REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 636/2012

In the matter between:

POPCRU **Applicant**

and

L G P LEDWABA N.O. **First Respondent**

MINISTER OF CORRECTIONAL SERVICES **Second Respondent**

SACOSWU **Third Respondent**

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL ("GPSSBC") **Fourth Respondent**

Heard: **18 July 2013**

Delivered: **05 September 2013**

Summary: **Bargaining Council proceedings – Review of proceedings, decisions and awards of arbitrators – issue of a material error or law as ground for review**

Organizational rights – purpose of organizational rights – application of Chapter

III of the LRA – when can organizational rights be excluded

Organizational rights – application of Sections 18 and 20 of the LRA – Section 18 threshold of representativeness applies to all unions – nature of collective agreement in terms of Section 20 determined

Collective agreements – collective agreement with majority union – binding on minority unions and members – collective agreement relating to such organizational rights constituting binding collective agreement on minority union

Collective agreements – nature and status of collective agreements – can exclude organizational rights of minority union – not constitutional infringement

Collective agreements – application of Section 23(1)(d) of the LRA – extension to non parties – principles applicable

Arbitration award – award of arbitrator based on material error of law – award reviewed and set aside

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JUDGMENT

SNYMAN, AJ

Introduction

[1] This matter concerns an application by the applicant to review and set aside an arbitration award of the first respondent in his capacity as arbitrator of the GPSSBC (the fourth respondent). The Minister of Correctional Services (the second respondent) has not formally participated in the proceedings and has elected to abide by the decision of the Court. For ease of reference, the parties will be referred to in this judgment as cited in the pleadings, with the applicant being referred to as "POPCRU", the first respondent as "the arbitrator", the second respondent as "the Department" and the third respondent as "SACOSWU".

[2] This matter concerns, at its core, a dispute about the entitlement to organisational rights between POPCRU and SACOSWU in the Department as the employer of their respective members. The arbitrator had found that SACOSWU as minority union is entitled to organisational rights in the Department, had concluded a valid and enforceable collective agreement with the Department in which it was granted such organisational rights, and consequently made an award in terms of which the arbitrator confirmed that SACOSWU is entitled to such organisational rights. POPCRU has applied to review and set aside this award.

[3] From the arguments presented by both POPCRU and SACOSWU, it became apparent that the arbitrator in fact did exceed his powers in the award that he ultimately made, and it was conceded by the parties that irrespective if POPCRU was successful in its review application, some aspects of the award made needed to be amended. These aspects related to the conclusion by the arbitrator that the Department had concluded a collective agreement with SACOSWU in terms of which SACOSWU was entitled to organisational rights in terms of Sections 12, 13, 14, 15 and 16 of the LRA. The parties were *ad idem* that the issue before the arbitrator only concerned whether SACOSWU was entitled to organisational rights in terms of Sections 12 and 13 of the LRA. Nothing, however, turns on this, having regard to the actual issues to be considered and determined in this judgment. I will accept that the only organisational rights at stake in this matter are organisational rights as contemplated by sections 12 and 13 of the LRA.

Background facts

[4] This matter came before the arbitrator as a stated case.[1] The arbitrator has also fully set out the stated case in his arbitration award[2] and I do not intend to do so

[1] Annexure "C" to the joint bundle of documents
[2] Pleadings Bundle page 29 – 36

again in this judgment. I will only refer to those issues recorded in the stated case and agreed supporting documents that are in my view pertinent for the purposes of the determination of the review application before me.

[5] POPCRU is an existing trade union recognised in the Department. It is also a majority union, meaning that its members constitute the majority of the employees in the Department. SACOSWU, on the other hand, was not a recognized trade union in the Department and was what can be termed a minority union, having 1 479 members. The Department has some 40 000 employees. Both POPCRU and SACOSWU are registered trade unions as contemplated by the LRA.

[6] There is a formal and agreed bargaining and dispute resolution structure in place in the Department. There are three parts to this structure, firstly being the Public Service Coordinating Bargaining Council ("PSCBC") with in essence functions with the second part of the structure being the GPSCCBC, in conducting dispute resolution in respect of employment issues in the Department. The third part of the structure is a central bargaining forum, where collective bargaining is conducted, being the Departmental Bargaining Chamber ("DBC"). POPCRU is an admitted member to all of these structures, whilst SACOSWU is not. All of the members of SACOSWU are, however, employees in the Department resorting under the scope and jurisdiction of the DBC.

[7] The functioning of the DBC is regulated by way of collective agreements, found in resolutions concluded between POPCRU as majority union, the Public Service Association ("PSA") as another recognised union, and the Department. These resolutions were placed before the arbitrator in terms of the stated case and relevant extracts from these resolutions were referred to in the stated case.

[8] The first resolution referred to in the stated case was Resolution 7 of 2001. The purpose of this resolution was to determine the thresholds of representativeness for the admission of trade unions to the DBC. It is recorded that the agreement

concluded in terms of such resolution binds all employees in the Department in the DBC bargaining unit, whether they are union members of POPCRU or not.[3] This resolution was also agreed to by another trade union, DENOSA. In terms of this resolution, the threshold of admission to the DBC was agreed to be 9 000 members for a union acting individually, or where unions act jointly, each union must at least have 4 500 members.[4]

[9] The next applicable resolution to be referred to is Resolution 3 of 2006 and in this resolution, it is recorded that the agreement concluded in terms of such resolution is a collective agreement and binds all employees in the Department in the DBC bargaining unit, whether they are union members of POPCRU or not.[5] In terms of this resolution, the parties implemented and agreed to a procedure manual which in essence constitutes a recognition and procedure agreement determining and regulating the relationship, organisational rights and bargaining activities and processes between the said unions and the Department in the DBC. In particular, this procedure manual specifically regulates and determines organisational rights.[6] With particular reference to trade union subscription deductions,[7] it is recorded that only trade unions admitted to the DBC has such right.[8]

[10] Resolution 1 of 2006 regulates disciplinary and grievance proceedings in the Department. Yet again and in this resolution, it is recorded that the agreement concluded in terms of such resolution is a collective agreement and binds all employees in the Department in the DBC bargaining unit, whether they are union members of POPCRU or not.[9] In terms of this resolution, the parties implemented and agreed to a disciplinary code and procedure in the Department, which was

[3] Resolution 7 of 2001 clause 2.
[4] Resolution 7 of 2001 clauses 3.1 and 4.
[5] Resolution 3 of 2006 – clauses 1 and 2.
[6] Clauses 5.1 – 5.5 of the procedure manual.
[7] Being the rights as contemplated by Sections 13 of the LRA.
[8] Clause 5.2.1 of the procedure manual.
[9] Resolution 1 of 2006 – clauses 1 and 2.

made applicable to all employees.[10] Of relevance to this matter, the disciplinary code provides for trade union representation of employees being disciplined in the Department, by way of a representative from a recognised trade union, with a recognised trade union then being defined as a union admitted to the DBC complying with the thresholds set for admission.[11] Access to union members by the trade unions on the employer's premises[12] is also specifically regulated.[13]

[11] SACOSWU approached the Department at some point in 2009 seeking that the Department afford it the organisational rights of access to the employer's premises and trade union subscription deductions, which the Department initially refused.[14] In 2010, SACOSWU objected against such refusal to, *inter alia,* the ILO and the office of the State President. The upshot of all of these complaints was that the Department decided, on 7 October 2010, to afford SACOSWU what was termed "Permision to organise" (sic). This was in essence affording SACOSWU right of access as contemplated by Section 12 of the LRA. This led to a complaint by POPCRU that this conduct undermines the collective agreements referred to above and that SACOSWU did not qualify in terms of number of members for admission to the DBC.

[12] On 3 November 2010, the Department and following a meeting with SACOSWU, formally afforded SACOSWU organisational rights. These included SACOSWU representing its members in internal department disciplinary proceedings and affording SACOSWU trade union membership subscription deductions.[15] This was despite SACOSWU never being admitted to the DBC and never having attained the prescribed threshold of representativeness. It was common cause that an agreement was concluded between the Department and SACOSWU which granted SACOSWU these organisational rights referred to and this was a

[10] Resolution 1 of 2006 clause 3.1 ; disciplinary code clause 3.
[11] Clauses 7.3.6 and "definitions" of the disciplinary code.
[12] Being the rights as contemplated by Section 12 of the LRA.
[13] Clause 5.1 of the procedure manual.
[14] Clause 9 of the stated case.
[15] Para 4 of the Department's letter of 3 November 2010.

collective agreement.

[13] According to POPCRU, the conduct of the Department in affording SACOSWU organisational rights as set out above contravenes the collective agreements referred to which the Department is bound to and must comply with and, consequently, the collective agreement the Department concluded with SACOSWU was invalid. The Department contended that it had agreed with SACOSWU to afford it organisational rights as there was nothing in law prohibiting this as the only proviso in the way of such an agreement is that such agreement must not prevent the exercise of statutory organisational rights of representative trade unions and the SACOSWU agreement did not cause this vis-à-vis POPCRU. SACOSWU contended that the agreement concluded between it and the Department was concluded in terms of section 20 of the LRA, which meant that these organisational rights were afforded to it outside the ambit of Part A of Chapter III of the LRA and in any event Part A of Chapter III of the LRA does not preclude the Department from concluding an agreement with a minority union on organisational rights. These were the positions of the parties, in a nutshell, before the arbitrator.

[14] Based on the above contentions of the parties, the matter before the arbitrator was thus whether the collective agreement between the Department and SACOSWU on organisational rights was validly concluded. The arbitrator concluded that it was. The conclusions of the arbitrator were principally based on the arbitrator's interpretation and application of the judgment in *National Union of Metalworkers of SA and Others v Bader Bop (Pty) Ltd and Another.*[16] According to the arbitrator, the judgment in *Bader Bop* determined that the LRA should not be interpreted in such a manner so as to preclude minority unions from obtaining organisational rights through collective bargaining. Applying this reasoning, the arbitrator came to the conclusion that nothing prevented the Department and SACOSWU from concluding a collective agreement on organisational rights,

[16] (2003) 24 ILJ 305 (CC).

which is what they ultimately did. The arbitrator accepted that such a collective agreement would be an agreement as contemplated by section 20 of the LRA and would thus fall outside the ambit of the statutory organisational rights in terms of Part A of Chapter III of the LRA. The arbitrator further found that the collective agreements between the Department and POPCRU were agreements concluded in terms of Section 18 of the LRA and not section 20 and were thus not affected. The arbitrator finally concluded that to deny SACOSWU the right to enter into a collective agreement with the Department would contravene section 23(5) of the Constitution.[17]

[15] It is the above conclusions of the arbitrator that form the subject matter of this review application.

The relevant test for review

[16] The approach for review is now relatively settled. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[18] Navsa AJ held that in the light of the constitutional requirement (in s 33 (1) of the Constitution) that everyone has the right to administrative action that is lawful, reasonable and procedurally fair, 'the reasonableness standard should now suffuse s 145 of the LRA'. The majority of the Constitutional Court set the threshold test for the reasonableness of an award or ruling as the following: 'Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?'[19] In *CUSA v Tao Ying Metal Industries and Others,*[20] O'Regan J held:

> 'It is clear… that a commissioner is obliged to apply his or her mind to the issues in a case. Commissioners who do not do so are not acting lawfully and/or reasonably and their decisions will constitute a breach of the right to administrative justice.'

[17] Act 108 of 1996.
[18] (2007) 28 ILJ 2405 (CC) at para 106.
[19] Id at para 110.
[20] (2008) 29 *ILJ* 2461 (CC) at para 84.

[17] The Labour Appeal Court in *Herholdt v Nedbank Ltd*[21] said that:

> '…Where a commissioner fails to have regard to material facts, this will constitute a gross irregularity in the conduct of the arbitration proceedings because the commissioner would have unreasonably failed to perform his or her mandate and thereby have prevented the aggrieved party from having its case fully and fairly determined. Proper consideration of all the relevant and material facts and issues is indispensable to a reasonable decision and if a decision maker fails to take account of a relevant factor which he or she is bound to consider, the resulting decision will not be reasonable in a dialectical sense. Likewise, where a commissioner does not apply his or her mind to the issues in a case the decision will not be reasonable….
>
> …. Whether or not an arbitration award or decision or finding of a commissioner is reasonable must be determined objectively with due regard to all the evidence that was before him or her and what the issues were. There is no requirement that the commissioner must have deprived the aggrieved party of a fair trial by misconceiving the whole nature of enquiry. The threshold for interference is lower than that; it being sufficient that the commissioner has failed to apply his mind to certain of the material facts or issues before him, with such having potential for prejudice and the possibility that the result may have been different. This standard recognizes that dialectical and substantive reasonableness are intrinsically interlinked and that latent process irregularities carry the inherent risk of causing an unreasonable substantive outcome.'

[18] In the current matter, the facts are determined by an agreed statement of case. There is thus no issue whether the arbitrator considered all the evidentiary material before him. The issue on review in essence is one of law, namely whether the arbitrator, in deciding that the Department and SACOSWU was entitled to conclude a collective agreement on organisational rights, applied the correct legal principles and if so, whether he applied such legal principles in a

[21] (2012) 33 ILJ 1789 (LAC) at para 36 and 39; See also *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 964 (LAC) at para 92.

manner that is sustainable. There is ample recent authority for the proposition that a material misdirection on a principle of law would constitute a reviewable irregularity,[22] in terms of the review principles cited above. I wish to specifically refer to *Pam Golding Properties (Pty) Ltd v Erasmus and Others*[23] where the Court said:

> 'If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or a gross irregularity during the proceedings under review including, for example, a material mistake of law, and a party is likely to be prejudiced as a consequence, the commissioner's decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that result is nonetheless capable of justification.' (emphasis added)

[19] Mr Grogan, who represented SACOSWU, conceded that the issues of law at stake in this matter were so fundamental, that if the arbitrator was wrong in interpreting and applying the same, it would be a reviewable irregularity. The concession was properly made. The issues of law, which are important and complex, go to the heart of this matter. As Mr Grogan correctly said, if it is to be found that the Department and SACOSWU could not as a matter of law conclude the collective agreement on organisational rights, the review must succeed. If they could, then the review application must fail. I will proceed to determine the review application on this basis.

The issue of collective bargaining and organisational rights

[20] As alluded to above, this matter concerns several fundamental issues, which includes freedom of association and the sanctity of collective bargaining and collective agreements. At the heart of this case lies a resolution of the conflict

[22] See *MEC: Department of Education, Gauteng v Msweli and Others* (2013) 34 ILJ 650 (LC) at para 45; *Renier Reyneke Vervoer CC t/a Premium Trucking v Commission for Conciliation, Mediation and Arbitration and Others* (2012) 33 ILJ 1262 (LC) para 13; *Munnik Basson Dagama Attorneys v Commission for Conciliation, Mediation and Arbitration and Others* (2011) 32 ILJ 1169 (LC) at para 13.
[23] (2010) 31 ILJ 1460 (LC) at para 8

between freedom of association and collective bargaining where it comes to the issue of organisational rights of minority trade unions, which, as the facts of this matter illustrate, can actually arise. It is therefore important to properly interpret, determine and apply the provisions of Parts A and B of Chapter III of the LRA, in line with the objectives of interpretation as set out in Section 3 of the LRA.[24]

[21] As the Constitution must be considered in any interpretation of the LRA, I will commence with a reference to the relevant parts of Section 23 of the Constitution, which provide as follows:

> '(2) Every worker has the right -
>
> *(a)* to form and join a trade union;
>
> *(b)* to participate in the activities and programmes of a trade union; and
>
> *(c)* to strike. ….
>
> (4) Every trade union and every employers' organisation has the right -
>
> *(a)* to determine its own administration, programmes and activities;
>
> *(b)* to organise; and
>
> *(c)* to form and join a federation.
>
> (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).'

I also refer to Section 18 of the Constitution, which reads 'everyone has the right

[24] Section 3 reads: 'Any person applying this Act must interpret its provisions- (a) to give effect to its primary objects; (b) in compliance with the Constitution; and (c) in compliance with the public international law obligations of the Republic'

to freedom of association.'

[22] In this instance and especially considering the factual background as set out above, the Constitutional rights in terms of sections 18, 23(2) and (4) would come into conflict with the Constitutional rights in terms of section 23(5). The reason for this conundrum is simple – what if a majority trade union in exercising its rights in terms of section 23(5) determines (of course with the agreement of the employer) the basis upon which a minority trade union and its members may exercise their rights in terms of sections 23(2) and (4) in a particular employer or even deprives such minority trade union of such rights? This would be done in accordance with and pursuant to collective bargaining under section 23(5) of the Constitution. Both these sets of rights, for the want of a better description, are fundamental Constitutional rights of equal status.

[23] The rights in terms of sections 23(2), (4) and (5) of the Constitution are then also regulated by the LRA, with the issues of organisational rights and collective agreements being regulated in Parts A and B of Chapter III of the LRA and the right to strike in Chapter IV of the LRA. There is no duty to bargain under the LRA[25] and for this reason, the entitlement to statutory prescribed organisational rights was created so as to afford sufficiently representative trade unions at least a proper basis or platform from which to seek to convince an employer to collectively bargain with such union. To put it simply, a trade union that has a right of access to its members to procure proper mandates, that has funding through the collection of membership subscriptions, that has shop stewards to protect its and employees' interests in the employer, and finally that has access to information, can not only effectively bargain with an employer but this would go

[25] See *SA National Defence Union v Minister of Defence and Others* (2006) 27 ILJ 2276 (SCA) at para 25; *ECCAWU and Others v Southern Sun Hotel Interests (Pty) Ltd* (2000) 21 ILJ 1090 (LC) at para 22*; National Police Services Union and Others v National Negotiating Forum and Others* (1999) 20 ILJ 1081 (LC) paras 52 – 53; *National Union of Mineworkers and Another v Eskom Holdings Soc Ltd* (2012) 33 ILJ 669 (LC) at para 24; *SA Municipal Workers Union and Another v SA Local Government Association and Others* (2010) 31 ILJ 2178 (LC) at para 16; *BHP Billiton Energy Coal SA Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2009) 30 ILJ 2056 (LC) at para 24.

a long way to convince an employer to so bargain. It is in this context that the issue of organisational rights must be considered.

[24] Organisational rights are not an end in itself but a means to an end. It is part and parcel of the process of collective bargaining. Similarly, the right to strike is not an end in itself but a means to an end also as part and parcel of the process of collective bargaining. There is a logical sequence to the collective bargaining process, of which organisational rights, collective agreements and ultimately the right to strike plays its own part. At the start of a collective bargaining process, it is the organisational rights that enable the trade union to have a proper platform from which to engage the employer in collective bargaining. In the collective bargaining process itself, the objective is then to conclude a collective agreement and if concluded, these kinds of agreements are given special status and priority. If a collective agreement cannot be concluded, then the right to strike at the other end of the collective bargaining process spectrum is the sharp end of the spear to seek to compel the employer to conclude the collective agreement sought. All of these issues together form the makeup of the process of collective bargaining, as a whole.

[25] In the context of the right to strike as being part and parcel of the collective bargaining process, the Court in *SA Airways (Pty) Ltd v SA Transport and Allied Workers Union*[26] held that:

> '...The structure of the Act is one in which the right to strike is drawn from the institution of collective bargaining. The right to strike, fundamental as it is, is thus not an end in itself - the resolution of disputes through collective bargaining remains the ultimate objective.'

The same reasoning, in my view, must apply to the very issue of organisational rights, being that one of most important purposes or it must be to facilitate the resolution of disputes through collective bargaining.

[26] (2010) 31 ILJ 1219 (LC) at para 22.

[26] In my view, the structure of Parts A and B of Chapter III itself emphasises this collective bargaining objective of organisational rights by way of the very fact that the statutory organisational rights is directly correlated with membership numbers of a trade union. Again, and to put it simply as a general proposition, the more members a trade union has, the more influence it would wield in the collective bargaining process. For that reason, the trade union must at least have a certain threshold of numbers to qualify for statutory organisational rights, being that it has to be sufficiently representative[27] to qualify for access to the employer's premises and the deduction of trade union membership subscriptions and majority representative to add the rights of trade union representatives and access to information to the basket of such rights. In the end, it is all about the enhancement of the process of collective bargaining.

[27] Having addressed two of the components of collective bargaining, being the right to strike and organisational rights, with both such rights being guaranteed by law in the LRA and the Constitution, this then leaves the central component of collective bargaining to consider, being the collective agreement itself concluded as a result of the collective bargaining process. In *Equity Aviation Services (Pty) Ltd v SA Transport and Allied Workers Union and Others,*[28] Zondo JP (as he then was) said 'collective bargaining is normally expected to result in the conclusion of a collective agreement.' Added to this is the fact remains that collective agreements have special status and authority, as the very product of collective bargaining. As the Court said in *SA Breweries v Commission for Conciliation, Mediation and Arbitration and Others*:[29]

> 'In *Minister of Safety and Security v Safety and Security Sectoral Bargaining Council and Others* (2001) 22 ILJ 2684 (LC), this court emphasized this principle,

[27] Section 11 of the LRA ; See for example *Oil Chemical and General Workers Union v Total SA (Pty) Ltd* (1999) 20 ILJ 2176 (CCMA); *National Union of Metalworkers of SA v Feltex Foam* (1997) 18 ILJ 1404 (CCMA); *SA Commercial Catering and Allied Workers Union v The Hub* (1999) 20 ILJ 479 (CCMA); *SA Clothing and Textile Workers Union v Sheraton Textiles (Pty) Ltd* (1997) 18 ILJ 1412 (CCMA).
[28] (2009) 30 ILJ 1997 (LAC) para 76.
[29] (2002) 23 ILJ 1467 (LC) at para 12

namely that the Labour Relations Act encourages voluntarism and collective agreements which should be given primacy over the provisions of the Labour Relations Act...'

In this respect, a collective agreement can regulate and even preclude the right to strike[30] or certain basic conditions of employment[31] or contract out of the dispute resolution provisions of the LRA[32] and of relevance to this matter as will be further addressed hereunder, determine the issue of organisational rights irrespective of the provisions of Part A of Chapter III of the LRA.[33] Proper record must be kept of any collective agreement which must be provided by the employer on request to interested parties.[34] A collective agreement also remains binding on a member of a trade union even if that person leaves the union and becomes binding on a union member that joins a union only after the collective agreement was concluded.[35] A collective agreement can even compel employees to join a particular union in order to be employed at an employer.[36] Also of critical importance to the current matter, a collective agreement with a majority union can even bind employees that are not even members of that trade union concluding the agreement or members of other trade unions, provided certain requirements are met.[37] What all of this shows is that a collective agreement, as the product of the collective bargaining process, has preference over all else, which even includes the right to strike and the contractual freedom of individual employees and minority trade unions. In my view, this statutory framework should equally apply to the issue of organisational rights and as such,

[30] Section 65(1)(a) and 65(3)(a) of the LRA.
[31] See Section 49(1) of the Basic Conditions of Employment Act 75 of 1997 which provides 'A collective agreement concluded in a bargaining council may alter, replace or exclude any basic condition of employment if the collective agreement is consistent with the purpose of this Act….'
[32] *JDG Trading (Pty) Ltd t/a Bradlows Furnishers v Laka No and Others* (2001) 22 ILJ 641 (LAC); *SA Broadcasting Corporation v Commission for Conciliation, Mediation and Arbitration and Others* (2003) 24 ILJ 999 (LC); *SA Breweries v Commission for Conciliation, Mediation and Arbitration and Others* (*supra*); *Mthimkhulu v Commission for Conciliation, Mediation and Arbitration and Another* (1999) 20 ILJ 620 (LC).
[33] Sections 18 and 20 of the LRA.
[34] Section 204 of the LRA.
[35] Section 23(2).
[36] See the closed shop provisions in Section 26 of the LRA.
[37] Section 23(1)(d).

a collective agreement regulating the issue of organisational rights would have preference over any other provision in statute relating to organisational rights.

[28] I am, therefore, of the view that collective bargaining itself and its ultimate result, being the conclusion of a collective agreement, must always have preference, especially where it is concluded between an employer and a majority trade union. This means that as a matter of principle, a collective agreement concluded with a majority trade union that regulates or even excludes organisational rights of minority trade unions in the particular employer, must have preference over the organisational rights such minority union may be entitled to in terms of the Constitution or the LRA. Organisational rights must have a purpose and no such purpose can be achieved by affording organisational rights to a minority trade union where an employer and a majority trade union have already fully regulated all their affairs relating to their relationship, and the structure of collective bargaining, in a collective agreement made binding on all the employees in the employer. To simply afford organisational rights without a purpose or reason would make organisational rights an end in itself and not a means to an end, which is not what is intended by the LRA.

[29] I am fortified in my conclusions by the priority given to collective bargaining as part of the defined primary purposes of the LRA in Section 1, which reads:

> 'The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are- (a) to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution; (b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation; (c) to provide a framework within which employees and their trade unions, employers and employers' organisations can- (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and (ii) formulate industrial policy; and (d) to promote- (i) orderly collective bargaining; (ii) collective bargaining at sectoral level; (iii) employee

participation in decision-making in the workplace; and (iv) the effective resolution of labour disputes.'

It is clear that specific reference is made to the parties to the employment environment regulating their own affairs by collective bargaining and that this collective bargaining must be orderly and the framework provided in terms of the LRA is inter alia to give effect to this. The point I make is that self regulation by way of collective agreement of all employment issues in terms of the LRA, which would include the issue of organisational rights, is consistent with the primary purposes of the LRA.

[30] This then brings me to the judgment in *Bader Bop,*[38] which formed the cornerstone of the reasoning of the arbitrator. From the outset, it must be stated that the judgment in *Bader Bop* dealt with the issue of the right to strike,[39] which is, as I have set out above, another component of the collective bargaining process. The Court in *Bader Bop* was not called upon to specifically determine the issue of whether a minority trade union could in any way be deprived of organisational rights through the application of a collective agreement with another majority trade union in a particular employer. The central issue before the Court in *Bader Bop* was whether, because of the statutory regulation of organisational rights in Part A of Chapter III of the LRA, this statutory regulation was such as to exclude the right to strike of minority trade unions in support of a demand for organisational rights such trade union would not ordinarily qualify for as statutory rights in terms of Part A of Chapter III. In other words, the issue the court in *Bader Bop* was called on to determine is whether the statutory enforcement provisions[40] in Part A of Chapter III of the LRA was the exclusive platform for a trade union to obtain organisational rights to the exclusion of the right to otherwise collectively bargain for it and ultimately exercise the right to

[38] *Bader Bop* (*supra*) footnote 16.
[39] *Bader Bop* per O'Regan J at para 45.
[40] Section 21 of the LRA.

strike to get it.[41] This is a completely different question to the one in this the matter now before me, being whether a minority trade union could be deprived of organisational rights by way of a collective agreement concluded between another but majority trade and the employer. Therefore, and with respect, the judgment in *Bader Bop* is not directly applicable in the current matter but I do point out that it is still of some use in properly determining this matter and I still intend to make several references to some of the ratios in this judgment, which will be deal with hereunder.

[31] In my view, a collective agreement between a majority trade union and an employer can competently and lawfully exclude organisational rights of another minority trade union and the very issue of the right to strike as considered in *Bader Bop* is an excellent illustration of why this is so. In this regard, I firstly refer to the following reasoning in *Bader Bop*, where O'Regan J said that:[42]

> '…. There is nothing in part A of chapter III, however, which expressly states that unions which admit that they do not meet the requisite threshold membership levels are prevented from using the ordinary processes of collective bargaining and industrial action to persuade employers to grant them organizational facilities such as access to the workplace, stop-order facilities and recognition of shop stewards. These are matters which are clearly of 'mutual interest' to employers and unions and as such matters capable of forming the subject-matter of collective agreements…'

Pursuant to the above reasoning, O'Regan J then concluded as follows:[43]

> 'Where employers and unions have the right to engage in collective bargaining on a matter, the ordinary presumption would be that both parties would be entitled to exercise industrial action in respect of that matter. There is nothing in s 64 or 65 suggesting that there is a limitation on the right to strike in this regard….'

[41] *Bader Bop* per Ngcobo J at para 76.
[42] Id at para 40.
[43] Id at para 43.

Similarly, Ngcobo J in *Bader Bop* said:[44]

> '...The right to strike is essential to the process of collective bargaining. It is what makes collective bargaining work. It is to the process of bargaining what an engine is to a motor vehicle. Section 64(1) of the LRA confers this right upon every worker. The Constitution guarantees this right to every worker in s 23(2)(c). Once it is accepted that an unrepresentative union has a right to bargain collectively to obtain organizational rights, as it must be, it must follow that it has the right to resort to strike action in the pursuit of those rights…'

What this shows is that the right of minority unions to collectively bargain on the issue of organisational rights must ultimately be susceptible to leading to the right to strike to enforce it. Again and without a minority and unrepresentative union being able to exercise the right to strike, as essential component of collective bargaining to enforce the demand for organisational rights, there is simply no point to the collective bargaining exercise and this cannot be in line with the primary objectives of the LRA as referred to above.

[32] It is in this context where the distinction between the current matter and the judgment in *Bader Bop* comes in. In *Bader Bop*, the Court found that in the circumstances of that case, as set out above, none of the limitations in section 65 of the LRA of the right to strike found application. And indeed, it did not in that case, as in that case there was no other majority trade union in the employer armed with collective agreements concluded with the employer such as the collective agreements at stake in the current matter. In the current matter, POPCRU and its collective agreements with the Department completely changes the landscape. SACOSWU has no statutory entitlement to organisational rights because it is not a sufficiently representative in terms of Part A of Chapter III of the LRA and must thus collectively bargain for it. Accepting SACOSWU is entitled to collectively bargain per se, then the next question is to what end? It would not be able to strike, as there already exist a collective agreement on the

[44] Id at para 67.

very issue of the bargaining topics (the organisational rights) which collective agreement actually and directly regulates the issue in dispute by specifically determining all aspects or organisational rights in the Department, which includes the thresholds of representativeness and the organisational rights themselves. In addition to that, these collective agreements expressly bind all the members of SACOSWU (which issue is further addressed hereunder). It is in this context that one of the limitations in section 65 actually comes into play, being section 65(3)(a).

[33] Section 65(3)(a) of the LRA provides that:

> 'Subject to a collective agreement, no person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or lock-out- (a) if that person is bound by- (i) any… collective agreement that regulates the issue in dispute…'

As to what constitutes "regulate" for the purposes of this Section, the Court in *Fidelity Guards v PTWU and Others*[45] said:

> 'I am of the opinion that the phrase "regulates the issue in dispute" refers to a substantive regulation of the issue or a process leading to the resolution of the issue. Must this regulation be comprehensive? Or is it sufficient that the issue be regulated generally by providing for instance, that the issue is settled, at least for the present year of bargaining, or is assigned to a specific process or that an issue is assigned to a particular level of bargaining or to a particular forum? I think that the wider sense is meant here.'

The reasoning of the Court in *Fidelity Guards v PTWU* was approved of in *Air Chefs (Pty) Ltd v SA Transport and Allied Workers Union and Others*[46] where the Court said:

[45] [1997] 11 BLLR 1425 (LC) at 1433F-H.
[46] (2013) 34 ILJ 119 (LC) at para 27.

> 'In summary, the learned judge concluded that an issue is regulated if it is contained in a substantive rule, or if the process for dealing with the issue is set out in the regulating agreement. In this case, the parties did agree on a process regulated by a procedure.'

A final reference is made to *ADT Security (Pty) Ltd v SA Transport and Allied Workers Union and Another*[47] where it was held with specific reference to Section 65(3)(a) that 'the prohibition against a strike action where there is a binding collective agreement is not limited to substantive issue/s in dispute but includes the procedure laid out in the collective agreement.'.[48]

[34] Applying the above principles to the current matter, it is clear that the POPCRU collective agreements clearly regulate the issue in dispute as contemplated by Section 65(3)(a). The actual substantive issue is regulated, in that all organisational rights are regulated, defined and determined and exist only in the DBC. In addition, procedural issues are specifically regulated by confining the organisational rights entitlements to a threshold of representativeness and admission to the DBC and with organisational rights being determined in the DBC. I am compelled to conclude that the POPCRU collective agreements actually already regulated the issue in dispute as contemplated by the SACOSWU collective agreement at the time this latter agreement was concluded.

[35] The simple point is that where SACOSWU bargains for organisational rights by way of the normal collective bargaining process and the Department does not agree to conclude a collective agreement in this regard, SACOSWU would have to embark upon strike action to compel the Department to so agree. The problem then is that SACOSWU would not be entitled to strike by virtue of the application of section 65(3)(a) of the LRA. Added to this, if the Department indeed decides to

[47] (2012) 33 ILJ 2061 (LC) at para 18.
[48] See also *Transnet Ltd v SA Transport and Allied Workers Union and Others* (2011) 32 ILJ 2269 (LC) at para 21 – 24; *Unitrans Fuel and Chemical (Pty) Ltd v Transport and Allied Workers Union of SA and Another* (2010) 31 ILJ 2854 (LAC) at para 18.

conclude a collective agreement with SACOSWU (as it actually did in the current matter), the Department would either have to unilaterally amend the collective agreements with PORCRU or worse breach it by simply ignoring it, which would also not be permissible.[49] It is for such very reasons that section 65(3)(a) was incorporated into the LRA. Existing collective agreements that already regulate and determine issues in dispute that could form the subject matter of possible strike action must have the effect that such strike action is prohibited for as long as these collective agreements endure. A trade union that is dissatisfied with the terms of a collective agreement that is still binding on it cannot strike about this for as long as the agreement endures.[50] Therefore, and in fact in line with the reasoning in *Bader Bop*, one of the statutory limitations in section 65 would find application in this instance, for as long as the collective agreements between POPCRU and the Department endure and remains valid and binding. That being so, and without the right to strike accruing to SACOSWU on the issue of organisational rights in this particular matter, there is no point to collective bargaining on the issue and in turn, as such, the Department and SACOSWU are not entitled to collectively bargain on the same. It, therefore, has to follow that as a matter of general principle and subject to proper consideration of whether Parts A and B of Chapter III of the LRA in fact provide otherwise, which will be dealt with hereunder, the Department and SACOSWU are not entitled to conclude a collective agreement on the issue of organisational rights for as long as this issue is regulated by the POPCRU collective agreements.

[36] In *SA Federation of Civil Engineering Contractors on behalf of Its Members v National Union of Mineworkers and Another,*[51] the Court said that 'a lawful strike is by definition functional to collective bargaining…' In a similar vein, and in the

[49] See Section 23(1)(a) of the LRA which reads that 'A collective agreement binds- the parties to the collective agreement'.
[50] If the collective agreement is for an indefinite duration it can be cancelled by either party by way of unilateral written notice – See Section 23(4) of the LRA.
[51] (2010) 31 ILJ 426 (LC) at para 21.

minority judgment in *SA Transport and Allied Workers Union and Others v Moloto NO and Another,*[52] Maya AJ said

> '…The volatility of industrial action must, therefore, rank highly among the issues that the Act's primary objects, of promoting orderly collective bargaining and effective resolution of labour disputes, seek to address. It is as well to remember the Act's purposes, amongst others, to achieve peaceful labour relations in an orderly, democratic workplace and a thriving economy and that the right to strike is also an extension of the collective bargaining process. An interpretation that results in chaos and disturbs the desired balance of labour relations that is fair to both employees and employers is untenable.'

In the majority judgment, Yacoob ADCJ, Froneman J and Nkabinde J[53] said

> 'In summary then, the right to strike must be seen in the context of a right protected in order to redress the inequality in social and economic power in employer/employee relations. It also has associational aspects to it which enhance and reinforce other social and political rights in the Constitution, particularly freedom of association. It is an integral part of collective bargaining…'

In my view, this confirms the inextricable relationship between collective bargaining and the right to strike, as well as the crucial issue that this all must be pursuant to a legitimate purpose. In the current matter, there can be no legitimate purpose to SACOSWU collectively bargaining with the Department on organisational rights, for the reasons already set out above.

[37] In *Minister of Defence and Others v SA National Defence Union and Another,*[54] the SCA said that:

> 'A trade union does not have a constitutional right to engage in collective bargaining on any issue at large. Counsel for both parties accepted that the

[52] (2012) 33 ILJ 2549 (CC) at para 33.
[53] Id at para 61.
[54] (2007) 28 ILJ 828 (SCA) at para 11.

> scope of the right to engage in collective bargaining is limited to bargaining in respect of legitimate labour issues. But the scope of the bargaining right is itself capable of being limited if that can be justified under s 36.'

In the Constitutional Court judgment in this same matter of *SA National Defence Union v Minister of Defence and Others,*[55] the Court held that it neither endorsed nor rejected the aforesaid approach of the SCA and thus the SCA approach is still of authority. The point I make is that collective bargaining by SACOSWU and the Department on organisational rights whilst the POPCRU collective agreements still endure and are valid and binding cannot be for legitimate labour issues. The legitimacy of the issue is dispelled by the Department being by law bound to the POPCRU collective agreements and by virtue of the application of Section 65(3)(a) of the LRA.

[38] It may even be said a demand by SACOSWU in a collective bargaining process for organisational rights from the Department would be an unlawful demand because it would require the Department to breach the collective agreements with POPCRU. In *City of Johannesburg Metropolitan Municipality v SA Municipal Workers Union and Others,*[56] the Court said:

> 'The labour courts have previously held, in the context of a strike and in relation to the issue in dispute, that when a demand is made of an employer, it must be a lawful demand. ….'

In *TSI Holdings (Pty) Ltd and Others v National Union of Metalworkers of SA and Others,*[57] the Court said that a demand made by employees that forms the issue in dispute that gives rise to the strike that would cause the employer, if the employer accedes to such demand, to break the law, is an unlawful demand and strike action would not be permitted. This is precisely what would happen if the Department acceded to the demand of SACOSWU because it would require a

[55] (2007) 28 ILJ 1909 (CC) at para 56.
[56] (2009) 30 ILJ 2064 (LC) at 2069.
[57] (2006) 27 ILJ 1483 (LAC) at paras 25, 27, 29 and 40.

breach by the Department of the POPCRU collective agreements which is unlawful conduct.[58]

[39] What I am therefore saying is that at a fundamental rights level, where the issue of organisational rights is determined by way of collective agreement between a majority trade union and an employer, the statutory limitation on the right to strike in terms of section 65 indeed applies insofar as it concerns collective bargaining by a minority or unrepresentative trade union on the very same issue with the same employer. Because this limitation thus applies, SACOSWU is not entitled to collectively bargain with the Department to procure such organisational rights and, consequently, conclude a collective agreement with the Department on organisational rights. If this constitutes a limitation on the right of freedom of association, it is justified by statute in terms of the LRA itself and, as such, is a valid limitation.[59]

[40] In my view, the judgment in *Bader Bop* therefore did not provide substantiation for the reasoning of the arbitrator. The arbitrator simply blindly applied the ratios of this judgment in respect which actually related to the issue of the right to strike, without considering what impact the existing and binding collective agreements between the Department and POPCRU had on this right in any event. The arbitrator failed to consider the true nature and purpose of the collective bargaining process and the importance of and sanctity of the existing POPCRU collective agreements. This is a material error of law on the part of the arbitrator and thus reviewable in terms of the review principles set out above.

<u>The provisions of Chapter III of the LRA</u>

[58] See also *Metro Bus (Pty) Ltd v SA Municipal Workers Union on behalf of Members* (*supra*); *Passenger Rail Agency of SA v SA Transport and Allied Workers Union and Others* (2012) 33 ILJ 2659 (LC).
[59] See *Bader Bop* (*supra*) at para 43; *SA Police Service v Police and Prisons Civil Rights Union and Another* (2011) 32 ILJ 1603 (CC) at para 20; *Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd* (1999) 20 ILJ 321 (LAC) at para 28; *National Union of Mineworkers and Another v Eskom Holdings (Pty) Ltd* (2010) 31 ILJ 2570 (LAC) at para 18.

[41] The next issue to consider is whether, in terms of the provisions of section 20 of the LRA, the Department was nonetheless entitled to conclude a collective agreement with SACOSWU on organisational rights. In order to properly answer this question, proper regard must had to the very scheme of Part A of Chapter III of the LRA. As already stated above, this Chapter of the LRA contains the statutory regulation of the issue of organisational rights of representative trade unions.

[42] As confirmed by the Court in *Bader Bop*, a representative trade union has two options open to it to procure organisational rights. The first is utilising the statutory enforcement provisions in Section 21 of the LRA, which comprises an attempt to reach a collective agreement followed by a referral to the CCMA where, if the dispute remains unresolved, the trade union can either proceed to arbitration or permissible strike action.[60] In *Bader Bop,*[61] the Court said:

> 'Sufficiently representative trade unions, and those unions that claim to be sufficiently representative, may seek to enforce those organizational rights which they claim the Act confers upon them by adjudication (mediation and arbitration) or by industrial action.'

However, this statutory enforcement provision does not prevent even a representative trade union from still seeking to procure organisational rights through collective bargaining and then concluding a collective agreement in terms of section 20[62] with the employer. The Court in *Bader Bop* dealt with Section 20 and said '….On the other hand, however, s 21 should not be read to deny such unions the right to pursue organizational rights through the ordinary mechanisms of collective bargaining.'[63]

[60] Sections 21 (7) and 65(2)(a) of the LRA.
[61] *Bader Bop* (supra) at para 25
[62] Section 20 provides that 'Nothing in this Part precludes the conclusion of a collective agreement that regulates organisational rights'
[63] *Bader Bop* (supra) at para 42; See also Ngcobo J at para 64 where it was held that 'Section 20 permits representative unions to regulate organizational rights outside of the ambit of part A….'

[43] In terms of the judgment in *Bader Bop,* section 20 indeed provides for the conclusion of a collective agreement on organisational rights outside the parameters of Part A of Chapter III of the LRA. There can be no quarrel with this conclusion. The point, however, is that this avenue is available to all trade unions, whether representative. As the Court said in *Bader Bop*:[64]

> 'Unlike representative unions that have these rights conferred on them by part A and therefore need not bargain for them, an unrepresentative union must bargain for these rights'.

Therefore, and for representative trade unions, organisational rights can be obtained either by way of the statutory entitlements created in Part A of Chapter III which are enforced by way of Section 21 or through collective bargaining and the conclusion of a collective agreement in terms of Section 20. Trade unions that are not representative only have one option, being the option of collective bargaining and the conclusion of a collective agreement in terms of Section 20. There is, therefore, no particular magic in Section 20. All it does is to leave the avenue open for the procurement of organisational rights by way of a collective agreement irrespective of whether such rights are bestowed by the statute. Clearly, representative trade unions would rather use the statutory mechanisms, as all that such trade unions would need to show is that they are representative by way of their membership numbers and the right can then be enforced as a matter of law. The Court in *Bader Bop* referred with approval[65] to the following passage by Brassey:[66]

> 'The general intention behind the Act is that voluntarism (provided, at any rate, that it is collective) should prevail over state regulation. As a result, the rights conferred by the Act are generally residual: they are normally subordinate to arrangements that the parties collectively craft for themselves and operate only in

[64] Id at para 66.
[65] Id at para 65.
[66] Brassey 'Commentary on the Labour Relations Act' Vol 3 (Juta Cape Town 1999) A3: 26.

> the absence of such an agreement (see, by way of further support for this proposition, s 21(3)). This section gives recognition to this principle, not merely by expressly preserving the rights of registered unions and employers to conclude agreements that regulate organizational rights, but also by impliedly permitting them to prevail over the rights conferred by part A…'

This, in my view, is apposite to the current matter.

[44] The point further is that what is concluded in terms of section 20 is nothing else but a collective agreement,[67] and as such, would still be subject to all the provisions relating to collective agreements in Part B of Chapter III of the LRA. Just because the subject matter of a collective agreement in terms of section 20 is specifically organisational rights, this cannot change the very nature of the agreement as a collective agreement. A collective agreement is defined as[68] '… a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand (a) one or more employers …'[69] This would clearly include a collective agreement on organisational rights, being a matter of mutual interest. It equally does not matter whether organisational rights may be fundamental rights or not. As an illustration, the fundamental right of the right to strike as part of the very same collective bargaining process may also be regulated by collective agreement. Therefore, provisions that would apply to any collective agreement in terms of the LRA would equally apply to collective agreements in terms of Section 20.

[45] There is one further provision of Part A of Chapter III to consider, being section 18. In terms of Section 18:

> 'An employer and a registered trade union whose members are a majority of the employees employed by that employer in a workplace, or the parties to a

[67] *Bader Bop* (*supra*) at para 65.
[68] Section 213 of the LRA.
[69] Section 213 of the LRA.

> bargaining council, may conclude a collective agreement establishing a threshold of representativeness required in respect of one or more of the organisational rights referred to in sections 12, 13 and 15'.

It is clear that this section is completely unrelated to Section 20. In fact, and considering that any collective agreement regarding organisational rights can competently be concluded in terms of section 20, there would be no need or point for a separate provision such as section 18 which would then be superfluous. In *S v Weinberg,*[70] the Court held that:

> 'I think that the starting point… is to emphasize the general well-known principle that, if possible, a statutory provision must be construed in such a way that effect is given to every word or phrase in it: or putting the same principle negatively, which is more appropriate here: "a statute ought to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant…'

[46] Therefore, and considering the principle of statutory interpretation that the legislature would not incorporate superfluous provisions into a statute,[71] it has to be accepted that section 18 has another specific purpose and in my view indeed it has. Its very point is to regulate the admission of trade unions to the bargaining relationship with the employer so as to avoid a situation of proliferation by a multitude of small trade unions in one employer and in particular where there is already an established relationship with a majority trade union. The situation of a proliferation of trade unions is undesirable to the collective bargaining environment and undermines effective and organised collective bargaining as one of the primary purposes of the LRA. Added to this is the fact that the LRA unashamedly supports the principle of majoritarianism. In *Kem-Lin Fashions CC v Brunton and Another,*[72] the Court said that:

[70] 1979 (3) SA 89 (A) at 98D – G.
[71] See also *Fish Hoek Primary School v GW* 2010 (2) SA 141 (SCA) at paras 9 – 10.
[72] (2001) 22 ILJ 109 (LAC) at para 19.

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

[47] It does not matter if the application of the principle of majoritarianism causes hardship to or prejudice to the rights of minorities. The Court in *Ramolesane and Another v Andrew Mentis and Another*[73] said:

> 'By definition, a majority is, albeit in a benevolent sense, oppressive of a minority. In those circumstances, therefore, there will inevitably be groups of people, perhaps even fairly large groups of people, who will contend, with justification, that a settlement was against their interests. Nonetheless, because of the principle of majoritarianism, such decision must be enforceable against them also.'

The will of the majority must prevail over and bind the minority. That is the principle at stake in the current matter.[74]

[48] What Section 18 is thus designed to do is to provide a mechanism for an employer and a majority recognised trade union in such employer to prevent a proliferation of trade unions that would not be sufficiently representative as defined, in that employer. This is done by determining a threshold of representativeness. It is significant that this provision only applied to a majority trade union, as only collective agreements with majority trade unions can be

[73] (1991) 12 ILJ 329 (LAC) at 336A.
[74] See also *Public Servants Association of SA v Safety and Security Sectoral Bargaining Council and Others* (2007) 28 ILJ 1300 (LC) at para 52; *Mzeku and Others v Volkswagen SA (Pty) Ltd and Others* (2001) 22 ILJ 1575 (LAC) at para 55; *Ngcobo and Others v Blyvooruitzicht Gold Mining Co Ltd* (1999) 20 ILJ 1896 (LC) at paras 54 – 55.

extended to non parties. Section 18, in fact, in itself achieves such an extension, which is also one of its primary purposes.

[49] This then neatly brings me to the provisions of Section 23 of the LRA and of particular importance Section 23(1)(d), which provides as follows:

> 'A collective agreement binds - employees who are not members of the registered trade union or trade unions party to the agreement if- (i) the employees are identified in the agreement; (ii) the agreement expressly binds the employees; and (iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace.'

Therefore, and in terms of Section 23(1)(d), any collective agreement with a majority trade union that specifically binds non parties to the collective agreement and identifies the parties so bound, is actually binding on such non parties. Insofar as it concerns the issue of identification in terms of this Section, all that is needed is general identification by way of for example categories of employees and not specific identification of individual employees. Examples of this can be found in *Mega Express (Pty) Ltd v Employees as Listed*[75] where the Court held there was compliance with Section 23(1)(d) where the agreement recorded:

> 'The terms of this agreement shall be observed in the road passenger transport industry… *(b)* by all employers and eligible employees within the road passenger transport industry in the Republic of SA.'

Similarly, the Court in *Sigwali and Others v Libanon (A Division of Kloof Gold Mine Ltd)*[76] accepted as sufficient there the agreement recorded that 'it will be extended to all employees' in the particular employer. In my view, and in the current matter, there is very little doubt, on the facts, that Section 23(1)(d) finds proper and valid application. The POPCRU collective agreements specifically

[75] (2012) 33 ILJ 2634 (LC) at para 11.
[76] (2000) 21 ILJ 641 (LC) at para 15.

and expressly bind all employees in the DBC bargaining unit and make the agreements specifically applicable to all such employees.

[50] A consideration of the facts of this case reveal that the statutory organisational rights in terms of part A of Chapter III actually do not come into the picture at all. Firstly, SACOSWU is not representative even in terms of such Chapter and thus simply does not qualify for organisational rights in terms thereof. Insofar as POPCRU is concerned, it never relied on the statutory organisational rights in the first place, it never pursued enforcement in terms of Section 21 of the LRA and the collective agreements between POPCRU and the Department were not concluded in terms of Section 21 but were collective agreements concluded in terms of Section 20. Similarly, and because SACOSWU did not qualify for statutory organisational rights, it simply could not use the provisions of Section 21 and the collective agreement concluded between it and the Department was equally concluded in terms of Section 20. So what we actually have are two sets of collective agreements with two sets of trade unions and the Department both concluded in terms of section 20, regulating the issue of organisational rights. Added to this is the collective agreement between the Department and POPCRU in terms of Section 18(1), which is distinct and separate from the collective agreement in terms of Section 20. Unfortunately, and on the facts of this matter, the collective agreement between the Department and SACOSWU is entirely incompatible with the collective agreements between the Department and POPCRU, for the reasons set out hereunder.

[51] Firstly, the Section 18(1) collective agreement between POPCRU and the Department specifically sets a threshold of representativeness of 9 000 members for a single trade union. This is done in the form of prescribing that any trade union has to have such membership in order to be admitted to the DBC. This collective agreement is also specifically extended to all non parties. SACOSWU has a membership of less than 2 000 and thus cannot comply with this collective agreement.

[52] Secondly, and only once admission is obtained by a trade union to the DBC, the organisational rights of such trade union is specifically bestowed, determined and regulated by the DBC collective agreement. It is specifically recorded in this collective agreement (the procedure manual) that its purpose is to 'ensure consistency and uniformity in the relations between the DCS as employer and the respective unions representing the employees of DCS'.[77] In addition, and as far as deductions for trade union subscriptions are concerned, the collective agreement specifically incorporates the threshold referred to above as a qualifying prerequisite to obtain such right. This collective agreement is also once again specifically extended to non parties. On the other hand, the collective agreement between SACOSWU and the Department affords SACOSWU membership deduction facilities for trade union subscriptions, despite it not being admitted to the DBC or meeting the threshold. The same considerations and difficulties apply to the issue of access to the premises of the Department by SACOSWU.

[53] Thirdly, and where it comes to trade union representation in disciplinary proceedings, once again, a collective agreement between the Department and POPCRU regulates the issue of application of discipline in the Department. This collective agreement allows for trade union representation in disciplinary proceedings but specifically limits this only to trade unions admitted to the DBC. This collective agreement was once again extended to all non parties. The collective agreement between the Department and SACOSWU allows for trade union representation by SACOSWU in disciplinary proceedings despite it not being admitted to the DBC and meeting the threshold.

[54] The next issue to consider is when these respective collective agreements were concluded. The threshold agreement between the Department and POPCRU was concluded on 8 November 2001. The current applicable procedure manual (organisational rights) was concluded between the Department and POPCRU on

[77] Clause 1 of the practice manual.

23 February 2006. The current applicable disciplinary procedure was concluded between the Department and POPCRU on 8 March 2006. The collective agreement between SACOSWU and the Department was concluded on 3 November 2010, which is subsequent to all the mentioned collective agreements with POPCRU.

[55] It is clear that the collective agreements between POPCRU and the Department, on the one hand, cannot continue to exist in conjunction with the collective agreement between SACOSWU and the Department on the other hand, as a matter of undisputed fact and considering the above legal provisions referred to. One must stand and one must fall. The question now is – which one? In my view, the collective agreements between the Department and POPCRU must stand and have preference over that of the Department and SACOSWU. There are a number of reasons for this, which I will now address.

[56] The first and most obvious reason is that the POPCRU collective agreements precede that of SACOSWU and create an existing dispensation. The conclusion of the SACOSWU collective agreement seeks to infringe on this dispensation, in breach of the already exiting collective agreements. What already exists and continues to exist, as a general proposition, must be upheld.

[57] The next reason can be found in the provisions of Section 23(1)(d) itself. The fact is that all the POPCRU collective agreements have been made applicable and binding on all employees in the Department from time to time. This would include employees that became employed after the collective agreements were concluded.[78] This would include any SACOSWU members as well, irrespective of whether they are recruits from the non unionised corps or resigned from POPCRU.[79] In *Mzeku and Others v Volkswagen SA (Pty) Ltd and Others,*[80] the Court held the following with specific reference to Section 23:

[78] Section 23(2).
[79] Section 23(2).

> '… because there are situations where, even if an employee has resigned as a member of a union, such union remains entitled in effect to represent such employee and the employer remains obliged to deal with such union as representing, among others, such employee. The latter situation will occur, for example, where the union is a representative union that enjoys majority status in a workplace or in a sector because in such a case such union may conclude a collective agreement with the employer, or, employers, in the case of a sector, which binds even those employees who are not its members and those who may have been its members but have since resigned as well as those employees who will be employed by the employer or employers during the currency of such collective agreement.'

The members of SACOSWU were thus already bound by the POPCRU collective agreements when the SACOSWU collective agreement was concluded, which would surely make the SACOSWU collective agreement invalid. Mr Grogan sought to get around this difficulty by contending that a collective agreement on organisational rights is a collective agreement to the benefit of the union itself, and not the members, and nowhere is section 23(1)(d) is it determined that other trade unions are bound by such extended collective agreements and reference is only made in such Section to individual employees. Mr Grogan thus contended that section 23(1)(d) cannot serve to bind SACOSWU itself. I cannot agree with these submissions of Mr Grogan. A trade union without members is an empty shell. A trade union exists because of, and for its members. Trade unions do not act by way of agency but by way of collective majority with its members. In *SA Post Office Ltd v Communication Workers Union and Others,*[81] the Court specifically said that the principle is that a union in a collective bargaining process does not represent its members or other

[80] (2001) 22 ILJ 1575 (LAC) at para 55.
[81] (2010) 31 ILJ 997 (LC).

structures of the union as an agent but as a collective majority with such members.[82]

[58] Whilst it may be so that organisational rights are sought by a trade union in its own interest as well, the facts remains, as has been illustrated above, that organisational rights is an integral part of the collective bargaining process and as such, cannot be divorced from the interests of the union members in whose very interest the collective bargaining process is embarked upon. What binds these members, by necessary consequence, must bind their union as well, especially concerning particular workplace issues. What Mr Grogan is trying to do is to separate the trade union from its members where the shoe pinches. The fact remains that the individual members of SACOSWU are bound by the POPCRU collective agreements, and as a result, SACOSWU as well. That simply means that SACOSWU needs admission to the DBC to procure organisational rights.

[59] Thirdly, and by necessary consequence and application, the Section 18(1) collective agreement between the Department and POPCRU as majority union must equally bind SACOSWU. Otherwise, the provisions of Section 18(1) and any collective agreement concluded in terms thereof would be absolutely pointless, as it could never be enforced against other trade unions that are not actually a party to it. This setting of the threshold must apply to parties not actually party to the collective agreement itself concluded in terms of Section 18(1) in order to be effective, which is why a majority trade union is an imperative to the conclusion of this kind of collective agreement. In my view, therefore, SACOSWU is actually bound by the threshold collective agreement between the Department and POPCRU and this needs 9 000 members to qualify to be admitted to the DBC to so procure organisational rights. Clearly, the SACOSWU collective agreement itself would be in breach of this and, consequently, invalid.

[82] See also *Mhlongo and Others v FAWU and Another* (2007) 28 ILJ 397 (LC) at para 14.

[60] The fourth reason can be found in what can be termed a hierarchy of collective agreements. The concept is not unprecedented in the employment law environment. The issue has arisen where there is a conflict between plant level collective agreements and industry level collective agreements. In such instances, the industry level collective agreement had been held to have preference.[83] In my view, the issue of collective agreement hierarchy should equally apply in respect of collective agreements concluded with a majority trade union and that of any trade union that is not a majority where such agreements are entirely incompatible with one another and cannot exist in conjunction with one another. The collective agreement with the majority trade union must then have preference and apply over the agreement with the trade union that is not a majority. In *Workers Union of SA v Crouse NO and Another,*[84] it was held that

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

[61] The fact is that majority trade unions already have several statutory preferences over other unions. The organisational rights in Sections 14 and 16 is a prime example. So are the right in terms of Sections 18 and 23(1)(d), 25, 26, 32(1)(a) and (b), 32(3)(a) – (d), 32(5) and 78. To apply the terms agreed with a majority trade union over that in respect of terms agreed with a minority trade union where the two sets of terms are incompatible, is in my view in the interest of orderly and effective collective bargaining as an imperative of the LRA.[85] In

[83] See *Unitrans Fuel and Chemical (Pty) Ltd v Transport and Allied Workers Union of SA and Another* (2010) 31 ILJ 2854 (LAC) at paras 16 – 18; *SA Clothing and Textile Workers Union and Others v Yarntex (Pty) Ltd t/a Bertrand Group* (2010) 31 ILJ 2986 (LC) at para 56; *Cape Gate (Pty) Ltd v National Union of Metalworkers of SA and Others* (2007) 28 ILJ 871 (LC).
[84] (2005) 26 ILJ 1723 (LC) at para 28.
[85] See *Kem-Lin Fashions CC* (supra).

National Union of Mineworkers and Others v Geffens Diamond Cutting Works (Pty) Ltd,[86] The Court referred with approval to an the following extract from the reported arbitration award in *Profal (Pty) Ltd and National Entitled Workers Union*:[87]

> 'It is clear that one of the primary objectives of the legislature in crafting the LRA, was to promote the principle of majoritarianism in preference to the ''all comers' principle that would encourage the proliferation of unions. The idea was to create an orderly system of collective bargaining. Majoritarianism finds its expression most vividly in the system of centralized bargaining at industry level in which a union or a group of unions, that collectively represent the majority of employees above a pre-determined threshold in the industry, win the right to bargaining with employers on substantive conditions of employment.' I fully agree with this reasoning.

[62] Therefore, I conclude that the POPCRU collective agreements must have preference over the SACOSWU collective agreement, insofar as these sets of collective agreements are incompatible, as POPCRU is a majority union, with whom the Department arrived at a fully bargained and agreed solution on the issue of organizational rights. In this respect, one can do no better than to refer to the following extract from the judgment in *SA Police Union and another v National Commissioner of the SA Police Service and Another*:[88]

> '… Labour relations in our system are regulated primarily through collective bargaining, minimum standards legislation and contextually sensitive dispute resolution which takes account of the policy prescriptions and values of a constitutionally sanctioned pluralist model, underpinned by organizational rights, majoritarianism and a preference for negotiated solutions and outcomes.'

[86] (2008) 29 ILJ 1227 (LC) at para 44.
[87] (2003) 24 ILJ 2416 (BCA).
[88] (2005) 26 ILJ 2403 (LC) at para 54.

[63] Based on all of the above and considering what I have found to be the proper basis for the interpretation and application of Parts A and B of Chapter III of the LRA, the SACOSWU collective agreement cannot be allowed to stand. It is actually in direct breach of the POPCRU collective agreements referred to. To give effect to the SACOSWU collective agreement, the Department must in essence disregard what is provided for the POPCRU collective agreements. This cannot be what is contemplated by Section 20 of the LRA.

Conclusion

[64] In terms of the stated case, the arbitrator had two questions he needed to answer.[89] The first is whether SACOSWU is entitled to exercise any organisational rights in the Department. The second question is really a two part question, being whether SACOSWU as a minority and unrepresentative trade union is entitled to conclude a collective agreement with the Department in terms of which SACOSWU is granted organisational rights outside the ambit of Part A of Chapter III, and if so, whether that agreement would be valid and enforceable.

[65] Based on what has been set out above, it is my conclusion that both these questions had to have been answered in the negative. SACOSWU, as unrepresentative trade union, cannot rely on statutory enforcement under Part A of Chapter III because it simply does not qualify for it. Whilst it may be so that SACOSWU as a minority and unrepresentative trade union may as a matter of general principle collectively bargain with the Department with the view to concluding a collective agreement with the Department on organisational rights outside the ambit of Part A of Chapter III of the LRA, which is indeed what section 20 envisages, this general principle will always be subject to and tempered by the rights of POPCRU as the majority representative trade union to do three things: (1) to determine thresholds of representativeness for all trade unions in the Department to qualify for organisational rights; (2) to regulate the

[89] See para 11 of the stated case.

issue of organisational rights for all trade unions with the Department by way of collective agreement; and (3) to make such collective agreements binding on all other parties who must comply with the terms thereof. This is exactly the case in this instance, and these rights of POPCRU must be given effect to in the first instance.

[66] My conclusion thus is that because of the existence of POPCRU as a recognised and majority representative trade union in the Department and because of the existence of already concluded collective agreements with POPCRU determining thresholds of representativeness and organisational rights, and which have been made applicable and binding on non parties, the Department and SACOSWU were not entitled to conclude a collective agreement on organisational rights. Even if I am not correct in this conclusion, and the Department and SACOSWU were as a matter of general principle entitled to conclude the SACOSWU collective agreement, this agreement would still be invalid and unenforceable for these very same reasons. To apply this agreement would negate and breach the POPCRU collective agreements. It would also fly in the face of Sections 18(1) and 23(1)(d) of the LRA in terms of which SACOSWU and/or its individual members are bound by such POPCRU collective agreements. Added to this is the fact that POPCRU is a majority representative union. These issues must therefore taint the SACOSWU collective agreement, even if competently concluded, with invalidity.

[67] If SACOSWU wants to exercise organisational rights in the Department, it must comply with the threshold of representativeness of 9 000 members to qualify. It must obtain admission to the DBC. It cannot conclude a collective agreement with the Department outside the ambit of this agreed structure.

[68] The arbitrator (first respondent) concluded to the contrary. The first respondent answered both the questions referred to above in the positive. This cannot be upheld and in terms of the review test as set out above, would constitute a

material error of law and a reviewable irregularity. The award of the first respondent is thus unsustainable, and falls to be reviewed and set aside. I accordingly review and set aside the arbitration award of the first respondent.

[69] Having reviewed and set aside the award of the arbitrator (the first respondent), and considering that the issues at stake in this matter are in essence considerations of law against the backdrop of a stated case on the facts, I see no reason to remit this matter back to the fourth respondent again. I, therefore, intend to substitute the arbitration award of the first respondent with an award as set out in the order made at the conclusion of this judgment.

[70] Neither the applicant nor the third respondent pressed the issue of costs before me. In terms of the provisions of section 162(1) and (2) of the LRA, I have a wide discretion where it comes to the issue of costs. The issues before the Court were complex and novel and both parties had a proper case to present. The matter concerned important principles of law as well. I also consider the continuing relationship between the applicant and second respondent. I will, accordingly, exercise my discretion in favour of making no order as to costs, as I am of the view that this would be fair and appropriate in this instance.

Order

[71] In the premises, I make the following order:

71.1 The arbitration award of the first respondent, being arbitrator L G P Ledwaba dated 16 February 2012 in the arbitration proceedings between the applicant and the second and third respondents, under case number GPBC 1754/2011, is reviewed and set aside.

71.2 The arbitration award of the first respondent, being arbitrator L G P Ledwaba dated 16 February 2012 in the arbitration proceedings between the applicant and the second and third respondents, under case number

GPBC 1754/2011, is substituted and replaced with the following determination:

(1) The collective agreement concluded between SACOSWU and the Department of Correctional Services in terms of which SACOSWU was granted and afforded organizational rights is declared to be invalid and set aside.

(2) SACOSWU is not entitled to exercise organizational rights in the Department of Correctional Services unless SACOSWU complies with the threshold of representativeness and is admitted to the Department Bargaining Council, as specified in resolution 7 of 2001 dated 8 November 2001, for as long as this resolution remains valid and binding.

(3) SACOSWU is not entitled to conclude a collective agreement with the Department of Correctional Services on organizational rights in terms Section 20 for as long as the Procedure Manual as contained in resolution 3 of 2006 dated 23 February 2006 remains valid and binding.

71.3 The application in terms of Section 158(1)(c) by SACOSWU under case number J 1150 / 12 is dismissed.

71.4 There is no order as to costs.

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Snyman AJ

Acting Judge of the Labour Court

APPEARANCES:

For the Applicant:	Adv J L Basson
Instructed by:	Grosskopf Attorneys
For the Second Respondent:	Advocate E M Matanda
Instructed by:	The State Attorney
For the Second Respondent:	Advocate J G Grogan SC (together with Adv L Vootsos)
Instructed by:	Neville Borman & Botha