119] *Ibid.*

and rules to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.[120] It is submitted that the emphasis on "full freedom" to elect representatives should entail that the right is to be exercised without limitation by either a law or collective agreement. Convention No 98 of 1949 does not provide a definition for collective agreement. However, the Preamble to Convention No 98 of 1949 affirms the onus on the ILO to advance world programmes which will achieve the effective recognition of collective bargaining among member states.[121]

Freedom of Association including the right to form and join unions for the protection of one's rights and interest has been recognised as one of fundamental human rights. This was evident when the Constitution of the ILO, revised in 1946, affirms that ' labour is not a commodity', that 'freedom of expression and of association are essential to sustained progress', that ' poverty anywhere constitutes a danger to prosperity everywhere' and that ' all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity'.[122] Freedom of association right is critical and fundamental because it is only through their exercise that workers and employers can give voice to their legitimate occupational interest at the workplace.[123]

With the above in mind, it is therefore necessary to investigate the position on the international level, looking at the right to freedom of association. Furthermore, it becomes pivotal to reconsider those conventions that are aimed at promoting freedom of associations and collective bargaining by trade unions. We will also reflect on how South Africa as a member state have adhered to the conventions in ensuring that the right of freedom of associations by employee, employers and trade unions are attainable.

[120] *Ibid*.
[121] ILO Declaration of 1944 para III(e).
[122] Philadelphia Declaration, 1944.
[123] ILO (2013) 7.

2.7. The ILO Convention

As a result of Declaration of Philadelphia, the ILO adopted two main instruments aimed to protect the freedom of association of workers being, the Freedom of Association and Protection of the Right to Organise Convention, 1948[124] and the Right to Organise and Collective Bargaining Convention, 1949[125]. These conventions contain the most comprehensive set of standards on freedom of association to be found on international level. The ILO has highly developed system of supervisory machinery and procedures with which to promote them and to oversee their application[126]. The standards on these subjects are critical to the ILO because its very existence relies on the existence of free, independent organisations of employers and workers established through the exercise of associational rights. A state which ratifies these conventions is obliged to take such action as may be necessary to make effective its provisions, although, at certain intervals, it is open to state to denounce a previously ratified Convention[127].

2.7.1. Freedom of Association and Protection of the Right to Organize Convention, No. 87 of 1948

Following the Declaration of Philadelphia the ILO adopted Freedom of Association and Protection of the Right to Organise Convention. The Convention confines itself to defining very clearly certain fundamental principles, which in the view of the International Labour Conference should enable both employers and workers to exercise their right to organise freely. The Convention set forth the right for all workers and employers to establish and join organisations of their own choice without been required to obtain authorization[128]. According to the Convention, workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisation of their own choosing without previous authorisation.

[124] Convention No.87.
[125] Convention No. 98.
[126] Von Potobsky *ILR* (1998) 221.
[127] Art 19(5)(d) of the ILO Constitution. See also Deakin and Morris Labour Law (2009) 94.
[128] Article 2 above.

Organisations should in terms of the Convention, have full freedom to develop their own constitution and rules and their own programs of activities, provided that they respect the law of the land. Articles 2 and 3 of Convention No 87 of 1948 are supplemented by Article 8(2) which provides that the law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this convention.[129] The Convention does not expressly include a right not to join and organise or a right to strike. In terms of Article each member state of the ILO for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise. it is clear that whatever law any member state elects to promulgate it may not limit the guarantees of the right to freedom of association more than it is necessary.

2.7.2. Right to organise and Collective Bargaining Convention, No. 98 of 1949

A year later after the adoption of the ILO Convention no. 87, the International Labour Conference took second step by adopting the Right to Organise and Collective Bargaining. The Convention complemented and supplemented the ILO Convention no. 87. It contains further safeguards concerning the right to organise and makes provision for the development of the machinery of collective bargaining. In terms of this Convention, workers shall enjoy adequate protection against act of anti-union discrimination in respect of their employment.[130] The Convention requires machinery appropriate to national conditions to be established, where necessary, for the purpose of ensuring respect for the right to organise as defined in the preceding Articles.[131] The Convention further requires appropriate measures to be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreement.[132]

[129] Article 8.
[130] Article 1(1).
[131] Article 3.
[132] Article 4.

2.8. The extent to which South Africa has adhered to the ILO

In South Africa post 1994, the ILO has been recognized as the pre-eminent international institution that shapes international labour standards and the yardstick in developing domestic labour legislations. The Constitution of the Republic of South Africa expressly recognises international law as a foundation of democracy and it accords international law a particular status and recognises the relevance of customary international law as one of the sources of our law.[133] Section 39 of the Constitution places an obvious premium on the value of international law in relation to the interpretation of the Bill of Rights. While a court may have regard to comparable foreign case law, it must have regard to public international law.[134] The Constitutional Court has affirmed that section 39(1) requires both instruments that are binding on South Africa and those to which South Africa is not a party to be used as tools of interpretation.

Sections 1 and 3 of the LRA extends specific recognition to the international law obligations incurred by South Africa by virtue of its membership of the ILO. Section 1 of the LRA provides among others that the purpose of this Act is to advance economic development, social justice, labour peace and the democratization of the workplace by fulfilling the primary objects of this Act, which are to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation. The Labour Court as noted by Van Niekerk *et al* has not limited its point of reference to conventions and recommendations[135].

The LRA adhering to their international obligation protects the right to freedom of association and the right to organise in two ways. First Chapter II of the Labour Relations Act extends specific rights and protections to workers and to employers. Secondly, Chapter III extends organisational rights to registered trade unions that meet representativeness thresholds. Although these extensions were to give effect to the constitutional rights under section 18 and 23, they pose a serious challenge to the provisions the ILO. Under Convention No 87 of 1948 notably there is no articulation that

[133] SS 39(1)(b) and 232, 233 of the Constitution.
[134] Van Niekerk, Smit et al (2017) 32-34.
[135] *Ibid.*

the right to freedom of association and to organise are to be subject to a particular threshold for them to be acquired and enjoyed by trade unions.

2.9. Conclusion

South Africa's constitutional democracy is built on a number of cornerstones. One important cornerstone is that of human dignity, the achievement of equality and the advancement of human rights and freedoms.[136] The Constitution under section 23 constitutionalise the rights of every trade union which was a serious constrain in the past. Trade unions, mostly Black trade unions, received some hurdles in exercising their rights in the interests of their respective members. The question of inequality which was more visible in the society also took its course in the labour relations where minority trade unions were victims of their circumstances. Despite the fact equality before the law is a fundamental right which is enshrined in the Constitution[137] and everyone is equal before the law, has the right to equal protection and benefit of the law, equality before the law for all trade unions is often not seen in practice.[138]

Section 23(5) of the Constitution grants every trade union the right to engage in collective bargaining. This would imply that there is, constitutional speaking, a corresponding obligation on the other party in the collective bargaining process to engage in collective bargaining.[139] This does not come without hurdle to minority trade unions as the Labour Relations Act envisages the establishment of workplace forum on the initiative of a union(s) with majority support in workplaces. This in my view go against the principle of equality and the provisions of section 23 of the Constitution entrenched with the purpose of ensuring that the democratic principle prevails in the labour context where trade unions should be treated equally in the workplace. The constitutional right to freedom of association in terms of section 18 confirms that it applies to “everyone” which includes minority trade unions. The labour rights in section 23 of the Constitution makes no provisions for any limitation on the enjoyment of these rights. It is clear that the Constitution does not endorse majoritarianism but allows the minority trade unions the

[136] S1 of the Constitution.
[137] S9 of the Constitution provides that "everyone is equal before the law and has the right to equal protection and benefit of the law".
[138] Kruger and Tshoose *PER* (2013) 290.
[139] Sewerynski *EJCL* (2007) 5.

right to voice their opinion. Therefore, any provisions of the Labour Relations Act which provides for the limitations on labour rights must comply with section 36(1) of the Constitution.

Section 23(5) of the Constitution provides that national legislation may be enacted to regulate collective bargaining. The Labour Relations Act was enacted to give effect to this right. However, the South African system of collective bargaining and the statutory organisational rights dispensation as contained in the Labour Relations Act is possibly in contradiction to the constitutionally guaranteed right to freedom of association and the right to organise within the context of constitutional democracy. Freedom of association and the right to collective bargaining are fundamental human rights at workplace that form an integral part of democracy. They underpin civil liberties and guarantee protection against discrimination, interference and harassment. These rights also play a pivotal role in efforts to establish sustainable economic and social development, help connect social goals and the demands of the globalised economy.[140] South Africa should be commended for its great success of including both freedom of association in the Constitution and the LRA.[141] However, the manner in which representatives threshold are structured, remains a huge influence on collective agreements which continues to abuse the rights of minority trade unions.

[140] ILO Fact Sheet- Freedom of Association and the Right to Collective Bargaining: Africa (2004) 1.
[141] S 23(5) of the Constitution, Preamble and s1 of the LRA.

CHAPTER 3

A COMPARATIVE PERSPECTIVE ON THE MEANING OF 'WORKPLACE' AND THE POSSIBLE IMPACT OF LIMITATIONS

3.1. Introduction

The previous abuse of trade unions led to a unique entrenchment of labour rights under Section 23 of the Constitution. Subsequent thereto, the LRA was promulgated in furtherance of section 23(5) of the Constitution with the purpose of providing a regulatory framework for collective bargaining in South Africa[142]. At the center of Section 23 of the Constitution is the workers fundamental right to freedom of association which is more close to collective bargaining. The right to organise and establish trade unions is expressed in the Constitution and to this end, the LRA recognises both trade unions and employers' organisations to provide them with specific organisational rights as well as the means to create forums within which bargaining processes can take place.[143] In *Hospersa v Zuid-Afrikaanse Hospitaal*[144] the arbitrator suggested that organisational rights are meant to enable unions 'to get their foot in the door'. Du Toit *et al* also suggested that organisational rights are aimed at assisting unions to build up sufficient bargaining power to persuade employers to negotiate.[145] Mischke expands on this idea and argues that organisational rights make it possible for a trade union to build up, consolidate and maintain a power-base of sufficient strength among the employers' employees and, it is only once the union has attained sufficient strength that it can exercise sufficient economic power on the employer to compel the employer to bargain on wages and terms of conditions of employment.[146] Organisational rights serve the purpose of enabling start-up registered trade unions that may relatively be unrepresentative to be able to recruit

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[142] S 1(c)(i) of the Labour Relations Act 66 of 1995.
[143] Grogan (2017) 380.
[144] *Hospersa v Zuid- Afrikaanse Hospital GA 637* (unreported CCMA award, 3 February 1997) cited in Du Toit, Godfrey et al (2015) 250. See also Van Niekerk, Smit et al (2015) 373
[145] Du Toit, Godfrey et al (2006) 250.
[146] Mischke *CLL* (2004) 52.

and organise to reach whatever threshold level is required for full recognition status in the workplace.[147] Without organisational rights trade unions will be faced with hurdles and be unable to exercise their constitutional rights and to advance the need of their members. However, the admission of trade unions to a bargaining council is determined by satisfying a set threshold to show the influence the trade union has in the workplace.[148] The central point of this research is to revisit the interpretation of 'workplace' by the courts as reasonable and justifiable limitation to the right to strike. Further, the research examines whether the Constitutional Court properly applied the international labour standards and the provisions of Section 36 of the Constitution in interpreting the definition of 'workplace' as reasonable and justifiable limitation and, the impact thereof on the future of collective bargaining and the rights of minority trade unions.

3.2. The definition of 'Workplace'

The term "workplace" is defined by the LRA as the place or places where the employees of an employer work. If an employer carries on two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes a workplace. [149]In addition thereto, section 213 of the LRA defines "workplace" in relation to the public service for the purposes of collective bargaining and dispute resolution, as the registered scope of the Public Service Co-ordinating Bargaining Council or a Bargaining Council in a sector in the public service, as the case may be; or for any other purpose, a national department, provincial administration, provincial department or organisational component contemplated in section 7(2) of the Public Service Act, 1994 (promulgated by Proclamation 103 of 1994), or any other part of the public service that the Minister for Public Service and Administration, after consultation with the Public Service Co-ordinating Bargaining Council, demarcates as a workplace. In all other instances means the place or places where the employees of an employer work. This could mean if an employer carries on or conducts two or more operations that are

[147] Esitang and Van Eck "Big kids on the block dominating minority trade unions: Reflections on threshold, democracy and ILO Conventions" (2015) 24.

[148] Paragraph 6.2 of the Constitution of the General Public Service Sectoral Bargaining Council (GPSSBC) and Chapter 6 at 4.2 on the discussion of membership to one of the public sector bargaining councils.

[149] *Association of Mineworkers and Construction Union v Chamber of Mines (2017) 38 ILJ 831 (CC)* at paragraphs 56 and 57.

independent of one another by reason of their size, function or organisation, the place where employees work in connection with each independent operation constitutes the workplace for that operation. This definition, specifically subsection (c) thereof, envisages the existence of more than one workplace where employees work in connection with each independent operation, and is applicable in this case.

The 'workplace' definition is clear on public sectors as the state is the employer and not the different national or provincial departments or individual departmental offices in which employees work. [150] Unfortunately, the definition requires careful approach on private sectors as stated within the provisions of Section 213 of the LRA. With regard to private sectors, 'workplace' is defined as the place or places where the employees of an employer work. It further states that if an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, **the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation**. Private sector is composed of various employers with various employers' organisations and sectoral bargaining councils. The argument preferred on state employees will not carry the same weight with those in the private sector.

3.3. Constitutionality of 'workplace' as reasonable justifiable limitation of minority trade unions fundamental rights

The right to freedom of association and other fundamental rights such as the right to engage in collective bargaining and the right to organise are inextricably interwoven. All these rights are protected by section 23 of the Constitution. In addition thereto, the Constitutional right to freedom of association does not provide circumstances under which the right may be limited and neither does it provide anywhere that the enjoyment of this right is subject to the numerical strength of a trade union. The LRA was enacted to give effect to these rights and it established limitations in so far as it has a provision which sets thresholds of representivity. If any labour practice infringes this right it is unlawful and unconstitutional, subject to the application of section 36(1). Section 36 of the

[150] *Member of the Executive Council for Transport: Kwazulu-Natal & others v Jele (2004) 25 ILJ 2179 (LAC)* at paragraphs 38 and 39.

Constitution read in conjunction with sections 7(3), 37 and 39 thereof, is the main provision that determines the degree to which a right entrenched in the Bill of Rights can be limited. In terms of section 36(2) of the Constitution any limitation of an entrenched right in the Bill of Rights should occur in terms of section 36(1) of the Constitution.[151]

The provisions of section 39(2) of the Constitution are important when it comes to the assessment of the tenability of definition of 'workplace' in the Labour Relations Act. This section provides that when interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purpose and objects of the Bill of Rights. Section 36 of the constitution provides that in order to determine whether a factual limitation is reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality, certain factors must be taken into account.[152] These factors are the nature of the right involved, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and alternative less intrusive ways to limit the right. Consideration of these factors will facilitate the process to decide whether the factual limitation is constitutionally justifiable.

The limitation to the right to freedom of association, to organise and the right to engage in collective bargaining are severe limitations bearing in mind the possible impact they have on minority trade unions. According to Rautenbach, the nature of the limitation includes the method used to limit the right.[153] Currie and De Waal contend that there needs to be a good reason for the infringement. It remains to be seen whether the provisions of the Labour Relations Act that empower parties to collective agreements to set thresholds for the enjoyment of organisational rights endow a good reason for the exclusion of minority trade unions from organisational rights.[154]

[151] *Ibid*.
[152] *Ibid*.
[153] Currie and De Waal (2013) 162-169.
[154] *Ibid*.

I reiterate that Convention No 87 of 1948 makes no provision that the right to freedom of association and to organise are to be subject to a particular threshold for them to be acquired and enjoyed by trade unions. The issue of thresholds does not feature at all when the ILO deals with promotion of the rights to freedom of association and the right to organise. As stated above, Article 3 of Convention No 87 of 1948 provides amongst others that workers' and employers' organisations shall have the right to draw up their constitutions and rules, **to elect their representatives in full freedom**……The words "to elect representatives in full freedom" advocates that such right must be exercised without limitation by either a law or collective agreement. The provision does not mention that the enjoyment of the right to elect representativeness is subject to a particular level of representivity being attained. Further, the word "without distinction" in Article 2 of ILO Convention 87 of 1948 emphasize the universal scope of the principle of freedom of association and that the right must be guaranteed without distinction or discrimination of any kind.[155] Having said that, it is arguable on whether the establishment of collective agreements in the Labour Relations Act and the provisions of Section 36 of the Constitution are consistent with Articles 2 and 3 of the ILO Convention No 87 of 1948. The ILO is careful not to prefer one model of collective bargaining over another.[156] Although the ILO regards the freedom of employers and trade unions to enter collective agreements in order to regulate their relationship as a guarantee of freedom of association,[157] it remains consistent that the fact of establishing in the legislation a percentage in order to determine the threshold for the representativeness of organisations and grant certain privileges to the most representative organisations (in particular for collective bargaining purposes) does not raise any difficulty provided that the criteria are objective, precise and pre-established, in order to avoid any possibility of bias or abuse.[158] In this regard the Committee on Freedom of Association held that members of the unrepresentative trade unions are not be denied representation in the grievance processes of members.

[155] General Survey (1994) 23 para 45.
[156] Digest of Decisions (2006) para 318.
[157] Digest of Decisions (2006) para 178.
[158] Digest of Decisions (2006) para 356. According to Esitang and Van Eck ILJ (2016) 776 the position of the CFA on this is clear and where thresholds set in legislation meet these criteria, such would be easily acceptable.

3.4. Implications 'workplace' definition on S 23 (1)(d) of the LRA and minority trade unions.

In dealing with this issue, Grogan[159] refers to the matter of *OCGAWU v Volkswagen of South Africa (Pty) Ltd.*[160] Grogan asserts that the commissioner in this case noted that the legislature recognised that the term workplace could have a different meaning than that of the statutory definition as quoted above, where the context indicated to the contrary. The commissioner further held that if the term, when used in chapter III of the LRA is to be given the statutory meaning, this would lead to absurdities. The commissioner held that for at least the implementation of the provisions of the LRA, the measure should be the level of representivity of a trade union within a bargaining unit. The commissioner further held that the legislature's intention could not have been to promote majoritarianism so far as to diminish the rights of unions which have established majority status in a particular bargaining unit. He further contends that a threshold of a majority in the workplace as a whole would constitute a radical departure from the rights won by unions in their historical bargaining constituencies.

The Constitutional Court in *AMCU* matter held a different view from *OCGAWU* case on what constitutes 'workplace' by refusing to apply the definition literally and held that 'workplace' is not the place where any single employee works but rather where the employees of an employer collectively work.[161] The focus of the definition was solely on the collective with location being relatively immaterial and functional organisation being the most material signifier.[162] The court upheld finding that having regard to the organisational methodology and practicalities of each mining company, members of the Chamber of Mines, each company constituted a single industry-wide workplace rather than the individual mines at which the applicant union had majority.[163] In line with this interpretation by the Constitutional Court, collective agreement, which included an undertaking by the unions not to strike, was thus extended in terms of Section 23(1)(d) to AMCU members at the five mines where AMCU has majority representation. This

[159] Grogan Collective Labour Law 333.
[160] *OCGAWU v Volkswagen of South Africa (Pty) Ltd 2002 23 ILJ 220 (CCMA).*
[161] Van Niekerk, Smit e tal (2017) 398.
[162] *Ibid.*
[163] *Ibid.*

Constitutional Court approach promotes a system of collective bargaining in which the position of majority unions is enhanced while minority unions are marginalised.

As already stated above, the right to freedom of association is internationally recognised and has historically been linked to other democratic rights such as freedom of expression. In addition thereto, freedom of association and the right to free collective bargaining are well established as fundamental human rights. The study compared the approach taken by Constitutional Court and other countries. Canada has traditionally been a major participant in both of these organisations and has actively helped develop many of the international human rights standards that give meaning to freedom of association and the right to collective bargaining. On one hand, it is standard principle of American Labour Law, incorporated in the fundamental National Labour Relations Act[164] that an employer must bargain with the union representing majority of employees in the appropriate bargaining unit and may not deal with any other union.[165] If there is no dispute on issue, the employer may simply deal with the appropriate union. In case of dispute, the National Labour Relations Board which is a federal administrative body must determine which union, if any, represents a majority of workers. This is normally done through an election in the appropriate bargaining unit as determined by the board. The size of the bargaining unit depends on the traditions of the industry, commonalty of interest, the wishes of those involved, practical considerations such as distance. The American model of bargaining is more or less similar to the one in South Africa except that the Americans has a provision for the intervention of the National Labor Relations Board which is a federal administrative body to determine which union represents a majority of workers where a dispute arise.

One of the central problems inherent in collective bargaining is defining the relative rights of individuals and minority trade unions. Both Sweden and the United States have confronted this problem in its most insistent form, for in both countries government relies upon free collective bargaining as an instrument for regulating labour market.[166] Although

[164] National Labor Relations Act (Wagner Act) 49 Stat.449 (1935), as amended by the Taft-Hartley Act §§8(a) (5), 9(a), 29 U.S.C. §§158(a) (5), 159(a) (1982) hereinafter referred to as the Wagner Act.
[165] Herzog *AJCL* (1986) 319.
[166] Summers *YLJ* (1963)34, 320.

both countries by statute protect the right to organise and bargain collectively, both require recognition of unions and compel negotiations and, make collective agreements legally enforceable.[167] On the other hand, both countries have rejected the simple solution of giving the organisation total dominance and wholly submerging the individual.[168] Deeply rooted beliefs in the importance of the individual, and the desire to preserve some measure of independence have compelled the law to confront the difficult problem of accommodating the rights of the individual and those of collective parties. The efforts in the two countries to resolve this problem provide interesting parallels and contrasts which illuminate the problem and suggest the range of possible solutions.

In the United States, the dominant pattern of collective bargaining is between a union and single employer.[169] The problem of individual rights is therefore conceived solely in terms of employee union relation. The dominant pattern of bargaining in Sweden is collective on both sides, with employers represented by national employers association organised along industrial lines.[170] A single association may bargain for hundreds of employers, many of whom are individual entrepreneurs with less than a dozen employees. However, the law treats unions and employers' associations as full equivalents wherein both are protected in their right to organise by a statutory provision guaranteeing the right of association with the binding effect of collective agreements defined in terms of the obligations of associations and members of associations. As a result, the problem of individual rights is more broadly conceived and the legal rules governing the status of the individual under the collective agreement are equally applicable to employers and employees. In defining the relative rights of individual and the organisation, it is essential to distinguish between the making of a collective agreement and its administration. The first consists of establishing the rules governing the terms and conditions of employment whereas the other focus on interpreting and applying those rules. The law in both Sweden and United States has recognised this distinction. The power of the union to make an agreement binding the individual and its

[167] *Ibid*.
[168] *Ibid*.
[169] The National Labor Relations Act makes no explicit provision for multiple-employer units but states that the unit appropriate shall be the "the employer unit, craft unit or subdivision thereof- Section 9(b), 61 Stat.
[170] *Ibid.*

power to settle the individual's claim arising under the agreement are not the same. Defining the power of the organisation to make collective agreement binding on individual presents two questions, firstly, who is governed by the collective agreement, and secondly, what freedom does the individual who is governed retain to contract on his/her own behalf

In the United States, the basic theory is expressed in Section 9(a) of the National Labour Relations Act.[171] The collective agreement negotiated by the majority union binds all employees in the unit, members and non-members alike. The union in majority retains its status and the Employer is compelled to recognise it as the sole representative. The majority union is thus vested by statute with exclusive authority to speak for and bind individuals. In Sweden the Collective Contract Act provides that the union bargain only for its members and its collective agreement creates rights and duties only or its members. Employees who do not belong to the union stand beyond the bounds of the collective agreement and their rights and duties are based on their individual contracts of employment. The Swedish theory proceeds from the premise that individuals cannot be contractually bound without their consent.

3.5. Conclusion

It is clear the definition of 'workplace' in section 213 of the LRA intend to address, amongst others, the purpose collective bargaining and dispute resolution both in public and private sector. However, the distinction must be clearly drawn between the public and private sector as defined in Section 213 of the LRA. The provisions of Section 23(1) (d) of the LRA has detrimental effect to minority trade unions and promotes a system of collective bargaining in which the position of majority unions is enhanced while minority unions are marginalised. Pluralism and diversity, which should be respected in a democracy, are being stifled through the application of Section 23 (1) (d) of the LRA

[171] S 9(a) of the National Labour Relations Act provides that the union selected by the majority of the employees in the bargaining unit shall be the exclusive representative of all employees in the unit.

The Constitutional Court considered the definition of a 'workplace' AMCU matter[172] and held that the individual operations where AMCU had the majority of members would be individual workplaces only if these were independent operations.[173] However, the Constitutional Court held that the five individual mines in which AMCU had majority membership operated integrally as a single workplace and each of the mines was not an independent operation, as argued by AMCU.[174] The Constitutional Court unequivocally endorsed the notion of majoritarianism within the context of collective bargaining in AMCU case. However, the Constitutional Court has also unequivocally confirmed the principle on the protection and the promotion of the right to freedom of association of minority trade unions.789

Du Toit *et al* state that the independence referred to in the private sector definition of workplace may be established "with reference to one or more criteria of size, function or organisation where a business has various operations at different sites.[175] This definition has been criticised as being too wide and vague with Cheadle stating that it is evident from this definition that a workplace can be made up of one or more places of work and that each case will depend on its own facts[176]. I concur with both Du Toit and Cheadle that disputes about what constitutes a 'workplace' must be determined with reference to the particulars of each case. The term size must not only be limited to absolute size, such as the number of employees, but also to relative size or financial turnover.[177] Van Eck argues that the Constitutional Court cases of AMCU and Bader Bop are not finely attuned to one another as one endorses majoritarianism and the other recognises minority trade unions.[178] He further mentions that there is a significant distinction to be drawn between the Constitutional Court in Bader Bop and AMCU. In Bader Bop

[172] Chapter 1 page 6 above: *Association of Mineworkers and Construction Union v Chamber of Mines (2017) 38 ILJ 831 (CC).*
[173] *Association of Mineworkers and Construction Union v Chamber of Mines (2017) 38 ILJ 831 (CC)* at paragraphs 27 and 30.
[174] *Ibid*.
[175] Du Toit Godfrey *et al* (2015) 256.
[176] Cheadle (1994) 169 75.
[177] *Ibid*
[178] Van Eck ILJ (2017) 1507-1509.

CHAPTER 4

CONCLUSION AND RECOMMENDATIONS

4.1 Introduction

The founding principles of the Constitution set positive standards with which all law in South Africa must comply in order to be valid. These founding principles are the prism through which the Constitution should be viewed as they include the founding principles of human dignity, the achievement of equality[179] and the advancement of human rights and freedoms.[180] The supremacy of the Constitution and the rule of law[181] are further important provisions for the purposes of this research. Section 7(1) of the Constitution further affirms the democratic principles and lays the foundation for the interpretation of the fundamental rights in Chapter 2 of the Constitution by stating: "The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom." The right of freedom of association, the right to organise and the right to engage in collective bargaining are separately enshrined constitutional labour rights. As confirmed by Van Niekerk *et al* constitutional rights affect labour legislation and they perform a test of the "the validity of the law seeking to give effect to fundamental labour rights; interpret legislation enacted and to develop common law". These labour rights guarantee that the voice of workers is heard in the workplace.[182]

4.2. Recommendations.

At issue in *AMCU v Chamber of Mines*, amongst others was whether prohibition of strike in terms of S23(1)(d) to the workers at five gold mines where AMCU was in the majority was constitutional if 'workplace' included all the mines of member companies. The Constitutional Court in dealing with this issue concentrated only on the merits and constitutionality of majoritarianism which is decision making by majority of the members

[179] S 9(1) of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law.
[180] S 1(a) of the Constitution.
[181] S 1(c) of the Constitution.
[182] Van Niekerk Smit et al (2015) 38.

of a defined collective unit or constituency[183]. This approach by the Constitutional Court provides a simple solution of giving the majority trade unions total dominance on constitutional rights of employees and wholly submerging the individual employees' constitutional rights. Therefore, it becomes pivotal that we reflect on the importance of the rights of an individual employee at the workplace and the desire to preserve some measure of independence without undermining the constitutionality of collective bargaining.

The Constitutional Court did not comment on whether limitation of the right to strike by the definition of 'workplace' is in line with the provisions of Section 36 of the Constitution. In fact, the court did not pay much attention on the importance and the nature of the right to strike but concentrated on what it said as "at the core of AMCU's challenge", namely majoritarianism, which is the decision by majority of the members of a defined collective unit or constituency.[184] The court focused on the merits and constitutionality of majoritarianism[185] and explained that the purpose of majoritarianism is to promote "orderly and collective bargaining" and the democratisation of the workplace[186]. Majoritarianism discourages "a proliferation of trade unions in one workplace or in a sector" and it enhances Employees' bargaining power through a single representative bargaining agent"[187] The court also pointed out that using majoritarianism as an instrument to promote orderly collective bargaining in various provisions of the Labour Relations Act. The Constitutional Court did not pay attention to the purpose of prohibiting strikes in a collective agreement for the duration of the agreement[188]. It also did not discuss to what extent such a purpose would be served by extending the agreement to non-parties. What is reasonable and justifiable in one instance is not necessarily reasonable and justifiable in another. It is submitted that any factor in the non- exhaustive list in section 36(1) of the Constitution will still need to be viewed in the context of the circumstances of the society the Constitution envisages. Therefore, it is critical that the

[183] Rautenbach *TSAR* (2017) 859.
[184] *Ibid* 861 (Paragraphs 42, 43 and 44 of the Constitutional Court Judgment).
[185] *Ibid*.
[186] *Ibid*
[187] *Kem-Lin Fashions CC v Brunton* 2001 ILJ 109 (LAC).
[188] *Ibid*.

significant role of international labour standards within the context of the right to freedom of association and the impact of Section 23 (1) (d) of the LRA be considered.

4.3. Conclusion

It is my argument to revisit the provisions of the LRA on setting of thresholds of representivity for the acquisition of organisational rights and the related amendments to verify if they are in line with the democratic model envisaged by the Constitution and the international labour standards which recognise the rights to freedom of association of every employee including employees in minority trade unions. The Constitution provides that national legislation may be enacted to regulate collective bargaining.[189] The LRA was enacted to give effect to this right. However, the South African system of collective bargaining and the statutory organisational rights dispensation as contained in the LRA possibly contradicts with the constitutionally guaranteed right to freedom of association and the right to organise within the context of constitutional democracy.[190] The exposition of these issues ultimately demonstrates that inasmuch as organisational rights are critical to support a trade union in collective bargaining they are equally important in relation to the protection of the right to freedom of association for sufficiently representative and minority trade unions. However, Sections 18 and 23 of the LRA are often used as instruments that provides for the dominance of the majority trade union in the workplace to the detriment of the right to freedom of association for unrepresentative trade unions. This possibly contradicts with the constitutional framework and international law which is accommodating the interests of minority entities and provides for diversity to at least permit minority trade unions to represent their members. Placing organisational rights under the collective bargaining dispensation creates the impression that collective bargaining parties have the freedom to agree to exclude unrepresentative trade unions from acquiring organisational rights. This is what is regarded as a complete disconnect between the spirit and purport of the Constitution as often the application of majoritarian principles are abused by setting thresholds very high.

[189] S 23 (5) of the Constitution.
[190] SS 18 and 23(4)b of the Constitution.

The model of democracy as envisaged in the Constitution is not one that promotes exclusivity. However, the effect of section 18 of the LRA which allows threshold agreements, continues to foster such exclusivity in the workplace. This situation has resulted in industrial democracy being a terrain of endless conflict between employers and labour and amongst trade unions themselves. As a result, the rivalry between unions in workplaces is exacerbated. The original intent behind the organisational rights of trade unions and their right to strike was to bolster their capacity to bargain collectively. It was meant to get them to focus on collective bargaining gains they can secure and to bargain more effectively. However, the current framework that favours majority trade unions has the effect of minority trade unions generally finding their existence threatened and their being systematically excluded from the acquisition of organisational rights. These collective agreements creates a hurdle in respect of the provisions of the LRA that seek to promote industrial democracy, the enjoyment of the rights to freedom of association, to organise and to engage in collective bargaining.

The constitutional right to freedom of association in terms of Section 18 confirms that it applies to **'everyone'**. The words '**everyone'** in Sections 18 and 23 of the Constitution are of significance importance. Everyone includes minority trade unions. The labour rights in Section 23 of the Constitution do not stipulate a limitation on the enjoyment of these rights on the basis of size or numerical strength. The provisions of the LRA which provides for the limitations on labour rights need comply with section 36(1) of the Constitution. Limiting the labour rights of minority trade and creating a conducive environment for a "winner take all" system without taking cognisance of this constitutional framework is a disconnect for workplace democracy. The Constitutional Court has given clear direction that it recognises minority interests and where it is justifiable will protect and promote them even if means going against majority interest. The requirement is that the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Currie and De Waal, in explaining this provision, state that the law must be reasonable in the sense that it should not invade rights any further than

it needs to in order to achieve its purpose and that there is sufficient proportionality between the harm done by the law and the benefits to be achieved.[191]

The drafters of the LRA resolved that statutory organisational rights accrue to majority and sufficiently representative trade unions per 'workplace'.[192] An employer can control more than one workplace or bargaining constituency. The question remains as to what will constitute workplace in the given circumstances. Corazza and Fergus argues that the definition of workplace as it currently stands has implications for organisational rights state that unions with significant percentages of workers as members at a particular operation may be precluded from accessing organisational rights.[193]. Further, they caution that although majoritarianism has certain value, it should not be regarded as an end in itself and majority trade unions should not operate unsupervised.[194] The arguments of Corazza and Fergus are relevant in circumstances where majority trade unions pursue collective agreements that deny the exercise of the right to freedom of association of minority trade unions. The courts should also refrain from intervening in collective bargaining.[195]

I agree with Botha and Germishuys that the extent to which the courts may interfere in the process of collective bargaining to bring it within the ambit of the regulatory framework provided for in the LRA will depend on specific circumstances of each case.[196] They further argue that the courts must intervene where necessary and by facilitating the regulation of collective bargaining the courts will give effect to not only the purpose of the LRA but also to the constitutional right to fair labour practices as one of the primary objects of the LRA is to give effect to and regulate the fundamental rights conferred by

[191] Currie and De Waal (2013) 162. See also Woolman and Botha in Woolman et al (2016) 34:67-68.
[192] Sections 12-16 of the Labour Relations Act.
[193] Corazza and Fergus (2015) 88.
[194] *Ibid.*
[195] Fergus 2016 ILJ 1537-1538.
[196] 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).

s23 of the Constitution.[197] Esitang made recommendations on redefining the concept of workplace as follows:[198]

"The current definition of "workplace" as per section 213 of the LRA of 1995 in the context of the public service reflects upon two types of purposes. The purposive approach in defining the workplace can also be appropriate for the private sector definition. In the public sector, the definition of the workplace is nuanced in as far as it makes provision for two descriptions, one for the purpose of collective bargaining and the other for all other purposes. In the context of the collective bargaining purpose, the workplace would entail the State as employer and in the private sector would entail the total aggregate of individual workplaces of the employer. In the context of the other purposes which are mooted to include organisational rights the workplace would entail in relation to the public service the individual national and provincial departments. The low threshold for acquisition of organisational rights will in this way apply to these individual national and provincial departments. In the context of the private sector, the workplace in respect of the acquisition of organisational rights relation will entail the individual operations of the employer. Glaringly in the private sector the element of independence is removed make the definition of workplace in the private sector consistent with the one in the public service".

He further made new recommendations on section 213 definition of "workplace" is follows:

"(a) in relation to the public service- (i) for the purpose of collective bargaining and related disputes, the registered scope of the Public Service Co-ordinating Bargaining Council or a bargaining council in a sector in the public service, the national or provincial department as the case may be; or (ii) for dispute resolution and any other purpose, including the acquisition of one or more organisational rights, an office or the place where the employees work in the national department, provincial administration, provincial department or organisational component contemplated in section 7(2) of the Public

[197] *Ibid.*

Service Act, 1994 (promulgated by Proclamation No. 103 of 1994), or any other part of the public service that the Minister for Public Service *and Administration, after consultation with the Public Service Coordinating Bargaining Council, demarcates as a workplace;*

(b) in the private sector –

(i) and all other instances, if an employer carries on or conducts two or more operations, all the operations taken together that, constitutes the workplace for that operation for purposes of collective bargaining and related disputes. If an employer conducts a single operation the workplace refers to that individual operation for purposes of collective bargaining.

(ii) for dispute resolution and any other purpose including the acquisition of one or more organisational rights, the individual place where employees work in connection with an operation, constitutes a workplace."

He argues that *"the implementation of these recommendations may address the shortcomings of the LRA of 1995 which pertain to organisational rights acquisition and the impact of threshold agreements on the right to freedom of association of minority trade unions in particular. It is further submitted that the suggested changes should be considered and debated through forums of social dialogue, in which international norms and constitutional values serve as the guiding light during deliberations".*

I fully concur with recommendations made by Esitang. It is inappropriate for the right to freedom of association to be limited by any means or be abused by majority trade unions including the courts' interpretation on the definition of workplace. In line with the ILO's dimension, the only instances where collective agreements should become relevant should be when the majority trade unions and the employers or bargaining councils negotiate substantive issues concerning changes to the conditions of service for all employees.

Botha and Germishuys argue that revisiting the majoritarian model and consideration of the 1956 pluralist model may yield some positive results of the state of labour relations in South Africa as the pluralist model grants recognition to more than one trade union provided that it is sufficiently represented in a particular bargaining unit. I agree with this pluralist model in that locating organisational rights under the umbrella of collective bargaining subjects the issue of thresholds to the whim of collective bargaining parties. It allows them free reign to decide who enjoys organisational rights and who does not. South Africa, which is committed to the ILO conventions, has not given effect to the determinations of the ILO's supervisory bodies which require the setting of criteria which are "objective, precise and pre-established, in order to avoid any possibility of bias or abuse against minority trade unions. Majoritarian system may be incompatible with the right to freedom of association if it does not allow minority trade unions within that framework to exist, to organise members, to represent members in relation to individual grievances and to seek to challenge majority unions from time to time.[199] According to Bader Bop, section 20 of the LRA was not included with a view to depriving registered trade unions of their rights conferred on them in terms of statute. The Constitutional Court must at all times strive to interpret the provisions of the LRA in a manner that would avoid the limitation of constitutional labour rights unnecessarily.

[199] Bader Bop at para 31-34.

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