IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JS427/15

Reportable

In the matter between:

NATIONAL UNION OF METALWORKERS OF

SOUTH AFRICA (NUMSA) obo ITS MEMBERS

IN THE EMPLOY OF THE RESPONDENT **Applicant**

and

TRANSNET SOC LTD **Respondent**

Date of trial: 17-18 April 2018

Date heads submitted: 29 June 2018

Date of judgment: 31 October 2018

JUDGMENT

VAN NIEKERK J

Introduction

[1] Is it legitimate for an employer to prohibit the wearing of union t-shirts in the workplace? The applicant (NUMSA) contends that such a prohibition would breach the rights of expression and freedom of association of its members. The respondent (Transnet) contends that there is no substantive right to wear a union t-shirt in the workplace as an element of the exercise of the right of expression or freedom of association, or on any other basis, except with its consent.

[2] In October 2014, the respondent (Transnet) adopted a corporate and protective clothing policy which, amongst other things, prohibited the wearing of '*political party clothing or non-recognised union regalia*' during working hours. NUMSA was not then a recognised trade union (nor is it now), with the consequence that the prohibition impacted directly on its members. The effect of the rule was that while Transnet employees who were members of other recognised trade unions could wear 'union regalia' at work, NUMSA members could not.

[3] With effect from 1 June 2015, the October 2014 policy was revised to extend the prohibition to the wearing, during working hours, of '*clothing or any regalia of any sort of any political party or trade union...* (Own emphasis).' The effect of this change in policy is a prohibition on the wearing of all union clothing and regalia in Transnet's workplaces, regardless of whether the union concerned is recognised for collective bargaining or other purposes.

[4] Although the policy refers to clothing and regalia, the focus of the rule in these proceedings has been on the wearing of t-shirts bearing union emblems or logos. For convenience, I refer to the rule that came into effect on 1 June 2015 as the 'union t-shirt ban'.

The factual background

[5] The material facts are not in dispute. Three witnesses testified – a Mr Phatela and Ms Herber for NUMSA, and Mr Motlou for Transnet. It is common cause that on 7 March 2014, by way of a document entitled 'Ops Brief – Code of Conduct', Transnet adopted the following workplace rule:

> 'All employees must wear uniform clothing that displays the Company logo. Any other clothing must either be unmarked or display a recognised union's logo only (SATAWU or UTATU SARWHU).
>
> It is prohibited to wear clothing of any political party or union that has no organisational rights within the workplace…
>
> It is a requirement for all employees to comply with all organisational policies and procedures. Not complying with any policy is construed in a serious light and necessary disciplinary action will be taken against employees who fail or neglect to comply accordingly.'

[6] NUMSA did not meet the threshold for recognition and was not a union, that for the purposes of the policy, enjoyed organisational rights in the workplace. Its members could not therefore wear union t-shirts to work, whereas members of the two recognised unions, SATAWU and UTATU, were so permitted.

[7] During 2015, NUMSA filed a statement of claim that sought first to declare the policy that prohibited the wearing of clothing or attire of unions that have no organisational rights in the workplace unconstitutional, and secondly to set aside the disciplinary action taken against its members in terms of the policy. Transnet responded by submitting, amongst other things, that the wearing of union regalia

to promote a trade union was an organisational right, a right to which NUMSA was not entitled to since it did not meet the threshold of representativity for the acquisition of organisational rights. Further, Transnet contended that NUMSA's members who were disciplined, contravened a workplace rule, and they were entitled to challenge the disciplinary action taken against them through the applicable channels.

[8] This phase of the litigation was overtaken by events, in particular, the introduction of the t-shirt ban in June 2015. A series of amendments were introduced to make reference to a new policy that came into force on 1 June 2015. On that date, Transnet introduced a Uniform and Protective Clothing Policy. This policy remains current, and I refer to it as the '2015 policy'. The policy reads thus:

> '12. No clothing or regalia of any sort of any political party or trade union may be worn during working hours.'

[9] The parties do not dispute that the effect of this policy, contrary to that which was previously applied, is to prohibit the wearing in the workplace of t-shirts displaying the logo or insignia of any trade union, regardless of its recognition status or whether it enjoys statutory or other organisational rights.

[10] Phathela testified that he joined Transnet in 2012. When employees are not required to wear safety gear, they are permitted to wear jeans and a t-shirt. He is employed at the depot in Uitenhage, and his evidence related only to events at the depot. He joined NUMSA in 2014, and became a shop steward in 2016. When he commenced employment with Transnet, wearing a union t-shirt was not an issue and no disciplinary action was ever taken for doing so. The situation changed after March 2014 when disciplinary action was taken against NUMSA members who wore union t-shirts to work. Some members were dismissed for contravening the rule. At no stage did the wearing of NUMSA t-shirts cause conflict or antagonism in the workplace. Phathela complained that despite the t-

shirt ban, members of unions other than NUMSA continued to wear union t-shirts with impunity. In his view, NUMSA members were selectively disciplined for contravention of the ban.

[11] Herber testified that she commenced employment at Transnet in 2010 as a crane operator. She joined NUMSA during 2014, after having been a member of other unions. Initially there were no problems wearing union t-shirts to work, but during February 2015 she was suspended for wearing a NUMSA t-shirt, and later dismissed. After a successful challenge to the fairness of her dismissal, she was reinstated with retrospective effect in terms of a CCMA arbitration award.

[12] Motlou sought to provide a justifiable rationale for the 2014 and 2015 manifestations of the t-shirt ban. He gave evidence of the emergence of 'breakaway' unions during 2014, when new unions were formed to challenge SATAWU, one of the two dominant unions in the workplace. At that time, there was no tension between the two representative unions, and wearing union t-shirts was not an issue. After a strike in 2014, which was accompanied by violence and intimidation, Transnet introduced the policy that allowed only the members of recognised trade unions to wear union t-shirts. The new policy, introduced in 2015, prohibits all employees, regardless of union affiliation, from wearing union t-shirts on account of its intent to maintain and ensure a peaceful environment in the workplace. The rationale for the t-shirt ban, he said, was one related to 'risk management'.

The issues

[13] There are two issues to be decided. The first is whether the workplace rule banning employees from wearing '*clothing or any other regalia of any sort of any political party or trade union …during working hours*' is constitutional, lawful, reasonable and valid. Put another way, the issue is whether through its conduct in prohibiting the wearing of union t-shirts in its workplace, Transnet has infringed the protections accorded by the right to freedom of association enshrined in

Chapter II of the Labour Relations Act, 66 of 1995, (LRA). The second is whether Transnet has applied the rule selectively by not taking disciplinary action against members of other unions who despite the policy, continue to wear union t-shirts to work and if so, whether this differentiation amounts to an act of unfair discrimination against NUMSA's members. I should emphasise that this case does not concern that part of clause 12 of the impugned policy that prohibits the wearing of the clothing or regalia of any political party.

Analysis

[14] It will be recalled that NUMSA's initial challenge was to the granting of the right to wear union t-shirts only to members of recognised trade unions. Transnet had defended its policy on the basis that the wearing of union t-shirts was a form of an organisational right, which was unilaterally entitled to grant to any trade union that it considered sufficiently representative to meet the threshold for the acquisition of organisational rights. Given that the 2014 policy no longer exists and that the ban on wearing union t-shirts now extends to members of all unions, it is not necessary for me to address this issue any further.

[15] The constitutionality, lawfulness and validity of the t-shirt ban of the June 2015 policy is challenged on the basis that it infringes:

15.1 The right of freedom of expression guaranteed by s 16 of the Constitution;
15.2 The labour relations rights established by s 23 (2)(a) and (b) and (4) (a) and (b) of the Constitution and s 4(1)(b) and 4 (2)(a) of the LRA;
15.3 The right of freedom of association in terms of s 18;
15.4 The prohibition of unfair discrimination in terms of s 5 (1) and s 5 (2)(c)(i), (iii), (iv), (v) and (vi) of the LRA;
15.5 The prohibition of unfair discrimination in terms of s 6 (1) of the EEA, on the grounds of conscience, belief, political opinion, the arbitrary grounds of union membership and minority trade union membership, and unreasonableness.

[16] The Constitution affords everyone the right of freedom of expression (s 16(1)). Section 18 affords the right of freedom of association. In the labour context, this right is affirmed in s 23 (2), which affords every worker the right to form and join a trade union, to participate in its activities and programmes, and to strike. Section 23 (4) confers on every trade union and employers' organisation the right to determine its own administration, programmes and activities and to organise.

[17] The principle of subsidiarity requires that where legislation is enacted to give effect to the Constitutional right, reliance must be placed, firstly, on the provisions of the specific legislation (see *Baron and others v Claytile (Pty) Ltd & another* 2017 (5) SA 329 (CC)). In *Safcor Freight (Pty) Ltd t/a Safcor Panalpina v SA Freight and Dock Workers* [2012] 12 BLLR 1267 (LAC), Murphy AJA said the following, at paragraph 18 of the judgment:

> 'In my view, the Labour Court erred in declaring the award of increased remuneration inconsistent with section 9 (equality) and section 23 (fair labour practices) of the Constitution. Where legislation has been enacted to give effect to a constitutional right, a party may not bypass that legislation and rely directly on … the general provisions of constitutional right to fair labour [practices in section 23 or the equality clause in section 9 of the Constitution.'

The LRA gives expression to the constitutional right of freedom of association, and the Employment Equity Act (EEA) prohibits unfair discrimination. NUMSA's claims must necessarily be adjudicated within that legislative framework.

[18] Sections 4 and 5 of the LRA read as follows:

> **'4. Employees' right to freedom of association**
>
> (1) Every employee has the right-
>
> (a) to participate in forming a trade union or federation of trade unions; and
>
> (b) to join a trade union, subject to its constitution.

(2) Every member of a trade union has the right, subject to the constitution of that trade union-

(a) to participate in its lawful activities;

(b) to participate in the election of any of its office-bearers, officials or trade union representatives;

(c) to stand for election and be eligible for appointment as an office bearer or official and, if elected or appointed, to hold office; and

(d) to stand for election and be eligible for appointment as a trade union representative and, if elected or appointed, to carry out the functions of a trade union representative in terms of this Act or any collective agreement.

(3) 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;

(b) to participate in the election of any of its office-bearers or officials; and

(c) to stand for election and be eligible for appointment as an office-bearer or official and, if elected or appointed, to hold office.

5. Protection of employees and persons seeking employment

(1) No person may discriminate against an employee for exercising any right conferred by this Act.

(2) Without limiting the general protection conferred by subsection (1), no person may do, or threaten to do, any of the following-

(a) require an employee or a person seeking employment-

(i) not to be a member of a trade union or workplace forum;

(ii) not to become a member of a trade union or workplace, forum; or

(iii) to give up membership of a trade union or workplace forum;

(b) prevent an employee or a person seeking employment from exercising any right conferred by this Act or from participating in any proceedings in terms of this Act; or

(c) prejudice an employee or a person seeking employment because of past, present or anticipated-

(i) membership of a trade union or workplace forum;

(ii) participation in forming a trade union or federation of trade unions or establishing a workplace forum;

(iii) participation in the lawful activities of a trade union, federation of trade unions or workplace forum;

(iv) failure or refusal to do something that an employer may not lawfully permit or require an employee to do;

(v) disclosure of information that the employee is lawfully entitled or required to give to another person;

(vi) exercise of any right conferred by this Act; or

(vii) participation in any proceedings in terms of this Act.

(3) No person may advantage, or promise to advantage, an employee or a person seeking employment in exchange for that person not exercising any right conferred by this Act or not participating in any proceedings in terms of this Act. '

[19] The provisions of s 4 are drawn from the ILO Convention 187, the Freedom of Association and Protection of the Right to Organise Convention. At its core, ILO Convention 187 provides that workers and employers, without distinction, have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing. The ILO's Declaration of Philadelphia, 1944, records that *'freedom of expression and of association are essential to sustained progress'* and are fundamental principles on which the ILO is based.

[20] Sections 4 and 5 of the LRA are interrelated – s 4 is definitional (in the sense that it accords substantive content to the scope of the right to freedom of association), while s 5 has, as its purpose, the protection of that (and other statutory rights) against acts of discrimination and interference. Section 4 establishes the right of every employee to participate in the formation of a union, to join a union, and to participate in its lawful activities. Section 5 (1) provides that no-one may discriminate against an employee for exercising any right conferred by the LRA. Having regard to the wording of s 5 (1) and the words '*without limiting the general protection conferred by subsection (1)*' it is clear that the umbrella protection

provided by s 5 (1) is followed by the specific forms of proscribed conduct that are identified by s 5 (2), without seeking to limit the broad protection of s 5 (1). Subparagraphs (i) to (iii) of s 5 (2)(c) address themselves to protections in respect specifically of the participation in the formation of a trade union, membership of a trade union and participation in its lawful activities.

[21] The relationship between sections 4 and 5 of the LRA and what is required of an applicant seeking to enforce the right to freedom of association was explained by Murphy AJA in *Safcor Freight (Pty) Ltd v SA Freight and Dock Workers* (supra) in the following terms:

> '[20] The provisions must be read, *inter alia*, with section 4 of the LRA which guarantees every employee the right to freedom of association, in particular the right to join a trade union and to participate in its lawful activities.
>
> [21] Simply put, the provisions of section 5 of the LRA constitute a prohibition against "anti-union discrimination". Although section 5(1) does not qualify the term "discriminate" with the adverb "unfairly", our constitutional and anti-discrimination jurisprudence generally require that discrimination be unfair and/or unjustifiable in order to constitute an infringement or violation. Differentiation which is fair and/or reasonable will not amount to discrimination. A contravention of section 5(1) therefore comprises two elements: discriminatory conduct or action and such being unjustifiable because it is irrational, lacking in proportionality, unreasonable or actuated by improper or illegitimate motives.
>
> [22] The party alleging discrimination (or violation of the specific protections in section 5) must establish the facts of the allegedly objectionable behaviour, in which event the onus of justifying it shifts to the party who engaged in the conduct. Moreover, the existence of differentiation or disparate treatment is not enough; generally, it must be established that the reason for the differentiation relates to a proscribed ground, in this case union membership or union activities. Where there is more than one

> reason for the differentiation, the requirement normally will be met where it is shown that the prescribed ground has an element of predominance. The general prohibition against discrimination in section 5(1) is given content, without its generality being limited, by the provisions of sections 5(2) and 5(3) which impose stricter liability in respect of specific forms of anti-union discrimination. Two of these are of greater significance in the present appeal, namely: section 5(2)(c)(i) which prohibits prejudicing an employee because of past, present or anticipated trade union membership; and section 5(3) which proscribes advantaging an employee in exchange for not exercising any right conferred by the LRA.

[22] In essence, NUMSA contends that by prohibiting the wearing of union t-shirts, Transnet has breached the provisions of s 5 of the LRA. It is well-established that the Bill of Rights provides the context within which the LRA must be interpreted. That much is clear from s 39 (2) of the Constitution, which requires the Court to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation. Further, the LRA itself, in s 3, requires the Court to interpret its provisions to give effect to its primary objects, in compliance with the constitution and in compliance with the public international law obligations of the Republic.

[23] In *National Union of Public Service and Allied Workers obo Mani and Others v National Lotteries Board* 2014 (3) SA 544 (CC), the Constitutional Court had occasion to consider the interpretation of s 5 of the LRA. The majority of the Court commenced with a reference to the right to freedom of expression in s16 (1) of the Constitution, the right to freedom of association in s 18 of the Constitution and the labour rights established by s 23 of the Constitution. The Court set out the approach to be followed in regard to the interpretation of the LRA:

> [146] This matter requires an interpretation of certain provisions of the LRA that confer certain rights on trade unions, employees and union members. For that reason it is important to bear in mind certain provisions of the

Constitution and the LRA relevant to interpretation. These include section 39 of the Constitution, the primary objects of the LRA as well as section 3 of that Act.

[147] Section 39(1) and (2) of the Constitution reads:

> "(1) When interpreting the Bill of Rights, a court, tribunal or forum—
>
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
>
> (b) must consider international law; and
>
> (c) may consider foreign law.
>
> (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[148] The purpose of the LRA is to advance economic development, social justice, labour peace and the *democratisation of the workplace* by *fulfilling the primary objects of that Act. Those objects* include—

> "(a) giving effect to section 23 of the Constitution;
>
> (b) giving effect to obligations incurred by the Republic as a member state of the International Labour Organisation;
>
> (c) *to provide a framework within which employees and their trade unions, employers and employers' organisations can—*
>
> (i) *collectively bargain to determine* wages, terms and conditions of employment *and other matters of mutual interest*; and
>
> . . .

(d) to promote—

(i) orderly collective bargaining;

. . .

(iii) *employee participation in decision-making in the workplace*; and

(iv) *the effective resolution of labour disputes*" (Emphasis added.)

…

[149] Section 3 of the LRA provides that any person applying the LRA must interpret its provisions—

"(a) to give effect to its primary objects;

(b) in compliance with the Constitution; and

(c) in compliance with the public international law obligations of the Republic.

[24] Section 5 (2) (c) (i) proscribes conduct which prejudices an employee on account of membership of trade union. In the present instance, it is an adjunct of trade union membership that members would wish to engage in associative conduct or expression, which disclosed or displayed such membership. One instance of such engagement would be the wearing of union t-shirts. This much was confirmed by the evidence of Herber, whose testimony disclosed the close nexus between association and identity. She gave the following response to a question that related to her identity with the union of which she was a member:

> How did you feel about the disciplinary action that was taken against you on this basis? I felt it was unfair and very discriminatory to me because I was wearing a T-shirt of a union that I have chosen to represent me and it was infringing on my

> rights as a worker for freedom of association and freedom of expression because that was what I was doing when I am wearing the T-shirt, showing the union that I had chosen to represent me for whenever there are cases and they had to go now be off when we give them mandate. Even the way that we were, I was taken out of the company I felt embarrassed by the choice that I have taken for wearing this T-shirt and being part of this, of this union because I was escorted just for wearing a T-shirt out of the company. It too was really, it was painful, it was hurting because I… If felt like I had to say as an employee, that I had to say just say as the employer told me whichever union they choose that I should follow that union and do whatever they want. When I come to work I could not do anything, evening shift meetings I could not have a say because when I have a say they know it is a NUMSA member say you have no right to say anything or whatever you say is not taken seriously.

And later, under cross-examination, in relation to recruitment:

> When I recruit a member I tell them of past experience. I tell them of things that has happened like for instance I am, I tell them about myself, how I had won her case because of NUMSA the union which I have not Bader sent yet from them yet they hired a legal assistance for me to find my case at the CCMA. How I am proof of NUMSA, I am a product of NUMSA, I am proof that NUMSA does work for the week is because I am back at work now

[25] However, it does not necessarily follow that the effect of the t-shirt ban is to prejudice an employee on account of membership of a trade union (and thus breach s 5 (2) (c) (i)). The ban extends to all trade unions; is not directed at membership of a union. Put another way, the wearing of a union t-shirt is not an adjunct of membership *per se*. It seems to me that the real issue in this instance is whether the scope of protection in respect of participation in the lawful activities of a trade union can be said to extend to a right to wear a union t-shirt in the workplace. Section 5 (1) (c) (iii) proscribes conduct which prejudices an employee because of participation in the lawful activities of a trade union. In *NUPSAW* (*supra*), the Constitutional Court went on to hold in relation to the

definition of the phrase 'lawful activities' of a trade union in s 5 (2)(c)(i) (footnotes omitted) –

'[151] The meaning of the phrase "lawful activities" in sections 4(2) (a) and 5(1) (c) (iii) plays an important role in the present case. In interpreting this phrase we must be guided by various factor- and principles. These include that—

(a) in accordance with the interpretive injunction in section 39(2) of the Constitution we must prefer the meaning of the provision that promotes the workers' right to "participate in the activities and programmes of a trade union" to an interpretation that undermines that right;

(b) in compliance with the instruction in section 3 of the LRA, we must promote the LRA's primary object of giving effect to and regulating the fundamental rights conferred by section 23 of the Constitution;

(c) section 4(2) (a) must be construed restrictively so as to give the workers a full measure of the protection afforded by section 23 of the Constitution; and

(d) we must heed the rule of constitutional interpretation that constitutional rights conferred without an express limitation should not be cut down by reading implicit restrictions into them.

[152] We must also bear in mind what this Court said in *SAPS v POPCRU* and in *SATAWU v Moloto.* In *SAPS v POPCRU* it said:

"The provisions in question must thus not be construed in isolation, but in the context of other provisions of the LRA and the SAPS Act. For this reason, a restrictive interpretation of essential services must, if possible, be adopted so as to avoid impermissibly limiting the right to strike. Were legislation to define essential services too broadly, this would impermissibly limit the right to strike".

In *SATAWU v Moloto* it said:

> "The relevance of a restrictive approach is to raise a cautionary flag against restricting the right more than is expressly provided for. Intrusion into the right should only be as much as is necessary to achieve the purpose of the provision and this requires sensitivity to the constraints of the language used".

[26] The Court went on to say, at paragraph 153 of the judgment:

> 'Although it may not be necessary on the facts of this case to give an exhaustive definition of the phrase "lawful activities" in sections 4 (2) (a) and 5(2) (c)(iii), it seems to me that, on a proper restrictive approach, the phrase must exclude illegal activities or activities that constitute contraventions of the law. It definitely excludes conduct that constitutes criminal offences. The provisions include participation by union members in union activities that form part of the core functions of a trade union. These include taking up members' complaints or grievances with their employer, representing them in grievance and disciplinary proceedings, collective-bargaining, attending statutory tribunal to represent their members' interests and communicating with its member's employer about workplace issues…'

[27] An earlier judgment by the Constitutional Court that gives meaning to the range of activities contemplated by the phrase 'lawful activities ' is *National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd & Another* 2003 (3) SA 513 (CC), where the Constitutional Court, in a case that concerns the rights of the minority union to embark on a protected strike action to persuade the employer to recognise it's shop stewards, conform to the important principle of freedom of association enshrined in Article 2 of the Convention on Freedom of Association and Protection of the Right to Organise which states:

> 'Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join

organisations of the choosing without previous authorisation' (see paragraph 31 of the judgment).

Further, the Constitutional Court acknowledged that the ILO jurisprudence extends to 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. 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 (at paragraph 34 of the judgment).

[28] In the present instance, the 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 unions by seeking to persuade members to associate with the minority union, with a view to it ultimately attaining majority.

[29] In those circumstances, and having regard to the interpretation of s 5 (2) (c) (iii) adopted by the Constitutional Court, in my view, the wearing of union t-shirts constitutes a lawful activity as contemplated by s 5 (2) (c) (iii). The imposition of the union t-shirt ban, with its underlying threat of disciplinary action for an infringement of the band, constitutes a form of prejudice proscribed by that provision. In short, the t-shirt ban is unlawful and invalid with reference to s 5 (2) (c) (iii).

[30] To the extent that s 5 (2)(c)(vi) proscribes an employer from prejudicing an employee on account of the exercise of any rights conferred by the LRA, the wearing of a union t-shirt constitutes a lawful activity under the LRA. This is particularly so in so far as the wearing of a t-shirt is an associative act and s 4 specifically protects an employee's right to freedom of association by joining

trade unions and participating in its lawful activities. On this basis, the union t-shirt ban is also an infringement of s 5 (2) (c) (vi) and is invalid.

[31] There is support for the interpretation advanced by NUMSA in the application and interpretation of s 7 of the US National Labour Relations Act. That section guarantees employees

> '…the right to self-organization, to form, join, or assist labor organizations to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

[32] The US Supreme Court has explicitly recognised and upheld this right in relation to the wearing of what are termed 'union buttons'. In *Republic Aviation Corp. v NLRB* 324 US 793 (1945), the court held that an employer had violated s 8 of the Act (s 8 provides that it is an unfair labour practice for an employer to interfere with, or restrain a case employees in the exercise of the rights guaranteed in section 7) by dismissing three employees for wearing union insignia. The Court stated that the employees concerned had been *"entirely deprived of their normal right to "full freedom of association" in the plant on their own time, the place uniquely appropriate and almost solely available to them therefor. The respondent's rule is therefore in clear derogation of the rights of its employees guaranteed by the Act"* (at 1195). The court also quoted the NLRB's conclusion that the right of employees to wear union insignia at work '*has long been recognized as a reasonable and legitimate form of union activity*'. What this language recognises is that the workplace is an ideal forum for expressing union sympathies and that an employee's freedom of association includes the right to wear union insignia (See John W Teeter J., 'Banning the Buttons: Employer Interference with the Right to wear Union Insignia in the Workplace' 80 *Ky Law Journal* vol 80 (1991 – 92) at 380.) For present purposes, the significance of this decision is the Court's view that in addition to assuring workers the right to form unions and bargain, s 7 also guarantees the freedom "*to engage in other*

concerted activities for the purpose of… other mutual aid protection"(at 179). As the learned author suggests, such broad language would clearly seem to encompass the right of workers to nurture unity and collective strength by wearing insignia (at p386). Further, the managerial absolutism inherent in denying workers their right to wear union insignia takes its toll on individual dignity and subjugates individual autonomy.

[33] This is not to say that the exercise of the right to freedom of association by wearing a union t-shirt in the workplace is unlimited. One can imagine a justification on the basis of a significant threat to safety, and a number of other reasons. Indeed, Matlou gave the example in his evidence of employees engaged in work on tracks being prohibited from wearing red clothing, on account of signals being the same colour and the potential for confusion that may arise. Transnet chose not to raise a plea of justifiability as a defence to NUMSA's claim. It is not necessary therefore for me to consider the factors that might serve as a rational justification for a limitation on or prohibition of the wearing of union t-shirts in the workplace. To the extent that Matlou in his testimony sought to justify the t-shirt ban on the basis of 'risk management', while he spoke about tension in the workplace occasioned by the split in SATAWU and the emergence of breakaway unions, I did not understand him to be proffering a rational justification for the limitation of a right rather than ascribing a motive for the new rule. I have no doubt that in appropriate circumstances, inter-union rivalry and any associated violence in the workplace may justify intervention by an employer in the form of a limitation on the wearing of t-shirts and union insignia (or even its prohibition in extreme cases), but that is not the case made in the present instance. Matlou testified in the most general terms regarding 'tension' in the workplace consequent on a split in the previously dominant unions. The pleadings aside, there is simply no evidentiary basis on which to make a finding that the limitation of the right to freedom of association, represented by the t-shirt ban, is reasonable and justifiable.

[34] In view of the conclusion to which I have come on the application of sections 4 and 5 of the LRA, it is not necessary for me to make any findings in relation to the part of NUMSA's claim that concerns the discriminatory nature of what it alleges to be the inconsistent application of the rule prohibiting the wearing of union t-shirts. Specifically, it is not necessary for me to decide whether the failure to institute disciplinary action against members of unions other than NUMSA for a breach of the t-shirt ban constitutes unfair discrimination as defined by s 6 of the EEA.

[35] To the extent that Transnet submits that because NUMSA employees have an alternative remedy in the form of a referral to the bargaining council should they be disciplined for breaching the 2015 policy, this submission overlooks that what is at issue in the present instance is an alleged breach by Transnet of a s 4 right, and its enforcement through the mechanism of s 5 (1). Section 9 makes it clear that any dispute about the interpretation and application of sections 4 and 5 may be referred to this Court for adjudication. NUMSA is entitled to approach this court on that basis, and need not delay until the dispute manifests itself in the form of a dispute concerning an unfair dismissal, nor is it precluded from approaching this court by any referral already made to the bargaining council of any unfair dismissal dispute.

[36] Finally, in regard to costs, this is quintessentially a matter in which costs ought not to be awarded. Although the parties are not collective bargaining partners, the concern expressed by what was then the Appellate division of the Supreme Court of Appeal in *National Union of Mine Workers v East Rand Gold and Uranium Company Ltd* 1992 (1) SA 700 (AD) that orders for costs may in some instances prejudice a relationship between a trade union and an employer and render a difficult relationship even more fraught, holds good. In my view, and in the exercise of the broad discretion conferred by s 162, the interests of the law and fairness are best served by there being no order as to costs.

[37] I make the following order:

1. Paragraph 12 of the respondent's policy on uniforms and protective clothing introduced with effect from 1 June 2015, to the extent that it prohibits the wearing of any trade union clothing or regalia during working hours, is declared to be in breach of s 4 (2) (a), 5 (2) (c) (iii) and (vi) of the Labour Relations Act, and is set aside.

2. Any disciplinary action taken by the respondent on charges of a breach of paragraph 12 of the 2015 policy on uniforms and protective clothing is declared to be in breach of s 5, to the extent that the breach concerned the wearing of trade union clothing or regalia, and is set aside.

3. There is no order as to costs.

_____

André van Niekerk

Judge of the Labour Court of South Africa

Appearances:

For the applicants: Adv. A Dodson SC, with him Adv. M Thys,

Instructed by: Ruth Edmonds Attorneys

For the respondent: Mr P Maserumule, Maserumule Attorneys.