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Preface

This edition of the *Industrial Law Journal* brings together a collection of eight papers delivered at the annual Labour Law Colloquium hosted by the Law Faculty of Stellenbosch University in October 2024 and organised by Professor Christoph Garbers.

The colloquium was designed to reflect on the development of our labour legislation over the one hundred years since adoption of the 1924 Industrial Conciliation Act. In particular, the colloquium aimed to stimulate debate on the successes and failures of our labour legislation and on the regulatory challenges that remain in the different areas of our labour law, including the scope of its protection, centralised and decentralised bargaining, strike law, equality, job security and protection, dispute resolution, as well as social security.

The colloquium also served as a vehicle to pay tribute to the very significant contributions to labour law of former Chief Justice Raymond Zondo and Professor Halton Cheadle.

The Evolution of the Right to Freedom of Association: A South African Perspective

Rochelle le Roux*
Kamalesh Newaj**

Abstract

Although individual jurisdictions have since developed their own nuances, the right to freedom of association in the labour context in jurisdictions acknowledging such a right stem from the Freedom of Association and Protection of the Right to Organise Convention 87, adopted by the International Labour Organisation (ILO) in 1948. In South Africa, this right is emphasised in ss 18 and 23 of the Constitution, with further regulation provided by the Labour Relations Act (LRA). Many of the provisions in the LRA can potentially raise issues, but this article focuses on its explicit expression in chapter II of the LRA. The article examines several contentious aspects of this chapter: the lack of a registration requirement for trade unions, the definition of 'lawful activities' for unions, an employee's right to join a union 'subject to its constitution,' and whether a right not to associate can be inferred. It further considers the interface between the right to freedom of association and closed and agency shop agreements. The conclusion is that, despite South African courts generally adopting a liberal understanding of the right to freedom of association, their approach regarding employees' rights to be represented by chosen trade unions has been surprisingly conservative.

Keywords: freedom of association — International Labour Organisation — Constitution — registered trade union — lawful activities of trade union — constitution of trade union — representation of members by trade union — closed shop and agency shop agreements — right not to associate.

1 Introduction

While the right to freedom of association is well established in democratic countries, it escapes precise definition.[1] For the purposes of this article, we depart from the broad hypothesis that the right evolved from an

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Aspects of this article were presented at a colloquium '100 Years of Labour Legislation' hosted by the University of Stellenbosch on 3-4 October 2024.

[1] See M Budeli 'Understanding the right to freedom of association at the workplace: Components and scope' (2010) 1 *Obiter* 16 at 17-21 for a review of the different views on the meanings, content and scope of the right to freedom of association.

attempt to facilitate individuals with a common interest to combine their resources to countervail a manifestation of power, be it the state, employer or another combination.

This basic premise probably still holds true, but history shows that the content of the right is dynamic and in a constant state of evolution;[2] some might even argue that it now also includes the freedom to associate with intangibles such as thought and ideologies.[3] This is an interesting view, but in the case of South Africa, probably addressed by the right to freedom of conscience, religion, thought, belief and opinion and the right to freedom of expression in ss 15 and 16 of the Constitution of the Republic of South Africa, 1996 (Constitution).

Nonetheless, even in its basic form, the right to freedom of association is complex and constantly challenged for meaning, particularly in the vibrant environment of labour relations. The focus of this article is the expression of the right to freedom of association in the Labour Relations Act (LRA)[4] against the background of the constitutional rights to fair labour practices[5] and freedom of association.[6] Other than chapter II of the LRA, which specifically addresses the right to freedom of association, many other provisions in the LRA, particularly those dealing with bargaining units and their registration, collective bargaining, strikes and lock outs, can in their application, one way or another, potentially transcend or raise issues concerning the right to freedom of association.[7] Subject to the caveat that other provisions of the LRA, particularly those

[2] Generally, see B Hepple *The Making of Labour Law in Europe* (1986) 200-222; S Deakin and G Morris *Labour* 4 ed (2005) 729-820; and JR Bellace 'The Committee on Freedom of Association: Making freedom of association a reality' in K Curtis and O Wolfson (eds) *70 Years of the ILO Committee on Freedom of Association: A Reliable Compass in Any Weather* (2022) https://www.ilo.org/sites/default/files/wcmsp5/groups/public/%40ed_norm/%40normes/documents/publication/wcms_860150.pdf, accessed 4 November 2024.

[3] There is some evidence of this reasoning in *Golden Arrow Bus Services (Pty) Ltd v National Union of Metalworkers of SA & others* (2022) 43 *ILJ* 844 (LC) (*Golden Arrow*) para 70. Also see Budeli n 1 above 19.

[4] Act 66 of 1995.

[5] s 23 of the Constitution.

[6] Section 18 of the Constitution provides that '[e]veryone has the right to freedom of association'. Whether there is a difference between a 'right to freedom of association' and mere 'freedom of association' is the subject of debate. Given that the Constitution refers to a 'right', this debate is not pursued in this article.

[7] For instance, the right to freedom of association is the basis on which some manifestations of majoritarianism and the substantive and procedural prerequisites for a secondary strike action had been attacked, both in the courts and through complaints lodged with the Committee on Freedom of Association (CFA). Regarding the former, see *Association of Mineworkers & Construction Union & others v Chamber of Mines of SA & others* (2017) 38 *ILJ* 831 (CC) (*Chamber of Mines*); *Association of Mineworkers & Construction Union & others v Royal Bafokeng Platinum Ltd & others* (2020) 41 *ILJ* 555 (CC); and *Association of Mineworkers and Construction Union & others v AngloGold Ashanti Ltd t/a AngloGold Ashanti & others* (2022) 43 *ILJ* 291 (CC). Regarding the latter see, Definitive Report — no 404, October 2023, case no 3422 (South Africa) — complaint date: 07-MAR-22 https://normlex.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:4364406, accessed 30 September 2024; and Definitive Report — no 396, October 2021, case no 3379 (South Africa) — Complaint date: 14-APR-20 https://normlex.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:4120998, accessed 30 September 2024.

dealing with the registration of trade unions (ss 95 and 96) and those regulating automatically unfair dismissals (s 187), are relevant, the main focus of this article is the overt expression of the right to freedom of expression and the overt expression of potential limitations in the LRA, namely: chapter II and closed shop and agency shop agreements (ss 25 and 26).

This article proceeds as follows. Part 2 provides a brief historical overview of the right to freedom of association in the labour context, taking note of developments at the ILO and their influence on the Constitution. Chapter II of the LRA regulates the right to freedom of association and an overview of its provisions is provided in part 3, followed by an analyses of their more contentious aspects: the absence of a registration requirement for a trade union or an employers' organisation; the meaning of the 'lawful activities' of a trade union; the import of an employee's right in s 4(1)*(b)* of the LRA to join a trade union 'subject to its constitution'; and, whether a negative right can be read into these provisions. Part 4 addresses the interface between the right to freedom of association and closed and agency shop agreements. Concluding remarks are made in part 5.

Finally, given the nature of the issues that have been ventilated in jurisprudence, the article is primarily, although not exclusively, dealing with an employee's or a trade union's (as opposed to an employers' organisation's) claim to the right to freedom of association.

2 Historical Overview: Right to Freedom of Association in the Labour Context

In the context of labour, rudimentary recognition of the right dates back 200 years to when Britain, in 1824, lifted the criminalisation of combinations (as trade unions were referred to at the time).[8] While statutory protection of the right followed in several jurisdictions,[9] it offered little in terms of positive rights and was often mostly in the

[8] Deakin and Morris n 2 above 743.

[9] The first statutory expression of the right to freedom of association in Britain was in the Trade Union Act of 1871. In France, probably because of the French Revolution's emphasis on individual liberties, trade unions were largely prohibited until the start of the 20th century. It was only with the adoption of the Associations Act in 1901 that the right to freedom of association became generally recognised in France. See T Teramoto 'The Committee on Freedom of Association (CFA): Origin and goals — Protecting the principles of workers' and employers' freedom of association and their right to collective bargaining as an enabling basis for sustainable, democratic and productive industrial relations' in Curtis and Wolfson n 2 above 46-51.

form of criminal sanctions for transgressions.[10] It was not until the ILO adopted the Freedom of Association and Protection of the Right to Organise Convention 87 (convention 87) in 1948 that the meaning of the right to freedom of association began to crystallise. The part of the Treaty of Versailles in 1919 that became the ILO Constitution earmarked the adoption of a convention on the right to freedom of association for urgent attention.[11] However, for reasons that will be explained in part 3, this was delayed for several decades until 1948.[12] When it was finally adopted, convention 87 unequivocally confirmed that the right to freedom of association belongs to both employees and workers, and that they shall 'have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation'.[13]

By the time South Africa adopted the Constitution, the ILO supervisory bodies[14] had already developed substantial jurisprudence on the scope of the right. The import of this jurisprudence was usefully summarised by the Constitutional Court in *National Union of Metalworkers of SA & others v Bader Bop (Pty) Ltd & another* (*Bader Bop*):[15]

'Of importance to this case in the ILO jurisprudence described is firstly the principle that freedom of association is ordinarily interpreted to afford unions the right to recruit members and to represent those members at least in individual workplace grievances; and, secondly, the principle that unions should have the right to strike to enforce collective bargaining demands … The second principle relates to the right of a union to take industrial action to pursue its demands.'[16]

The key tenets of the jurisprudence of the ILO's supervisory bodies were transplanted into the Constitution in the form of s 18, underscoring a general right to freedom of association,[17] and s 23, which is labour specific and, among others, guarantees the right of workers

[10] In South Africa, pre-1995 labour legislation prohibited employers from victimising workers for actual or suspected union membership and criminalised such conduct. See s 66 of the Industrial Conciliation Act 36 of 1937, s 66 of the Labour Relations Act 28 of 1956, and s 25 of the Wage Act 5 of 1957. Dismissals in contravention of these provisions were regarded as unlawful and invalid. See *National Union of Textile Workers & others v Stag Packings (Pty) Ltd & another* (1982) 3 *ILJ* 285 (T). The current LRA abandoned the criminal model. This, among others, informed the Constitutional Court's decision in *Steenkamp & others v Edcon Ltd (National Union of Metalworkers of SA intervening)* (2016) 37 *ILJ* 564 (CC) paras 108-112 that the current LRA does not contemplate invalid dismissals.

[11] See Bellace n 2 above 6.

[12] In the intervening years, the Right of Association (Agriculture) Convention 11 was adopted in 1921. It decreed that member states should ensure that those engaged in agriculture have the same rights of association and combination as industrial workers, but it provided no clarity about the content of the right. Bellace n 2 above 8.

[13] Convention 87 art 2.

[14] The CFA and the Committee of Experts on the Application of Conventions and Recommendations (CEACR).

[15] (2003) 24 *ILJ* 305 (CC), 2003 (3) SA 513 (CC) (*Bader Bop*).

[16] ibid paras 34-5. The outcome is not known at the time of writing, but during early 2025 the ILO is set to revisit whether the right to freedom of association implies the right to strike.

[17] See n 6 above.

and employers to join and participate in the activities and programmes of trade unions and employers' organisations, as the case may be, and for such trade unions and employers' organisations to organise, form federations and engage in collective bargaining.[18]

The detailed regulation of these constitutional rights was subsequently codified in chapter II (ss 4-9) of the LRA and is further strengthened by the provisions on automatically unfair dismissals (s 187), but possibly weakened by the provisions on closed and agency shop agreements (ss 25-26).[19]

Whether the right to freedom of association also includes the right not to associate (a 'negative right') is reverted to in part 3.

3 Chapter II of the LRA[20]

3.1 *Introduction*

Distilled to its bare essence, chapter II underscores an employee's right of freedom of association to join a trade union (even if not registered),[21] and an employer's right of freedom of association to join an employers' organisation (even if not registered).[22] Chapter II further provides for such unions and employers' organisations to determine their own constitutions and rules, to hold elections, and to plan and organise their administration and lawful activities.[23] More specifically, these provisions give employees and employers, as the case may be, the right to participate in the forming of the relevant association; once the association is formed, employees and employers have the right, subject to its constitution, to join the association and, as members, to participate in its lawful activities which such association has the right to determine. These provisions are reinforced by ss 5 and 7, which provide protection against acts of discrimination and interference because of the exercise of the right to freedom of association; although not specifically addressed in

[18] Section 23(2)-(4) of the Constitution reads 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.
(3) Every employer has the right—
(a) to form and join an employers' organisation; and
(b) to participate in the activities and programmes of an employers' organisation.
(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.'

[19] See n 9 above for legislative provisions on the right to freedom of association prior to 1995.

[20] For ease of reading, all references to legislative provisions in the rest of this article are to the LRA, unless otherwise indicated.

[21] s 4.

[22] s 6.

[23] s 8.

this article, these provisions represent an important subset of workplace discrimination law.[24]

Disputes about the interpretation or application of any provision of chapter II are ventilated via the conciliation and adjudication pathway,[25] and automatically unfair dismissal disputes, informed by a violation of the rights in chapter II, follow the same dispute resolution pathway.[26]

Apart from discrimination, the interpretation of chapter II presents several challenges. We highlight four of these for further deliberation:

- the absence of a registration requirement in respect of both trade unions and employers' organisations;
- the meaning of the 'lawful activities' of a trade union;
- the import of an employee's right in s 4(1)*(b)* to join a trade union 'subject to its constitution'; and
- whether a negative right can be read into these provisions.

3.2 *The absence of a registration requirement for trade unions*

Section 213 defines a trade union to mean, first, an association of employees, with, second, a principal purpose of regulating relations between its members and their employers (or employers' organisations representing those employers), but no mention is made of registration.

While art 2 of convention 87 provides that 'workers and employers, can join organizations of their choice without previous authorisation', the ILO's supervisory bodies do not regard registration as a breach of the convention.[27] In South Africa, while registration of a trade union (or an employers' organisation) is not required for the association to acquire separate juristic personality, registration is significant in the scheme of the LRA as it provides the gateway to certain benefits and rights.[28] However, unlike elsewhere in the LRA, the threshold for entitlement

[24] *Safcor Freight (Pty) Ltd t/a Safcor Panalpina v SA Freight & Dock Workers Union* (2013) 34 *ILJ* 335 (LAC) (*Safcor Freight*); *National Union of Mineworkers obo Members v Cullinan Diamond Mine, A Division of Petra Diamonds (Pty) Ltd* (2019) 40 *ILJ* 1826 (LC) (*Cullinan Diamond Mine*).

[25] s 9.

[26] s 191(5)*(b)* and (11).

[27] *Simunye Workers Forum v Registrar of Labour Relations* (2023) 44 *ILJ* 2021 (LC) para 17 (*Simunye*).

[28] These rights were helpfully summarised in *National Employers Forum v Minister of Labour & others* (2003) 24 *ILJ* 954 (LC) para 5: 'The construction of the LRA is such that registered trade unions and employee organisations are afforded numerous rights in terms of the LRA. For example, organisational rights in respect of representative registered trade unions are conferred in terms of ss 12-16 of the LRA; the ability to enter into binding and enforceable collective agreements (s 23 of the LRA), agency shop agreements (s 25), close shop agreements (s 26), the ability to establish bargaining councils and to negotiate at such bargaining councils (ss 27-34), the establishment of statutory councils (s 40), the ability to pursue disputes regarding demarcation between sectors and areas (s 62), the right to engage in strikes and recourse to a lock-out (ss 64-77), the right to refer and appear on behalf of members at conciliation and arbitration proceedings before the CCMA in terms of ss 133-150 of the LRA and at the Labour Court (s 161 of the LRA).'

to chapter II rights is not registration. This was also the case under the Labour Relations Act of 1956.[29]

Presumably the reason for this is that if the right can be claimed only by registered trade unions, nascent unions seeking traction in the workplace and their members (or potential members) could be victimised and undermined by the employer with impunity, preventing the union from maturing into a formation capable of registration.

This then begs the question when an association can be said to be a trade union for the purposes of chapter II. This requires a detour and some reflection on the requirements for registration. The requirements for the registration of a trade union in South Africa are listed in s 95 and have been summarised as follows:

'In summary, in broad terms, the sole requirements for the registration of a trade union are first, a name that does not closely resemble the name or shortened form of the name of another trade union such that it is likely to mislead or cause confusion; secondly, a constitution that meets the prescribed requirements; thirdly, an address in the Republic; fourthly, independence from employers; and finally, the requirement of genuineness.'[30]

Since registration requirements obviously have the potential to stymie the growth of a union and the right to freedom of association, our labour courts have favoured a generous approach to registration, minimising any interpretation that confers discretionary powers upon the registrar of labour relations (registrar) when considering an application for registration, as it might be regarded as a manifestation of 'previous authorisation' as contemplated by convention 87.[31] More recently, the Labour Court has also cautioned that, no matter how unconventional the applicant union, once the requirements listed above are met, the registrar has no discretion and is obliged to register the applicant.[32]

Nonetheless, the requirements of independence and genuineness open the door for the exercise of some judgment by the registrar. In *Simunye*,[33] the registrar was troubled by the applicant union's dependence for its

[29] Act 28 of 1956.

[30] *Simunye* n 27 above para 20.

[31] In particular, the Labour Court has cautioned that it would be too restrictive to impose a requirement that trade unions can be formed only by those who qualify for membership. See *Workers Union of SA v Crouse NO & another* (2005) 26 *ILJ* 1723 (LC) (*WUSA*). This judgment was overruled on appeal on the basis that the registrar had not yet taken a final decision and an appeal in terms of s 111(3) was not competent: see *Crouse NO & another v Workers Union of SA* (2008) 29 *ILJ* 2571 (LAC) (*Crouse*). It is also not a requirement that an applicant trade union must be fully operational in terms of its constitution when it applies for registration: see *Municipal & Allied Trade Union of SA v Crouse NO & others* (2015) 36 *ILJ* 3122 (LC) (*MATUSA*). Also, while majoritarianism is a premise of the LRA, the registrar is not its gatekeeper and the registration of trade unions cannot be declined because it would lead to a proliferation of trade unions in a particular workplace, or because the applicant trade union is not sufficiently representative: see *WUSA* and *Crouse* above. The latter is consistent with the Constitutional Court's endorsement of majoritarianism as expressed in the LRA on the basis that it is not oppressive and allows minority unions the right to freedom of association. See *Chamber of Mines* n 7 above paras 54-58.

[32] *Simunye* n 27 above para 38.

[33] ibid.

infrastructural needs on the Casual Workers' Advice Office (CWAO), a non-profit, registered, independent community advice office. In *Public Servants Association of SA v Department of Employment & Labour & another* (*PSA*),[34] the registrar refused to register an amendment to the constitution of a union on the basis that it lacked independence as it had dual registration as a trade union under the LRA and as a non-profit organisation under company laws — a situation that had existed for 29 years by the time the amendment was sought. In both cases, the Labour Court was untroubled by these links as the independence requirement in s 95(2) speaks to the union's relationship with an employer or an employers' organisation and the extent to which it has direct or indirect control and/or can interfere or influence the applicant trade union. In both these cases, there was no evidence of such control.

Even if passing the independence requirement, the applicant union must also meet the genuineness requirement in s 95(7), which was introduced by a 2002 amendment to the LRA. This requirement was introduced for the following reason:

'The mischief intended to be addressed was coercive practices on behalf of disguised labour consultancies registered for the sole purpose of gaining rights of appearance in the CCMA and this court, and the activities of financial and insurance brokers forming trade unions or becoming active in their affairs for the purpose of marketing financial or insurance products.'[35]

Guidelines[36] strengthening the provision direct the registrar, when deciding on the genuineness of a union, to 'examine the actual process of forming a trade union, its composition and membership and the activities it undertakes on behalf of its members',[37] and also provide further guidance on how each of these issues should be examined.

Regarding this requirement, *Simunye* emphasised that the applicant union's relationship with the CWAO did not impact on the genuineness requirement as 'there is nothing untoward in a trade union obtaining services from working in collaboration with a community advice office'.[38] In this regard, the court cited[39] an earlier Labour Court judgment which noted:

'Many trade unions in South Africa have been brought into existence at the instance of persons who were not employees, but who were social activists, academics or politically motivated individuals … [T]he Federation of South African Trade Unions (FOSATU), the predecessor of the country's biggest existing federation COSATU, is but one example.'[40]

[34] (2024) 45 *ILJ* 1646 (LC).

[35] *Simunye* n 27 above para 29.

[36] The current version, Guidelines in Terms of Section 95(8), was published in 2018. See GN R1395 *Government Gazette* 42121 of 19 December 2018.

[37] ibid clause 6.

[38] *Simunye* n 27 above para 31.

[39] ibid.

[40] *WUSA* n 31 above para 25.

Simunye further held that the LRA does not bar trade unions 'from obtaining services from, or working in collaboration with community advice offices'.[41] Given that the applicant union in question 'is not a vehicle for enriching individuals nor is it a vehicle to the right of representation before statutory dispute-resolution agencies and this court',[42] the registrar was ordered to register the applicant union.

The question whether an unregistered association is a trade union for the purposes of chapter II is likely to arise when a referral is made in terms of s 9, or when an employee refers an automatically unfair dismissal under s 187, based on the employee's victimisation because of his or her links with the association purporting to be a trade union. Given that the registration requirements in s 95 are not relevant, the only guidance whether the association in question is a trade union and not something else, eg an emerging labour consultancy that is disrupting labour relations in a workplace, is the definition of a trade union in s 213. This definition, apart from not requiring registration, has no independence requirement, and particularly no genuineness requirement.

This is a tricky situation, but once the two legs of the definition of a trade union are met, the existence of a union for the purpose of chapter II rights has probably been established. Nonetheless, one suspects that the courts will not be completely blind to the jurisprudence in respect of registration requirements for unions (particularly, in respect of the genuineness requirement) when examining whether the two requirements in the definition of a trade union have been met. Regardless, employers (and the courts) should guard against disregarding or undermining nascent unions simply because they do not look like traditional trade unions. Although the following statement was made in the context of an application for the registration of a union, it is equally true for unregistered unions:

'The emergence of trade unions that eschew traditional trade union structures is inevitable. Since the LRA was brought into operation in 1995, the labour market has changed radically. Workforces, once homogenous, have fragmented and segmented into core and marginal groups where new, less secure forms of work have emerged. New forms of worker organisation will inevitably emerge to meet these challenges and better serve the interests of the more vulnerable.'[43]

3.3 *Lawful activities of a trade union*

Section 4(2) provides as follows:
'Every member of a trade union has the right, subject to the constitution of that trade union—
(a) to participate in its lawful activities …'.[44]

[41] *Simunye* n 27 above para 32.

[42] ibid para 39.

[43] ibid para 38.

[44] Further see s 4(3)*(a)*, which reads as follows: 'Every member of a trade union that is a member of a federation of trade unions has the right, subject to the constitution of that federation — *(a)* to participate in its lawful activities …'.

The right of a union member to participate in the lawful activities of that union must be read with ss 5 and 187. Section 5(1) and (2) precludes anyone from discriminating against an employee for exercising a right conferred by the LRA, including participation in the lawful activities of a trade union,[45] the exercise of any right conferred by the LRA, and the participation in any proceedings in terms of the LRA.[46] Section 187(1)*(d)* further provides that a dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to s 5 or, if the reason for the dismissal is because the employee takes action (or signals an intention to take such action) against the employer by either exercising a right conferred by the LRA or participating in proceedings under the LRA.

'Lawful activities' also feature in s 8*(b)*, which provides that a union has the right to plan and organise its administration and lawful activities.

The inquiry into whether an activity is lawful is twofold: the activity must be that of a trade union, and it must be lawful. The inquiry, it is suggested, should start with the union's constitution. If the activities provided for in the constitution are consistent with those activities that a union's constitution must provide for in terms of s 95(5) before it can be registered, the activity should at least be prima facie a union activity and lawful, even if the union is not registered. Even so, the constitution of a union will inevitably be broad, and questions may arise whether certain activities not specifically mentioned in the constitution are indeed trade union activities. Section 95(5), for instance, does not specifically require that the constitution of a union applying for registration must empower it to bargain collectively or to call a strike, but that does not necessarily imply that these are not trade union activities. This, as will be demonstrated below, is a consequence of a union's constitutional right to engage in collective bargaining and the implications of the right to freedom of association.

It is useful to start the inquiry into the lawfulness of an activity by assuming that the activity is indeed a trade union activity. This discussion will provide the foundation for an analysis of, first, when an activity can be said to be a trade union activity, and, second, the relationship between an unlawful demand (in the strike context) and the lawfulness of a union activity.

[45] Section 5(2)*(c)*(iii) provides: 'Without limiting the general protection conferred by subsection (1), no person may do, or threaten to do, any of the following — *(c)* prejudice an employee or a person seeking employment because of past, present or anticipated — (iii) participation in the lawful activities of a trade union, federation of trade unions or workplace forum …'.

[46] The effect of s 5(2)*(c)*(iv), (vi) and (vii) is to preclude anyone from prejudicing any employee for the past, present or anticipated exercise of any right conferred by the LRA or for past, present or anticipated participation in any proceedings in terms of the LRA. Also see *Safcor Freight* n 24 above.

(a) When is a trade union activity (un)lawful?

The locus classicus in this regard is *National Union of Public Service & Allied Workers obo Mani & others v National Lotteries Board* (*Lotteries Board*).[47] The judgment addressed several significant issues, but for the purpose of this article, the focus is on its guidance on the meaning of the lawfulness of a trade union activity.

Following the refusal of the National Lotteries Board (the employer or the board) to disclose the terms of the contract of employment of its chief executive officer (CEO), the trade union referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation, which was postponed to allow for further engagement. A subsequent petition by the union, and signed by its members, urged the board to ensure that a specified date was to be the CEO's last day of employment. The board regarded this as confrontational and disciplinary action followed, ultimately resulting in the dismissal of those employees who signed the petition, ostensibly for insubordination. The dismissed employees claimed that the dismissals were automatically unfair because their conduct constituted participation in the lawful activities of the union under the Act.[48] This required an examination of the petition and whether it was the dominant cause of the dismissal.[49]

The specific findings regarding the demand about the CEO will be reverted to below, but for the moment the focus is purely on the court's interpretation of the meaning of 'lawful activities'. The minority (per Froneman J) held that the term relates to lawfulness under the LRA and not criminal conduct or civil wrongfulness.[50] In support of this reasoning, the minority further postulated that 'the opposite of "lawful activities" may perhaps more accurately be termed *unprotected* instead of *unlawful*'.[51] By contrast, the majority (per Zondo J as he then was) preferred an interpretation of 'lawful activities' in ss 4(2)*(a)* and 5(2)*(c)*(iii) that excludes illegal activities, contraventions of the law and criminal offences,[52] but includes

> 'participation by union members in union activities that form part of the core functions of a trade union. These include taking up its members' complaints or grievances with their employer, representing them in grievance and disciplinary proceedings, *collective bargaining*, attending statutory tribunals to represent their

[47] (2014) 35 *ILJ* 1885 (CC). See A Rycroft 'Insubordination and legitimate trade union activity' (2014) 35 *ILJ* 2689 for an insightful discussion of this judgment.

[48] *Lotteries Board* para 3. The provisions implicated are s 5 (read with s 187) and s 187(1)*(d)*.

[49] *National Union of Food Beverage Wine Spirits & Allied Workers v Coca Cola Beverages SA (Pty) Ltd* (2024) 45 *ILJ* 1813 (LAC) paras 27 and 32.

[50] *Lotteries Board* n 47 above para 67.

[51] ibid para 68.

[52] ibid para 151.

members' interests and communicating with its members' employer about workplace issues'.[53]

In other words, since the right to engage in collective bargaining is a constitutional right afforded to trade unions and since much of the LRA is about giving effect to this right, it is only logical that collective bargaining should be regarded as a trade union activity.[54] Given that the conciliation in this matter was extended to afford the union an opportunity to engage with the board, the petition, the majority reasoned, was simply a continuation of collective bargaining and a lawful union activity in terms of s 4(2)*(a)* in which the employees were entitled to participate.[55]

This should not be taken to imply that 'extended' collective bargaining can take any form: illegal activities, contraventions of the law and criminal offences will not pass muster. Applying this yardstick, the majority was unimpressed by the employer's argument that the union's confrontational stance (which did not involve any physical harm to any person or damage to property), and its efforts to seek media exposure (by leaking aspects of its communication to the board), were unlawful. However, the majority conceded that this conclusion was limited to the facts of the matter.[56]

Relying on the causation test, the majority held that the dominant reason for the dismissal of the employees 'is that they engaged in conduct in which the LRA entitled them to engage'.[57] In this regard, reliance was placed on a letter from the employer's attorney that disciplinary charges could be avoided if the petition was withdrawn.[58] 'Therefore, it is what the union and employees said in the petition that constitutes the important or real reason for the dismissal of the employees.'[59] Given that the petition constituted a lawful activity and an extension of collective bargaining and conciliation proceedings under the LRA, the majority

[53] ibid para 153. In support of this sentiment see *National Union of Mineworkers v Hernic Exploration (Pty) Ltd* (2003) 24 *ILJ* 787 (LAC) para 41 where the following comment was made: 'The primary function of a trade union is to act as the representative of its members. Without that capacity it is doubtful whether a trade union can survive.' For similar supporting sentiments see *Kroukam v SA Airlink (Pty) Ltd* (2005) 26 *ILJ* 2153 (LAC).

[54] *Lotteries Board* n 47 above para 142. Emphasis added.

[55] ibid paras 172 and 183. Furthermore, the letters were the result of the conciliation process in terms of the LRA, and the employees were entitled, as members of the union, to participate in such proceedings in terms of s 5(2)*(c)*(vii). Dismissal of employees for this, the court held, would constitute an automatically unfair dismissal as envisaged in s 187(1)*(d)*(ii).

[56] ibid para 194. The majority nonetheless cautioned that a union cannot say whatever it wants to say; the facts of the matter did not require it to deal with such limits.

[57] ibid para 202. Dambuza AJ agreed that the appeal should succeed and that the employees should be reinstated, but on the basis that the dismissal was only substantively unfair, and not automatically unfair. See para 227.

[58] ibid.

[59] ibid.

concluded that the dismissals were contrary to s 5(2)*(c)*, fell within s 187(1)*(d)*, and were thus automatically unfair.[60]

The scope of 'lawful activities' will obviously arise not only in the context of a dismissal. This is demonstrated by *National Union of Metalworkers of SA obo Members v Transnet SOC Ltd & others* (*Transnet*)[61] which concerned a trade union's attack, through s 9, on an employer's policy that prohibited the wearing of T-shirts displaying its insignia in the workplace. The court postulated possible reasons why members would wear trade union T-shirts in the workplace: promotion aimed at recruiting new members; as part of organising activities; and also to challenge majority unions.[62] These, the court held, are all consistent with the ILO supervisory bodies' interpretation of freedom of association. Accepting that the right to freedom of association by wearing a trade union T-shirt in the workplace might not be unlimited and suggesting that safety and violent union rivalry might justify such limitation,[63] the court held that the wearing of such T-shirts is a lawful activity as contemplated by s 5(2)*(c)*(iii).[64]

(b) When is an activity a trade union activity?

While this issue was not directly addressed in *Lotteries Board*, most would assume that strike action is also a trade union activity. However, the Labour Court in *National Union of Mineworkers obo Members v Cullinan Diamond Mine, A Division of Petra Diamonds (Pty) Ltd* (*Cullinan Diamond Mine*)[65] took a different position. On the basis that workers (ie not trade unions) have the constitutional right to strike and, further, that every employee (ie not trade unions) has the right to call a strike under the LRA, this judgment held that '[s]trike action is not an activity of a trade union but a constitutional right of a worker';[66] hence, the lawful activities of the union do not include participation in a strike.[67] Despite s 95(5) requiring that the constitution of a trade union must provide for a ballot before it calls a strike and that non-striking members cannot be disciplined in the absence of a ballot, the court nonetheless held that this does not imply that striking is a union activity:

'It may well be so that a trade union may call its members to join protected strike action, but if an employee does so, he is not carrying out the activities of the trade union but is exercising a right guaranteed in the Constitution.'[68]

[60] ibid. Also see n 55 above.
[61] (2019) 40 *ILJ* 583 (LC).
[62] ibid para 27.
[63] ibid para 32.
[64] ibid para 28.
[65] See n 24 above.
[66] ibid para 12.
[67] ibid.
[68] ibid.

This reasoning must be questioned: orchestrating a strike and striking are distinct activities, but is there really a disjunction between a union member striking and the trade union which called the strike? If *Cullinan Diamond Mine* is correct, it implies that a union member participating in the strike ballot is participating in a union activity, but once striking, is no longer participating in a union activity. Taking it further, this suggests that the union can bargain with the employer, make demands, refer the issue in dispute for conciliation, call a strike, give the strike notice, ballot its members, discipline its members for not striking, call a picket in support of the strike and, if the strike does not comply with chapter IV, be interdicted and ordered to pay damages, all while striking is not one of its activities.

It is suggested that both s 8*(b)*, which provides that a union has the right to plan and organise its administration and lawful activities, and s 2*(b)* of the Constitution, which affords workers the right to participate in the activities and programmes of a union, are broad enough to allow for an interpretation that includes strike action being seen as a trade union activity. This will not only be consistent with the Constitutional Court's understanding in *Bader Bop*[69] of international law (quoted in part 2), which regards the right of a trade union to strike in pursuit of its demands as a principle of freedom of association, but will also align with the majority judgment in *Lotteries Board*[70] that collective bargaining is a union activity, and conduct in support of collective bargaining (such as a petition) is an extension of collective bargaining. By parity of reasoning, strike action is likewise an activity in support of collective bargaining and, for that reason, should be regarded as a trade union activity.

However, while they are obvious manifestations of union activity, collective bargaining and strike action are not the only union activities falling within the ambit of the right to freedom of association. The following restatement of *Bader Bop* in *Transnet*[71] is a useful reminder of what such activities might entail:

'In other words, the statutory right to freedom of association extends to majority and minority unions, the *right to recruit new members* and the *right to organise those members* ... [T]he *wearing of trade union T-shirts* in the workplace would be encompassed by each of the above activities. Trade union members would wear their T-shirts in the workplace *as a form of promotion*, aimed at recruiting new members. *Unions would manufacture and distribute T-shirts* as a component of their organising activities. Minority unions would wear a T-shirt as a component of their efforts to *challenge majority union*s by seeking to persuade members to associate with the minority union, with a view to it ultimately attaining majority.'[72]

[69] *Bader Bop* n 15 above.
[70] *Lotteries Boar*d n 47 above.
[71] *Transnet* n 61 above.
[72] ibid paras 26-27. Emphasis added.

(c) The relationship between an unlawful demand (in the strike context) and the lawfulness of a trade union activity

Section 213 defines a strike as follows:

'the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to "work" in this definition includes overtime work, whether it is voluntary or compulsory'.

TSI Holdings (Pty) Ltd & others v National Union of Metalworkers of SA & others (*TSI Holdings*)[73] considered the protected status of a strike in support of the dismissal of a supervisor. The court held that the purpose of a refusal to work in the definition of a strike 'cannot be conduct that would constitute a violation of the right not to be dismissed unfairly provided for in s 185 read with s 188 of the Act',[74] and further that such demand 'falls outside the category of demands that can be supported by a concerted refusal to work, retardation or obstruction of work envisaged in the definition of the word "strike"'.[75] Read in isolation, the latter seems to imply that the refusal to work in support of an unlawful demand would not meet the definition of a strike in the LRA (and would thus constitute a breach of contract), but the wider context of the judgment indicates that it simply impacts on the protected status of the strike.[76]

Lest there is doubt: the discussion below contemplates unlawful demands, but not in the criminal sense.[77]

Reverting to *Lotteries Board*, the minority construed the petition as a demand that the CEO's employment should be ended without a fair hearing, failing which the employees would stop working, ie strike.[78]

[73] (2006) 27 *ILJ* 1483 (LAC) para 48.

[74] ibid para 48.

[75] ibid.

[76] ibid. The court's order in para 50 read with para 2.

[77] Although not the basis on which the judgment was decided, the facts in *Golden Arrow* n 3 above provide a useful illustration. The trade union demanded that the employer rejoin the employers' organisation from which it had withdrawn. Claiming that the employer's right to freedom of association and its right to join an employers' organisation in ss 6 and 7 also includes the right not to associate, the employer argued that the demand was unlawful and could not support a protected strike by the trade union. Even if it is assumed that the right to associate includes a negative right, it is difficult to see how this can make the trade union's demand unlawful. There is nothing unlawful about joining an employers' organisation; the employer was not asked to join a drug cartel. Furthermore, the trade union's demand did not deprive the employer of its choice not to join the employers' organisation. Employers are often faced with such choices when dealing with strikes and then need to decide what is most palatable to them. However, if they capitulate and join an employers' organisation, there is nothing unlawful about it. It is useful to contrast this case with *TSI Holdings* n 73 above, in which the trade union demanded the dismissal of a supervisor without a fair process. If the employer had capitulated, it would have participated in a breach of dismissal law. That is not what would have happened in *Golden Arrow* (n 3 above): capitulation would have meant doing a perfectly lawful thing, ie joining an employers' organisation. Further see part 3.5 below.

[78] *Lotteries Board* n 47 above para 60.

Relying on *TSI Holdings*, the minority reasoned that this made the demand concerning the termination of the CEO's employment unlawful and incapable of rendering a strike protected as contemplated by the LRA. Given that 'lawful activities' in s 4(2)*(a)* in the minority's view contemplates lawfulness under the LRA, and its further postulation that 'unprotected' under the LRA equals 'unlawful', it reasoned that making such a demand could not be a lawful (trade union) activity.[79]

The majority in *Lotteries Board* disagreed that the petition threatened a work stoppage if the demand was not met.[80] Explaining that *TSI Holdings* did not address 'whether a work stoppage in support of a demand for the dismissal of a manager or co-employee would be protected where the dismissal would not infringe the relevant co-employee's or the manager's right not to be dismissed unfairly',[81] it then proceeded to answer this aspect in the affirmative:

'Provided that his dismissal would be substantively and procedurally fair and the requirements of s 64 of the LRA had been complied with, a work stoppage in support of the demand would be a protected strike in terms of the LRA.'[82]

The above invites two questions: first, is the making of an unlawful demand per se an unlawful union activity for the purpose of chapter II of the LRA and, second, is participation in an unprotected strike an unlawful activity under the LRA?

It is useful to first deal with the second question: The minority reasoned that 'lawful activity' refers to (un)lawfulness under the LRA and should also be understood to include 'unprotected'.[83] The implication of this is that an unprotected strike will be an unlawful activity and that union members participating in an unprotected strike will not have

[79] ibid paras 60-61 and 66-67. However, in para 75, Froneman J seems to make a distinction between the conduct of the trade union and that of its members. However, as employees too, and not only trade unions, can call a strike, the difference is immaterial. See s 64.

[80] ibid paras 128 and 199.

[81] ibid para 129. Cf *TSI Holdings* n 73 above para 39.

[82] ibid. Even framed like this, it is difficult to see how a demand for a dismissal can be lawful if the demand does not contemplate the observance of procedural and substantive fairness. Zondo JP (as he then was) postulated the following example in *TSI Holdings* n 73 above para 39: 'In this regard I have in mind the case of an employee who has been charged with, and found guilty of, misconduct that is sufficiently serious to render his dismissal fair but whom the employer decides not to dismiss. Let us say that employees found guilty of fraud have consistently been dismissed in a particular company for many years but in one case the employer decides that in a particular case he will not dismiss the employee because of some unacceptable reason such as that he is white and the others who had been dismissed for similar offences were black. Let us assume that the loss resulting from such fraud for the employer is a million rand. It seems that in such a case, if the employee was guilty of such serious misconduct that would, quite clearly, be a fair reason for his dismissal. In such a case it may well be that, if there was a disciplinary enquiry and such employee was found guilty of such serious misconduct but was not dismissed on such unacceptable grounds as racist grounds, a demand that the employer dismiss such employee cannot be said to be a demand for the employer to act unfairly. It may well be that in such a case it is arguable – and I put it no higher than that — that such a demand may form part of a protected strike.'

[83] ibid para 68.

the protection of s 4(2)*(a)*. This reasoning cannot be supported. The right to strike is a constitutional right and the LRA merely gives special protection to those participating in protected strikes. The LRA further provides that participation in an unprotected strike 'may constitute a fair reason for dismissal',[84] but it does not outlaw such strikes.[85] Of course, participation in an unprotected strike would be a breach of contract and unlawful under the common law and might have implications for the individual striking employees. However, it is difficult to see how an unprotected strike per se can be an unlawful union activity *under the LRA*.

The potentially chilling effect of this finding on collective bargaining is demonstrated by turning to the first question. Striking in support of an unlawful demand will clearly be unprotected (as per *TSI Holdings*) and might justify dismissal for misconduct of individual striking employees. However, can the making of such a demand be construed as an unlawful union activity and then justify dismissal for members who associate with it, perhaps in the form of a petition, as in *Lotteries Board*? As part of collective bargaining posturing, unions often make demands that cannot inform a protected strike; they try their luck, so to speak, but do not necessarily take it further. Is making such a demand not simply robust collective bargaining with which individual members are entitled to associate? Should a distinction not be made between the act of making a demand and striking in support of that demand, which would be unprotected if the demand is indeed unlawful? Not making this distinction and being too particular about the nature of demands could stymie the collective bargaining process and be restrictive of chapter II rights. It is not that the unlawfulness does not matter, but that its significance is delayed until there is a strike.

3.4 *'Subject to its constitution'*

Freedom of association is closely associated with collective bargaining. As explained by Budeli, 'the right to organize, the right to bargain collectively and the right to strike unfold seamlessly from the basic right to freedom of association'.[86] A legal framework that protects the right to collective bargaining and to strike would be meaningless if the underlying right of an employee to first belong to a union was not safeguarded.[87]

Likewise, the right to freedom of association is critical for employees seeking to assert their individual labour rights. The LRA and the Code of Good Practice: Dismissal[88] provide for employee representation by trade

[84] s 68(5).

[85] This is alluded to by Froneman J in *Lotteries Board* n 47 above para 69.

[86] Budeli n 1 above 28.

[87] ibid 22. See also ME Manamela 'The right to freedom of association and the protection of employees against victimisation in the workplace' (2023) 26 *PER/PELJ* 3.

[88] Schedule 8 to the LRA amended by s 57 of Act 42 of 1996 and by s 56 of Act 12 of 2002.

unions in various forums.[89] Consequently, union membership becomes a vital lifeline for many employees confronting dismissal or other forms of unfair treatment in the workplace. Ultimately, the right of an employee to freedom of association is essential for safeguarding the constitutional right to fair labour practices and acts as a key mechanism for equalising power dynamics in employment relationships and promoting fairness.

It is for this reason that the courts have progressively advanced this right. The Constitutional Court in *Bader Bop* justified its decision to grant minority unions the right to strike to obtain organisational rights in order to promote an employee's right to freedom of association.[90] However, this right is not absolute; it is subject to limitations, one of which is that an employee's right to join a trade union is *subject to its constitution*.[91]

This phrase has given rise to the question whether a union is eligible to attain organisational rights provided for in chapter III of the LRA, if what qualifies them for such rights is their admittance of members falling outside the scope of their constitution. The other question that has arisen is whether a union is eligible to represent members admitted by it contrary to the scope of its constitution in individual disputes before dispute resolution forums, including the Labour Court. These questions were engaged with by the Labour Appeal Court (LAC) and Constitutional Court in *National Union of Metalworkers of SA v Lufil Packaging (Isithebe) (A Division of Bidvest Paperplus (Pty) Ltd) & others* (*Lufil Packaging*),[92] *National Union of Metalworkers of SA & others v AFGRI Animal Feeds (Pty) Ltd* (*AFGRI* (LAC))[93] and *AFGRI Animal Feeds (A Division of PhilAfrica Foods (Pty) Ltd) v National Union of Metalworkers of SA & others* (*AFGRI* (CC)).[94]

3.4.1 *Lufil Packaging*

In *Lufil Packaging* NUMSA sought organisational rights from the employer as it represented 70% of its employees. The employer refused this on the basis that the industry within which it operated did not fall within the registered scope of NUMSA's constitution and therefore NUMSA could not seek organisational rights in terms of its employees.[95] The LAC found in favour of Lufil, whereupon NUMSA appealed to the Constitutional Court.

[89] See ss 161*(c)* and 200, item 4(1) of the Code of Good Practice: Dismissal, rule 25 of the Rules for the Conduct of Proceedings before the CCMA as published under GN R3318 *GG* 48445 of 21 April 2023.

[90] *Bader Bop* n 15 above paras 34 and 36.

[91] Section 4(1)*(b)* states that every employee has the right to join a trade union, subject to its constitution.

[92] (2020) 41 *ILJ* 1846 (CC).

[93] (2022) 43 *ILJ* 1998 (LAC).

[94] (2024) 45 *ILJ* 1937 (CC), [2024] ZACC 13.

[95] *Lufil Packaging* n 92 above para 5.

The court noted that 'the issue in this case is a novel one', requiring the court to assess whether a union could disregard its own constitution and seek organisational rights on behalf of Lufil's employees who were admitted as NUMSA members, despite these employees falling outside the scope defined by NUMSA's constitution.[96] This necessitated a close examination of the wording in s 4(1)*(b)*, which stipulates that union membership is subject to the union's constitution.

NUMSA argued that this phrase must be interpreted in a manner that ensures that unions and their members can exercise their right to freedom of association. It essentially called for a less restrictive interpretation of this phrase and argued that a restrictive interpretation would limit the right to freedom of association. It argued that the phrase should be interpreted 'to mean between a union and its members *inter se* and should not be subject to outside interference by an employer'.[97]

It is important to note that Lufil's arguments before the court were focused solely on a union's capacity to obtain organisational rights when it had admitted members in contravention of its constitution's scope. The employer specifically asserted that if the court were to uphold the LAC judgment, it would prevent employers from challenging union membership in other contexts, such as representation during individual disputes.[98]

In interpreting the phrase 'subject to its constitution', the Constitutional Court engaged with various aspects, notably referencing international law, particularly art 2 of convention 87.[99] The court observed that the language of s 4(1)*(b)* aligns with art 2, which asserts that workers and employers, without distinction, have the right to establish and join organisations of their choice, subject only to the rules of those organisations. Based on this alignment, the court concluded that NUMSA's assertion that the LAC's decision contradicted international law was unfounded.[100]

The Constitutional Court ruled that NUMSA was bound by its constitution and possessed 'no powers beyond the four corners of that document'. This meant that, since its constitution defined specific eligibility criteria for membership, NUMSA was required to adhere to those categories when asserting organisational rights.[101] The court referred to the requirements set forth in the LRA for acquiring organisational rights, emphasising that a union seeking to claim such rights must be

[96] ibid para 1.

[97] ibid paras 14 and 16.

[98] ibid paras 20-21.

[99] Article 2 states that 'workers without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation'.

[100] *Lufil Packaging* n 92 above paras 42, 44 and 45.

[101] ibid para 47.

sufficiently representative of employees in a given workplace.[102] Since Lufil's employees were not valid members of NUMSA, the court determined that NUMSA could not demand organisational rights.[103]

Furthermore, the court clarified that NUMSA could not claim a violation of its right to freedom of association when it had chosen to limit membership categories in its constitution. It stated: 'A flaw in NUMSA's argument is its reliance on its own right and its members' right to freedom of association, without considering the rights of the employer. It is important to note that the LRA does not confer the right to associate solely to employees; employers hold this right as well.'[104]

The court also pointed out that NUMSA had the option to amend its constitution to accommodate a broader membership but chose not to do so. Therefore, the admission of members who did not meet the constitution's criteria was deemed invalid.[105] This comprehensive engagement with both legal standards and the principles of freedom of association underscored the court's rationale in reaching its decision that NUMSA was not entitled to claim organisational rights.

Notwithstanding the above pronouncements, the court engaged with the cases referred to by NUMSA where it was previously found that s 4(1)*(b)* could not have been intended to restrict representation of a member by a union unduly. These cases were *National Union of Mineworkers obo Mabote v CCMA*[106] and *MacDonald's Transport Upington (Pty) Ltd v Association of Mineworkers and Construction Union (AMCU) & others* (*MacDonald's Transport*).[107]

The Constitutional Court had the following to say in respect of these cases:

> 'The cases NUMSA relies on, in relation to the issue of interference are distinguishable on the facts of this case. These cases dealt with representation at arbitration hearings. This is noteworthy as in those cases the court had to balance the interests of the employees to have legal representation at arbitration hearings against that of the employer.'[108]

These pronouncements suggest that the representation of employees in individual disputes constitutes a distinct issue compared to the acquisition of organisational rights.

[102] ibid para 51. Section 11 of the LRA states that a representative trade union means a registered trade union, or two or more registered trade unions acting jointly, that are sufficiently representative of the employees employed by an employer in a workplace.

[103] ibid para 52.

[104] ibid para 36.

[105] ibid paras 54, 56, 59, 61 and 63.

[106] (2013) 34 *ILJ* 3296 (LC).

[107] (2016) 37 *ILJ* 2593 (LAC).

[108] *Lufil Packaging* n 92 above para 68.

3.4.2 *NUMSA v AFGRI Animal Feeds*

The above discussion illustrates that the central issue engaged with in *Lufil Packaging* was whether NUMSA could be granted organisational rights. It was not whether NUMSA's purported members were entitled to be represented in individual disputes.

The LAC in *AFGRI* in overturning the Labour Court's decision emphasised the above. The LAC found that there was a distinction between the case before it and that of *Lufil Packaging*, in response to the Labour Court's view that the principle emanating from *Lufil Packaging* remained valid for all enquiries.[109] This principle was that if an employee joins a union where the scope of the union's constitution does not provide for membership of the sector in which the employee works then such membership is void and any act that has taken place as a consequence of the purported membership is invalid.[110]

The LAC pointed out that *Lufil Packaging* did not question NUMSA's ability to represent its employees in individual hearings; instead, it was focused on how the union's constitution impacted its collective bargaining rights. The LAC clarified that there is a significant difference between the organisational rights claimed by unions to facilitate collective bargaining and the right of a union to represent an employee in an unfair dismissal case before the Labour Court, which is an individual employee right.[111] In essence, the core issue in this matter centred on individual employee rights, while *Lufil Packaging* dealt with collective bargaining rights.[112]

It can be argued that the right to represent employees in individual disputes stems from organisational rights.[113] However, it should be noted that a trade union representative's right to represent its members in individual disputes, as per the organisational right provided for by s 14 of the LRA, pertains to internal matters like grievance and disciplinary hearings.[114] In contrast, the issue in *AFGRI* (LAC) involved representation at the Labour Court under s 200 of the LRA.[115]

Advocating that a trade union member's right to representation in individual disputes derives from that member's right to freedom of association, rather than from the union's organisational rights protects employees belonging to minority trade unions that lack organisational

[109] *AFGRI* (LAC) n 93 above para 13.

[110] ibid para 15.

[111] It must be noted that s 23(5) of the Constitution states that every trade union has the right to engage in collective bargaining. It is a right that belongs to a trade union and not to an employee.

[112] *AFGRI* (LAC) n 93 above paras 34–36.

[113] See *Police & Prisons Civil Rights Union v SA Correctional Services Workers' Union & others* (2018) 39 *ILJ* 2646 (CC) paras 22, 50 and 78 where the Constitutional Court explained that the right to represent employees flows from s 14 of the LRA.

[114] s 14(4)*(a)*.

[115] *AFGRI* (LAC) n 93 above paras 16–17.

rights.[116] This perspective aligns with *Bader Bop's* interpretation of art 2 of convention 87, which parallels s 4(1)*(b)* of the LRA. The interpretation affirmed that the right to freedom of association in article 2 encompasses the right of employees belonging to minority unions being represented by these unions in individual disputes.[117]

Based on the separation between collective and individual rights the LAC explained that, following *Lufil Packaging*, a union that accepts as its member an employee who works in a sector that falls outside the scope of the union's constitution will not be entitled to bargain collectively with the employer on behalf of such an employee. However, the union would be able to represent the employee in an individual dispute. It highlighted that different considerations apply to the right of an employee to be represented at an unfair dismissal dispute, an important one being fairness.[118] The judgment stated that it would be manifestly unfair given the balance of power which exists between the employer and employee in the workplace to find that an employer has an interest in holding the union to terms of its constitution to limit the employee's right to representation, considering that such a right is aimed at providing effective access to justice and redress to the employee in terms of ss 23 and 38 of the Constitution.[119]

Similar sentiments were echoed in the earlier LAC decision in *Kalahari Country Club v National Union of Mineworkers & another* (*Kalahari*).[120] In that case the employer similarly challenged the right of the union to represent the employee in an unfair dismissal dispute, based on the employee being employed in a sector that fell outside the scope of the union's constitution.[121] The court found that it would be untenable to find that the union could not represent the employee as the employee considered himself a legitimate member of NUM and expected and was entitled to be represented by his trade union. The court emphasised that 'it is trite that in labour law fairness is also an important consideration in addition to whatever legal requirements may be applicable'.[122] The LAC further remarked that what is required in instances such as this is a purposive interpretation of the LRA, which is mandated by s 1 read with s 3*(a)*. It remarked that if the LRA is to achieve its constitutional

[116] See E Fergus 'The right to union representation in individual workplace disputes: Whose right is it anyway? Thoughts on *Solidarity v SA Police Service & others* (2019) 40 *ILJ* 448 (LC)' (2020) 41 *ILJ* 112-113. In *Solidarity* above paras 20-21 the Labour Court left open the question whether s 4 of the LRA grants union members the right to be represented by their union in individual disputes in line with their right to freedom of association.

[117] *Bader Bop* n 15 above paras 29-30.

[118] *AFGRI* (LAC) n 93 above paras 36.

[119] ibid para 37.

[120] (2015) 36 *ILJ* 1210 (LAC).

[121] ibid para 1.

[122] ibid para 11.

goals the courts must be vigilant to safeguard those employees that are particularly vulnerable to exploitation.[123]

In *MacDonald's Transport* the LAC held that while an employer has a legitimate interest in the validity of trade union membership for collective bargaining purposes, such an interest does not equally apply in relation to representation in individual disputes. It explained that the relationship between a union and its members is a private matter and for an employer to interfere with this private relationship it must demonstrate the harm suffered.[124]

3.4.3 *AFGRI Animal Feeds v NUMSA*

Unhappy with the decision of the LAC, the employer pursued the matter in the Constitutional Court. Before the latter, NUMSA argued that the principles laid down in *Lufil Packaging* were confined to collective bargaining rights. This is because organisational rights have an impact on the employer. However, the representation of vulnerable employees at Labour Court proceedings does not affect an employer's rights. The only right that is affected is the right of a dismissed employee to be represented by a union of their choice.[125] Essentially, it was about the right of an employee to freedom of association.

However, the Constitutional Court disagreed. It stated that where a trade union performs any act that deviates from its constitution, such an act is null and void.[126] The court found that there was no basis for drawing a distinction between a trade union's representation of employees when enforcing organisational rights and representation in an unfair dismissal dispute, as submitted by NUMSA.[127] The court held that it is untenable to find that a person is a member of a union for one purpose, but not a member for another. The union either has the power in terms of its constitution to admit employees or it does not, it cannot be both. In this instance it did not have the power to admit these members.[128]

The Constitutional Court remarked that this case was not about the limitation of an employee's right to freedom of association; denial of the right to access the court; an employer's interference in the internal affairs of the union; nor fairness and the right of the dismissed employees to representation in individual dispute proceedings. It was simply a matter of whether the union could act beyond the bounds of its constitution, which was answered in the negative by *Lufil Packaging*.[129]

[123] ibid para 13.
[124] *MacDonald's Transport* n 107 above para 42.
[125] *AFGRI* (CC) n 94 above para 28.
[126] ibid para 45.
[127] ibid para 51.
[128] ibid para 52.
[129] ibid paras 54–55.

3.4.4 *Evaluation of judicial pronouncements*

The Constitutional Court's decision in *AFGRI* depended solely on the ruling in *Lufil Packaging*, which explicitly addressed NUMSA's ability to claim organisational rights, which the court said it could not. However, the decision in *Lufil Packaging* included somewhat ambiguous statements. On the one hand, the Constitutional Court indicated that a trade union's authority to represent an employee in individual disputes was undermined by the employee's improper admission as a member, emphasising that a union must adhere to its constitution and cannot operate beyond its boundaries. On the other hand, the court suggested that membership granted outside the union's defined scope would not necessarily strip the employee of her or his right to union representation in individual disputes, noting that the representation of employees at arbitration hearings involves distinct considerations.

This raises a critical question about why the Constitutional Court believed it necessary to differentiate the impact of a violation of a union's constitution on an employee's right to representation in individual disputes. The court could have simply stated that the cases cited by NUMSA — none of which were Constitutional Court cases — incorrectly interpreted s 4(1)*(b)*. Interestingly, it did not take this route. Instead, it suggested that different considerations were at play, raising doubts about whether the court intended to imply, as the ruling in *AFGRI* (CC) suggests, that an employee admitted as a member contrary to the union's constitution would lose membership rights, thus preventing the union from effectively advocating for that employee's labour rights in both collective bargaining and individual disputes.

The Constitutional Court in *AFGRI* raised a valid concern about the legal merit in treating an employee as a union member for one purpose but not for another. However, given that the court relied on the decision in *Lufil Packaging*, its lack of engagement with *Lufil Packaging's* pronouncements on the authority of a union to represent employees in individual disputes is a notable omission. Furthermore, it was very restrictive for the court to have ignored the involvement of an employee's right to freedom of association and the right to fair treatment.

The interpretation of s 4(1)*(b)* in such a rigid manner failed to consider the implications for the affected employees. While they may have joined a union that did not fall within their sector, the court's denial of their right to representation by the union they joined effectively penalised them. Realistically, these employees may not have been aware of the provisions of the union's constitution. They may simply have applied for membership, been accepted, and paid their membership fees. However, when it came time for the union to represent them, the court denied them this.

The Constitutional Court said that there were trade unions operating in the animal feeds industry that they could join. While that may be so,

the employees chose to join NUMSA and at the time that the court heard the matter that was the union to which they were affiliated. The court further stated that the dismissed employees were entitled to continue with the Labour Court proceedings in their own names and that the firm of attorneys representing them in the Labour Court was still on record. Although further details were not provided, it can be inferred that the firm of attorneys representing them was appointed by NUMSA, suggesting that the Constitutional Court's decision would likely complicate their ability to utilise this legal representation. Additionally, expecting these employees to pursue their claims independently raises significant questions of fairness.

In contrast, the Constitutional Court overlooked the absence of any harm to the employer that would arise from allowing these employees to be assisted by NUMSA. Importantly, there were no employer rights adversely affected by this arrangement. As established in cases such as *Association of Mineworkers & Construction Union v UASA – The Union & others*[130] and *Kalahari*,[131] fairness is a foundational principle in labour law. While the employer faced no prejudice and its rights remained intact, the employees, on the other hand, undeniably faced significant disadvantage. This case ultimately fell short of upholding the fundamental principle of fairness. It did not achieve the necessary balance between the rights of the employer and those of its employees and compromised an employee's right to freedom of association.

Conversely, the LAC adopted a more progressive approach in its rulings, placing the fairness of employees at the forefront. In *AFGRI* the LAC made a concerted effort to differentiate the facts of the case from those in *Lufil Packaging*, thereby justifying a distinct outcome. By recognising these nuances, the LAC aimed to ensure that the rights of employees were not unduly compromised, reinforcing the importance of fairness in labour relations and ultimately championing the right of employees to freedom of association.

3.5 *The right not to associate*

As explained in part 2, the ILO constitution earmarked a convention on the right to freedom of association for urgent attention, but it took almost another three decades to materialise in the form of convention 87. This was not for lack of trying. An attempt in the mid-1920s to adopt a convention on freedom of association failed because of the demand by the employer group that it should also include a right not to associate,[132] a notion that remains contentious both at the ILO and in

[130] (2023) 44 *ILJ* 2479 (LAC) (*UASA*) (UASA was formerly named the United Association of South Africa). See the discussion of the judgment in part 4 above.

[131] n 120 above.

[132] See Bellace n 2 above 8.

almost all jurisdictions.[133] Ultimately, convention 87 made no reference to a negative right.

The right not to associate is similarly not specifically addressed in either ss 18 or 23 of the Constitution or in the LRA. However, s 23(6) of the Constitution provides that 'national legislation may recognise union security arrangements contained in collective agreements'. This is generally understood to refer to closed shop and agency shop agreements. Closed shop agreements impact the right not to associate, as it requires employees to become members of the majority trade union.

Since the legislative provisions that promote the right to freedom of association do not explicitly include a right not to associate, there has been ongoing uncertainty whether such a right exists.[134] Some scholars feel that 'any freedom' worth the name must involve the freedom to refuse to do something, along with the freedom to do it.[135]

In South Africa, non-labour related jurisprudence supports the existence of an implied negative right.[136] This position was endorsed by the Constitutional Court in *New Nation Movement NPC & others v President of the Republic of SA & others* (*New Nation*),[137] where it was held:

'In sum, choosing to associate is an exercise of the right to freedom of association. Choosing to dissociate from that which you earlier associated with is also an exercise of that right. Choosing not to associate at all too is an exercise of the right. A restraint on any of these choices is a negation of the right.'[138]

New Nation seemingly settled the matter. A recent Labour Court judgment, relying on *New Nation*, remarked that the 'right to join a union must surely embrace the right to join a union of the employee's choice as well as the right not to join a union at all'.[139] However, the earlier Labour Court decision of *Golden Arrow*[140] adopted a contrary view.

In the latter case the Labour Court was called upon to interdict NUMSA from striking. The dispute giving rise to the strike was characterised by NUMSA as a refusal by the employer to bargain. This

[133] Deakin and Morris n 2 above 802-804.

[134] Budeli n 1 above 21 and 30-31. See also A van Niekerk & N Smit et al *Law@Work* (LexisNexis 2023) 423 where it is explained that 'in other words, one must ask whether the positive right (the right to associate) and the negative right (the right not to associate) are two halves that make up the whole (the right to freedom of association). If so, any limitation of the right to freedom not to associate must be justifiable in terms of the limitation clause, section 36 of the Constitution. There is, however, little agreement on this question'.

[135] Budeli n 1 above 29.

[136] *The Law Society of the Transvaal v Tloubatla* 1999 JDR 0309 (T); *Cronje v United Cricket Board of South Africa* 2001 (4) SA 1361 (T).

[137] 2020 (6) SA 257 (CC). This matter concerned a provision in the Electoral Act 73 of 1998 providing that only members of political parties can hold political office and whether this limits the constitutional right to freedom of association.

[138] ibid para 58.

[139] *Skulpad & Another v Department of Health, Eastern Cape & Others* (2025) 46 *ILJ* 193 (LC) para 49. Also see para 54.

[140] *Golden Arrow* n 3 above.

was because the employer had terminated its membership with an employers' organisation, which was one of two employer organisation parties to the South African Road Passenger Bargaining Council ('BC'). Its withdrawal from the employers' organisation resulted in it no longer being a party to the council.[141]

The employer argued that this was not a dispute about a refusal to bargain. Instead, NUMSA sought to strike over an unlawful demand, notably a demand which violated the employer's right to freedom of association set out in s 6(2) which included the right it had not to associate, by seeking to compel the employer to rejoin the employers' organisation.[142] The employer asserted that as it had referred a dispute regarding freedom of association to the Labour Court in terms of s 9, NUMSA was barred from striking in terms of s 65(1)*(c)*.[143]

The Labour Court found that while it was the employer's decision to withdraw from the employers' organisation that gave rise to the intended strike, the dispute amounted to a refusal to bargain, as the employer's withdrawal resulted in it becoming a non-party to the BC and effectively preventing NUMSA from bargaining with it.[144]

The court rejected the employer's argument that NUMSA's demand violated its constitutional right to freedom of association. It clarified that the right not to associate is neither recognised in South African labour law nor endorsed by international law.[145] Furthermore, given the rationale for including the right to freedom of association in our legislative framework — namely, to address historical barriers that hindered unions from organising and exercising their collective power — the court concluded that the right not to join a trade union is excluded.[146] The court further rejected the inclusion of the right not to associate due to the recognition of closed shop agreements. It stated that 'closed shop agreements are expressly provided for by the LRA. This has never been challenged, indicating that the right to freedom of association is not absolute'.[147]

The Labour Court paid heed to *New Nation*,[148] as the employer relied on this case to support its right not to associate.[149] While the Constitutional Court in that instance found that s 18 of the Constitution not only protects the positive right to associate, but also the negative

[141] ibid paras 8-17.

[142] See further the discussion in n 77 above.

[143] *Golden Arrow* n 3 above paras 24-25.

[144] ibid paras 41-42.

[145] ibid para 52. The court explained that convention 87 does not enshrine such a negative right. Further that the committee on freedom of association found that closed shop agreements are compatible with the convention as long as closed shop agreements result from free negotiations and are not imposed by law.

[146] ibid paras 49-53 and 60.

[147] ibid paras 49-50.

[148] *New Nation* n 137 above.

[149] *Golden Arrow* n 3 above para 25.2.2.

right not to be compelled to associate, the Labour Court highlighted that these findings applied where matters of conscience or of similar gravity were at stake.[150] In this case, *Golden Arrow* held, the employer's refusal to rejoin the employer's organisation could not be equated with a matter of conscience but was rather a purely commercial reason.[151] Essentially, the Labour Court explained that the Constitutional Court did not lay down an unqualified rule that a right not to associate must be read into s 18 of the Constitution and by implication all statutory provisions that uphold the right to freedom of association.[152]

While a detailed analysis of the existence of an implied negative right is beyond the scope of this article, the correctness of *Golden Arrow* is questioned on at least one count. Can an argument against the existence of a negative right be sustained based on the permissibility of closed shop agreements? By recognising that closed shop agreements might be open to constitutional challenge, and then conceding that such a challenge might fail on the basis that the right to freedom of association is not absolute, is there not implicit recognition of a negative right? Asked differently, on what basis can closed shop agreements offend the right to freedom of association if such a right does not embody a negative right, considering that closed shop agreements do not impose an absolute bar to employees' joining both the majority union, as well as a union of their choice?

Notwithstanding the above, it is notable that *Golden Arrow* did not altogether rule out the existence of a negative right. Rather it found that 'if a negative right were to be inferred to the qualified extent described in *New Nation*'[153] it did not trump NUMSA's right to engage in collective bargaining and to strike. *Golden Arrow* highlighted that considering the purpose of collective bargaining, which is to redress the power imbalance between employers and employees, 'it would be inconsistent with this fundamental starting point to accord employers an absolute right not to associate while depriving employees of their right to engage in collective bargaining and to strike'.[154]

The following important pronouncements were made by the court:

'In essence, GABS wants to deprive NUMSA and its members of the hard fought for rights to collectively bargaining and to strike in favour of its right to freedom of association which is premised on its commercial interests. Not only would endorsing such an approach be contrary to our law, it would also threaten the collapse of our collective bargaining system, at least at sectoral level. This is because employers would be able to resist a demand that they be members of an employers' organisation on the basis that it infringes their right to freedom of association and unions would not be able to strike in support of such a demand. In the circumstances, I am of the

[150] ibid paras 64-66 and 70.
[151] ibid para 71.
[152] ibid para 69.
[153] ibid para 74.
[154] ibid paras 55-56.

view that GABS's right to freedom of association must bow to NUMSA's rights to strike and engage in collective bargaining.'[155]

Even if it were found that freedom of association includes the right not to associate, this would not have resolved the issue. Having determined that the dispute centred on a refusal to bargain, the Labour Court had no grounds to deny NUMSA the right to strike. However, important pronouncements were made about the interaction of competing rights. Here the court considered how giving preference to an employer's right to freedom of association would impact other fundamental rights, particularly the rights to collective bargaining and to strike — key tools for employees and trade unions in advocating fair terms and conditions of employment. As indicated by Van Niekerk and Smit, if the right not to associate is considered part of the right to associate, any limitations on the right not to associate must be justifiable under s 36 of the Constitution.[156] Limiting an employer's right not to associate to protect other constitutionally guaranteed rights would not be deemed an unjustifiable limitation, particularly if such limitations serve to uphold the principle of fairness.

4 Closed Shops and Agency Shop Agreements

As previously stated, union security arrangements, despite constituting a limitation on the right of freedom of association, are recognised in the Constitution.[157] From an international perspective, convention 87 does not expressly address the issue of union security arrangements. However, the CFA has interpreted art 2 in a manner that permits these arrangements if they are concluded by free agreement between workers' organisations and employers and not imposed by law.[158]

The LRA recognises the conclusion of two types of union security arrangements. The first is a closed shop agreement and the second an agency shop agreement.

Closed shop agreements are defined as agreements entered into between the employer and a majority trade union requiring all employees covered by the agreement to become members of the majority union.[159] An agency shop agreement does not require employees to become members of the majority union but rather compels employees of

[155] ibid paras 77-78.

[156] Van Niekerk and Smit n 134 above 423.

[157] Section 23(6) states that 'national legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter the limitation must comply with section 36(1)'.

[158] Compilation of Decisions of the Committee on Freedom of Association, 6 ed (2018) paras 551-556. See also *Municipal & Allied Trade Union of SA v Central Karoo District Municipality & others* (2020) 41 *ILJ* 1918 (LAC) para 33 (*Central Karoo*).

[159] s 26. See also Van Niekerk and Smit n 134 above 423.

minority unions or non-union employees to pay an agency fee to the majority union.[160]

Despite the permissibility of these agreements, they do not sit well with some.[161] The main reason for this is because they impede an employee's right to join a union of their choice.[162]

To address the concerns raised by critics, it is important to examine the rationale behind permitting such agreements. As explained by Van Niekerk and Smit there are two reasons for their existence. The one is to address the issue of free riders. The LAC in *Central Karoo*[163] explained that an agency fee is a fee for work done to advance workers' interests through collective bargaining. It seeks to address the problem of free riders, who are employees who choose not to join the trade union with collective bargaining rights, but who benefit from the fruits of the collective bargain struck by that trade union.[164] The second is to ensure orderly collective bargaining at a sectoral level, which is one of the primary objectives of the LRA.[165] In *Central Karoo* the LAC stated that 'the agency shop agreement advances the legitimate legislative policy of majoritarianism in collective bargaining as the preferred option for orderly collective bargaining at sectoral level'.[166]

Importantly, to counter the adverse effects that these agreements can have on the right to freedom of association, several safeguards are built into ss 25 and 26. Notably closed shop agreements cannot be entered into without the holding of a ballot, wherein two thirds of the employees who vote must vote in favour of the conclusion of the agreement. Despite the consequence of dismissal for employees who refuse to join the majority union, this does not apply to employees who were already employed at the time of the conclusion of the agreement, as well as to conscientious objectors. Notably, the fee deducted cannot be used for inappropriate purposes, such as being paid to a political party as an affiliation fee or contribution to that party. Furthermore, there is a process that can be followed to terminate the agreement, which requires a petition by one third of employees covered by the agreement and then

[160] s 25. See also Van Niekerk and Smit ibid.

[161] Budeli n 1 at 32.

[162] Van Niekerk and Smit n 134 above 423, 425. As explained by Van Niekerk and Smit 'although an agency shop does not require employees to become members of the trade union party to the agreement, it could also amount to an infringement upon the right to freedom not to associate as improper pressure is exercised upon the employee with regard to choice of union membership'.

[163] *Central Karoo* n 158 above.

[164] ibid paras 22 and 24. See also D du Toit et al *Labour Relations Law: A Comprehensive Guide* 7 ed (LexisNexis 2023) 261.

[165] Van Niekerk and Smit n 134 above 425. See also Manamela n 87 above 17 where it is explained that in '*ACTWUSA v Veldspan* it was found that closed shop agreements were actually not contrary to public policy. Both agreements are aimed at stopping "free-riders", who are employees benefitting from work done by a trade union such as negotiating for better terms and conditions of employment, but without having to pay for such services'.

[166] *Central Karoo* n 158 above para 29.

a ballot where the majority of employees who vote must vote in favour of the termination of the agreement.[167]

In respect of agency shop agreements, there must be an express provision that employees who are not members of the majority union are not compelled to become members. Furthermore, the agency fee must be used for initiatives that advance or protect the socioeconomic interests of employees. It cannot be used to support or fund political parties.[168]

It is notable that despite the limitations on the right to freedom of association stemming from these agreements there have been no constitutional challenges. In respect of closed shop agreements courts have only had to grapple with the interpretation and application of the legislative provisions provided for in s 26.[169]

Likewise, regarding agency shop agreements, courts have been tasked with assessing their lawfulness in relation to the legislative provisions outlined in s 25.[170] The LAC in *Central Karoo* emphasised that members of a minority union cannot be exempt from paying an agency fee simply because the union has been granted the organisational right for trade union subscriptions to be deducted.[171] The LAC distinguished between an agency fee and a trade union subscription or membership fee, illustrating that paying both does not constitute a double payment.[172] The LAC explained that an agency fee is a fee for work done to advance workers' interests through collective bargaining, while a union subscription or membership fee is a fee payable by an employee for the services offered to him by his union.[173] However, the court has recently held that there

[167] ss 26(3)-(7) and (15)-(17). See also Van Niekerk and Smit n 134 above 424-425.

[168] s 25(3).

[169] In *New Kleinfontein Goldmine (Pty) Ltd v Association of Mineworkers & Construction Union & others* (2024) 45 *ILJ* 159 (LC) the Labour Court engaged with s 26(15) and (16) relating to the termination of closed shop agreements. In *SA Transport & Allied Workers Union v Servest Security (Pty) Ltd & another* (2024) 45 *ILJ* 1308 (LC) one of the questions addressed by the Labour Court was whether an agency fee could be deducted from employees who were not required to join the majority trade union in the absence of an express provision in the closed shop agreement providing for an agency fee in line with s 26(8).

[170] In *Transnet* n 61 above the issue was whether the agency shop agreement was unlawful and invalid as the agreement only required majority membership in the bargaining union, as opposed to the workplace, which is the requirement set out in s 25. In *Solidarity obo Members Employed in the Motor Industry v Automobile Manufacturers Employers' Organisation & others* (2020) 41 *ILJ* 419 (LAC) the complaint was that the agency shop agreement did not comply with the provisions of s 25(3) as the agreement failed to stipulate that employees who were not members of the representative trade union were not obliged to become members of the union. See also PW Senoamadi 'A delicate balancing act: Does the majoritarian approach in South African labour law infringe the right to freedom of association?' (2024) 45 *ILJ* 751 who explains that 'the case law discussed above seem to suggest that the lawfulness or otherwise of agency shop agreements rests in the main on compliance with the formalities required in terms of s 25(3) of the LRA'.

[171] *Central Karoo* n 158 above paras 25 and 27.

[172] ibid para 23.

[173] ibid para 22.

are instances where it would be improper to deduct agency fees from members of a minority union in line with an agency shop agreement.

In *UASA* it was not in dispute that the agency shop agreement fully complied with the requirements set forth in s 25. However, the agreement was contested by the minority union, AMCU, on the basis that it had been admitted as a member of the bargaining council, having attained the membership requirements set out in the bargaining council's constitution. Therefore, it argued that its members should be exempted from the payment of an agency fee.[174]

The Labour Court dismissed the application on the grounds that it complied with legislative provisions. It further suggested that when a majority union is present in a bargaining council, the services offered by a minority union may be ineffective.[175] However, the LAC reached a different conclusion, on the grounds of fairness, despite the agreement meeting all legislative requirements.

AMCU's primary argument for exemption from the agency fee was that its members were not free riders, as it was recognised as a bargaining agent resulting in it being a participant in the collective bargaining process. AMCU contended that the continued application of the agency shop agreement to its members was unjust, as they faced double deductions — paying both the union levy to AMCU and the agency fee — without any justification for this arrangement. This situation risked driving AMCU members toward majority unions and discouraging non-union employees from joining AMCU.[176]

AMCU's application faced opposition on the grounds that the agreement was properly established by the majority unions in accordance with the principle of majoritarianism.[177] However, the LAC was receptive to AMCU's arguments. The court emphasised that, while the agreement complied with legislative provisions, it was essential to consider the purpose of agency shop agreements. It explained that employees who receive a benefit must pay a consideration for enjoying that benefit, which is rooted in the fairness or fair-play principle.[178] The court recognised the expenses incurred by majority trade unions in the collective bargaining process, which justified the payment of agency fees by non-members. However, in this case, AMCU, despite being a minority union, also incurred similar costs as it participated in the bargaining council. Like the majority unions, AMCU had to invest significant time and effort to negotiate favourable agreements for its members. Therefore, AMCU's members could not be said to be free riders.[179] Essentially, whatever

[174] See K Newaj 'Fairness as a factor in assessing the validity of agency shop agreements' (2024) 10 *International Labor Rights Case Law* 152-156.

[175] *UASA* n 130 above para 16.

[176] ibid paras 10 and 14.

[177] ibid para 15.

[178] ibid para 21.

[179] ibid paras 26 and 31.

bargains were struck would be attributable to all trade unions that were party to the bargaining council.

The LAC deemed the Labour Court's assertion regarding the ineffectiveness of a minority union's role in a bargaining council as irrelevant and an inappropriate standard. The court argued that it would be erroneous to overlook the value that minority unions contribute to the bargaining process, as they can offer unique perspectives that benefit employees.[180]

Ultimately, the LAC concluded that, despite the agency shop agreement's compliance with legislative provisions, it was unfair. This unfairness arose from the fact that majority unions were receiving fees for services they were not providing to AMCU members. The LAC underscored that agency shop agreements must be grounded in fairness, and fairness cannot exist when a majority union collects agency fees from minority union members under the assumption that they are free riders, especially when their interests are actively represented by their union. Furthermore, it was deemed illogical for a bargaining council to permit a trade union to act as a bargaining agent for its members while simultaneously imposing agency fees on them.[181]

This decision represents a positive development, illustrating that while there is room to limit the right to freedom of association, courts must remain vigilant to ensure that these limitations do not undermine the fundamental principle of fairness that governs the employment relationship. In enforcing union security arrangements, courts are obligated to assess the prevailing circumstances and prioritise fairness in their deliberations. Therefore, a delicate balance must be maintained between honouring collective agreements made between employers and majority unions while protecting the interests of employees.

6 Conclusion

The journey of the right to freedom of association in South Africa illustrates a complex interplay of historical context, legislative evolution, and nuanced judicial interpretations. Emerging from a legacy of oppression, wherein collective rights were systematically suppressed, South Africa has made substantial progress in embedding the right to freedom of association within its constitutional framework. This right is fundamental not only for the protection and promotion of trade union activities but also as a cornerstone for any democratic society, empowering individuals to unite around shared interests and to lobby for improved working conditions.

Despite the constitutional safeguards and the efforts articulated in the LRA to give effect to this right, the interpretation and application of freedom of association have faced numerous challenges over the years.

[180] ibid para 31.
[181] ibid para 32.

This article has focused on four significant challenges that highlight the ongoing struggles and complexities surrounding this right.

The discussions underscore a predominantly progressive trajectory regarding the protection of freedom of association, signifying South Africa's unwavering commitment to democracy and social justice. As explored, the right empowers employees not only to engage in collective bargaining but also to assert their individual rights through representation by trade unions. The Labour Court's rulings in *Simunye*[182] and *PSA*[183] exemplify a supportive stance, resisting undue restrictions on the registration of trade unions. Similarly, while the Labour Court's position in *Golden Arrow*[184] regarding the existence of a negative right might be seen as contentious by some, it nonetheless accentuated the necessity of balancing employer and employee rights within a framework of fairness.

Moreover, the court in *AFGRI* (LAC)[185] has sought to safeguard employees' rights to be represented by their chosen trade unions, even when such membership conflicts with a union's constitution. In *UASA*[186] despite the agency shop agreement having complied with legislative requirements, the LAC, prioritising fairness, ruled against imposing agency fees on members of a minority union, further reinforcing the importance of equitable treatment in labour relations.

However, it is concerning that pronouncements from the Constitutional Court have exhibited a more regressive stance in some instances. *Lotteries Board*[187] adopted a broad interpretation of lawful activities that support the right to freedom of association, while *Lufil Packaging*[188] did not explicitly preclude employees from being represented in individual disputes by a trade union, even if their membership contradicted the union's constitution. In contrast, the ruling in *AFGRI* (CC)[189] overlooked the crucial implications of the right to freedom of association, and the court seemingly neglected to recognise its significance in reaching a just decision.

In conclusion, while South Africa's journey towards a robust right to freedom of association reflects significant advancements, the legal landscape remains characterised by both encouraging developments and concerning regressions. Moving forward, it is crucial for the judiciary to reinforce the foundational role of this right in promoting labour justice and social equity, ensuring that the principles of fairness and representation are upheld for all workers within the changing dynamics of the labour market.

[182] *Simunye* n 27 above.
[183] *PSA* n 34 above.
[184] *Golden Arrow* n 3 above.
[185] *AFGRI* (LAC) n 93 above.
[186] *UASA* n 130 above.
[187] *Lotteries Board* n 47 above.
[188] *Lufil Packaging* n 92 above.
[189] *AFGRI* (CC) n 94 above.

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