CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 152/17

In the matter between:

POLICE AND PRISONS CIVIL RIGHTS UNION	Applicant
and	
SOUTH AFRICAN CORRECTIONAL SERVICES WORKERS' UNION	First Respondent
MINISTER OF CORRECTIONAL SERVICES N.O.	Second Respondent
LGP LEDWABA N.O.	Third Respondent
GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL	Fourth Respondent

Neutral citation:	*Police and Prisons Civil Rights Union v South African Correctional Services Workers' Union and Others* [2018] ZACC 24
Coram:	Zondo DCJ, Cachalia AJ, Dlodlo AJ, Froneman J, Goliath AJ, Jafta J, Khampepe J, Madlanga J, and Petse AJ.
Judgments:	Cachalia AJ (minority): [1] to [61] Jafta J (majority): [62] to [112] Zondo DCJ (concurring): [113] to [149]
Heard on:	15 February 2018

Decided on: 23 August 2018

Summary: Labour Relations Act 66 of 1995 — interpretation of sections 18 and 20 — collective agreements — thresholds of representativeness

collective bargaining by minority unions — sections 12, 13, and 15 rights — mootness — interests of justice — interpretation of *Bader Bop*

ORDER

On appeal from the Labour Appeal Court, the following order is made:

1. The application for leave to appeal is granted.
2. The appeal is dismissed.
3. There is no order as to costs.

JUDGMENT

CACHALIA AJ (Froneman J concurring):

Introduction

[1] This application for leave to appeal concerns a dispute between two rival unions over the right of a minority union to acquire organisational rights from an employer where the majority union has a pre-existing collective agreement with the employer setting a threshold of representativeness for admission to a departmental bargaining council, which the minority union does not meet.

[2] The majority union – the applicant – is the Police and Prisons Civil Rights Union (POPCRU). The minority union, which is a breakaway union from POPCRU, is the South African Correctional Services Workers' Union (SACOSWU). It is the first respondent.

[3] The second respondent is the Minister of Correctional Services. The third respondent is LGP Ledwaba N.O. (arbitrator) in his official capacity as an arbitrator of the General Public Service Sectoral Bargaining Council (GPSSBC) who made the arbitration award, which POPCRU took on review. The fourth respondent is the GPSSBC. The second to fourth respondents are not participating in these proceedings.

[4] POPCRU seeks to prevent SACOSWU from obtaining a foothold in the Department of Correctional Services (DCS). It thus contends that its threshold agreement with the DCS, in terms of section 18 of the Labour Relations Act (LRA),[1] prohibits the latter from bargaining with and entering into a collective agreement granting organisational rights to SACOSWU.

[5] SACOSWU, on the other hand, submits that section 18 merely authorises employers and majority unions, such as POPCRU, to establish a threshold for the automatic acquisition of the organisational rights referred to there. SACOSWU argues that section 18 does not – as section 20 makes clear – bar minority unions from bargaining for and obtaining the self-same organisational rights from an employer. As this matter involves the interpretation of the provisions of the LRA, this Court has jurisdiction.

Legislative framework

[6] It is apposite to set out the key provisions of the LRA that bear on the outcome of this dispute. These are sections 18 and 20 both of which are to be found in Part A of Chapter III. This Chapter deals with the acquisition of organisational rights by trade unions. Section 18 gives a majority trade union the right to conclude a collective agreement establishing a threshold of representativeness for the organisational rights

[1] 66 of 1995.

referred to in sections 12, 13 and 15, which deal with trade union access to the workplace, stop-order facilities and recognition of shop-stewards, respectively.[2]

[2] Section 12 of the LRA provides:

> "(1) Any office-bearer or official of a representative trade union is entitled to enter the employer's premises in order to recruit members or communicate with members, or otherwise serve their interests.
>
> (2) A representative trade union is entitled to hold meetings with employees outside their working hours at the employer's premises.
>
> (3) The members of a representative trade union are entitled to vote at the employer's premises in any election or ballot contemplated by that trade union's constitution.
>
> (4) The rights conferred by this section are subject to any conditions as to time and place that are reasonable and necessary to safeguard life or property or to prevent the undue disruption of work."

Section 13 of the LRA provides:

> "(1) Any employee who is a member of a representative trade union may authorise the employer in writing to deduct subscriptions or levies payable to that trade union from the employee's wages.
>
> (2) An employer who receives an authorisation in terms of subsection (1) must begin making the authorised deduction as soon as possible and must remit the amount deducted to the representative trade union by not later than the 15th day of the month first following the date each deduction was made.
>
> (3) An employee may revoke an authorisation given in terms of subsection (1) by giving the employer and the representative trade union one month's written notice or, if the employee works in the public service, three months' written notice.
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> (4) An employer who receives a notice in terms of subsection (3) must continue to make the authorised deduction until the notice period has expired and then must stop making the deduction.
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> (5) With each monthly remittance, the employer must give the representative trade union—
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> (a) a list of the names of every member from whose wages the employer has made the deductions that are included in the remittance;
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> (b) details of the amounts deducted and remitted and the period to which the deductions relate; and
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> (c) a copy of every notice of revocation in terms of subsection (3)."

Section 15 of the LRA provides:

> "(1) An employee who is an office-bearer of a representative trade union, or of a federation of trade unions to which the representative trade union is affiliated, is entitled to take reasonable leave during working hours for the purpose of performing the functions of that office.
>
> (2) The representative trade union and the employer may agree to the number of days of leave, the number of days of paid leave and the conditions attached to any leave.
>
> (3) An arbitration award in terms of section 21(7) regulating any of the matters referred to in subsection (2) remains in force for 12 months from the date of the award."

[7] Section 18 provides:

> "(1) An employer and a registered trade union whose members are a majority of the employees employed by that employer in a workplace, or the parties to a bargaining council, may conclude a collective agreement establishing a threshold of representativeness required in respect of one or more of the organisational rights referred to in sections 12, 13 and 15.
>
> (2) A collective agreement concluded in terms of subsection (1) is not binding unless the threshold of representativeness in the collective agreement are applied equally to any registered trade union seeking any of the organisational rights referred to in that subsection."

[8] On the other hand, section 20 says emphatically that:

> "Nothing in this Part precludes the conclusion of a collective agreement that regulates organisational rights."

[9] SACOSWU contends that, on a proper interpretation of section 20, section 18 cannot be read to prevent minority unions that do not satisfy an agreed threshold from acquiring organisational rights. To do so, the argument continues, would effectively negate the use of the words "nothing in this Part" at the beginning of the section.

[10] On the other hand, POPCRU insists that section 18 must be read with section 23(1)(d) of the LRA,[3] which provides that a collective agreement – which a

[3] It is important to note that section 23, which deals with the "[l]egal effect of collective agreements" is found in Part B of Chapter III of the LRA, not in Part A where sections 18 and 20 appear. SACOSWU thus contends that an agreement concluded under section 20 in Part A, is not subject to section 18, and cannot be extended under section 23(1)(d), which falls under Part B. Section 23(1)(d) reads:

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

threshold agreement contemplated in section 18 is – is binding on all employees in the workforce, including those who are not members of the majority union. This interpretation accords with the principle of majoritarianism, which promotes orderly collective bargaining. This means that SACOSWU is bound by the threshold agreement. Understood thus, so it is contended, minority unions such as SACOSWU are limited from acquiring rights identified in sections 12, 13 and 15 of the LRA.

Preliminary arguments

[11] However, before these submissions are considered, we have to determine a preliminary point. SACOSWU contends that this dispute is moot and not in the interests of justice to adjudicate because there is no live dispute between the parties since the threshold agreement that is the subject of the present dispute no longer exists.

[12] At the hearing of this application on 15 February 2018, POPCRU objected to us entertaining this issue because, it said, that it had insufficient time to respond to the factual allegations raised by SACOSWU. It also objected to the introduction of what it referred to as "new evidence" regarding the issue of mootness. As a result, the Court directed the parties to file affidavits and make further submissions on two issues regarding mootness. The first was whether the Departmental Bargaining Chamber Resolution 7 of 2001, which is the threshold agreement that is the subject of the present dispute (2001 threshold agreement) had been ratified, and the second, was whether the 2001 threshold agreement was still in force following Resolution 1 of 2013, which repealed and replaced all previous organisational rights agreements. POPCRU responded on 2 March 2018 and SACOSWU, a week later. In the light of POPCRU having adduced further facts on this issue, I do not understand it to persist with its objection to the "new evidence".

[13] POPCRU contends that, even if this Court were to find that the 2001 threshold agreement no longer exists, the issue in dispute in this appeal still raises an important question of law as to whether an employer and a minority trade union that does not

meet the threshold of representativeness, may enter into a collective agreement granting the union organisational rights, even where there exists a threshold agreement with a majority union. It is, says POPCRU, therefore in the interests of justice to decide the question.

Background

[14] On 8 November 2001, the 2001 threshold agreement was concluded between the DCS and the recognised trade unions in the DCS. POPCRU was among the recognised unions. The 2001 threshold agreement set the threshold for admission of a single registered union to the Department of Correctional Service Council at 9 000 members. It also permitted employees to be represented at disciplinary and grievance proceedings by a fellow employee or a representative of a recognised trade union.

[15] Subsequently, on 4 December 2003, Resolution 9 of 2003 disestablished the Departmental and Provincial Bargaining Councils and established the provincial co-ordinating chambers of the Public Service Coordinating Bargaining Council (PSCBC).

[16] On 22 April 2004, Resolution 3 of 2004 came into force for purposes of establishing provincial and national departmental chambers of the GPSSBC. According to this agreement, existing bargaining structures would cease to exist either at the launch of the newly established chambers or by 30 June 2004. Furthermore, all existing collective agreements were required to be ratified within a month of the establishment of the new chambers.

[17] In POPCRU's response to this Court's directions referred to earlier, it attached an unsigned affidavit from the General Secretary of the GPSSBC confirming that all collective agreements concluded in the previous council structure were ratified by the GPSSBC on 22 July 2005. The evidence is not entirely satisfactory as the resolutions proving this were not provided, but instead archived letters were relied upon.

However, I am prepared to accept, in favour of POPCRU, that the 2001 threshold agreement was ratified.

[18] In addition to the 2001 threshold agreement, on 23 February 2006, Resolution 3 of 2006 was adopted. This agreement regulated the relations between the DCS and trade unions admitted to the Departmental Bargaining Chamber and it allowed for trade unions admitted to the PSCBC or complying with the threshold of representativeness in the DCS to have access to stop order facilities.

[19] So, when SACOSWU was registered as a trade union on 31 August 2009, the 2001 threshold agreement and Resolution 3 of 2006 governed the relationship between trade unions and the DCS.

[20] Upon registration, SACOSWU approached the DCS seeking to be granted certain organisational rights despite not having the minimum membership dictated by the 2001 threshold agreement.

[21] On 5 November 2010, the DCS acceded to SACOSWU's request by allowing it to represent its members during grievance and disciplinary proceedings. It also granted SACOSWU facilities to deduct membership fees for a limited period of six months. The parties therefore understood that SACOSWU was given section 12 rights (access to premises to serve members' interests at grievance and disciplinary proceedings) and section 13 rights (stop-order facilities).[4]

[22] I pause to mention that in this Court there was no dispute between the parties as to whether the right of a representative union to serve its members' interests as contemplated in section 12(1) includes the right of access to an employer's premises for the purpose of representing its members in grievance and disciplinary proceedings. The application for leave to appeal was argued on this basis. However, the second

[4] See the full text of these provisions above n 2.

judgment considers that the Labour Appeal Court incorrectly dealt with this as a section 12 right, whereas it is in truth a section 14 right.[5] I revert to this issue later.

[23] POPCRU was aggrieved by the DCS having granted these organisational rights to SACOSWU because, it maintained, by so doing the DCS had contravened the 2001 threshold agreement and Resolution 3 of 2006. As a result, on 3 May 2011, it referred this dispute to the GPSSBC for conciliation maintaining that SACOSWU was not entitled to exercise any of the organisational rights contemplated under sections 12, 13, 14, 15 or 16.[6] After conciliation, the dispute remained unresolved and was then referred to arbitration.

[24] On 16 February 2012, the arbitrator found that the 2001 threshold agreement did not preclude SACOSWU from concluding a collective agreement with the DCS. However, as at that date, SACOSWU no longer required the DCS to deduct subscriptions on its behalf as the six-month period had since lapsed. This issue had therefore become moot. The only issue still in dispute concerned SACOSWU's section 12 right of access to the DCS's premises for the purpose of representing its members in grievance and disciplinary proceedings, which was to be heard in the Labour Court on 18 July 2013.

[25] On 4 February 2013, by Resolution 1 of 2013, another organisational rights agreement came into force. It replaced all previous organisational rights agreements that fell within the scope of the GPSSBC. The 2001 threshold agreement and Resolution 3 of 2006 had then ceased to exist. This meant that there was no longer any section 18 agreement barring SACOSWU from acquiring organisational rights.

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[5] Section 14(4) provides:

> "A trade union representative has the right to perform the following functions—
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> (a) at the request of an employee in the workplace, to assist and represent the employee in grievance and disciplinary proceedings."

[6] Even though the referral by POPCRU made reference to sections 12, 13, 14, 15 and 16 rights, only sections 12 and 13 rights were in issue.

[26] It is not clear why the existence of Resolution 1 of 2013 and the fact that the 2001 threshold agreement had lapsed was not brought to the attention of the Labour Court when the matter was heard on 18 July 2013, five months later. It should have been.

[27] Nevertheless, the Labour Court adjudicated the dispute on review and, on 5 September 2013, delivered its judgment setting aside the arbitration award. It concluded that the 2001 threshold agreement precluded the DCS and SACOSWU from concluding a collective agreement on organisational rights. SACOSWU was granted leave to appeal to the Labour Appeal Court on 26 November 2015.

[28] In the interim, on 7 July 2014, another organisational rights agreement – Resolution 3 of 2014 – was concluded. It replaced Resolution 1 of 2013 and also repealed all earlier collective agreements.

[29] On 1 January 2015, section 21(8C) of the LRA came into operation. This section was introduced through an amendment to the LRA. It provides:

> "[A] commissioner may in an arbitration conducted in terms of subsection (7) grant the rights referred to in sections 12, 13 or 15 to a registered trade union, or two or more registered trade unions acting jointly, that does not meet the thresholds of representativeness established by a collective agreement in terms of section 18, if—
>
> (a) all parties to the collective agreement have been given an opportunity to participate in the arbitration proceedings; and
>
> (b) *the trade union, or trade unions acting jointly, represent a significant interest, or a substantial number of employees, in the workplace*." (Emphasis added.)

[30] It is apparent that this amendment substantially changed the statutory regime applicable to threshold agreements since the dispute between the parties began some four years earlier. The amendment bears directly on the mootness issue traversed later in this judgment.

[31] On 13 May 2015, soon after section 21(8C) came into force, SACOSWU referred another dispute it had with POPCRU regarding its acquisition of organisational rights to the Commission for Conciliation, Mediation and Arbitration (CCMA). SACOSWU sought to vary the agreement it had with the DCS for access to the premises after working hours to hold meetings during the lunch break. POPCRU, once again, opposed this. The Public Servants Association, PSCBC and GPSSBC were joined as respondents. SACOSWU contended that it had a "significant interest or a substantial number" of employees in the workplace as contemplated by section 21(8C) of the LRA and was therefore entitled to organisational rights in terms of sections 12 (access to premises) and 15 (trade union activities).

[32] In its response, POPCRU contended that because the 2001 threshold agreement had been revoked, section 21(8C) did not apply to the dispute. An arbitrator delivered his award on 22 March 2017. Upholding POPCRU's contention, he found that "the section 18 agreement [that] POPCRU had relied upon in litigation before the courts had been revoked". The arbitrator's reference to "litigation before the courts" was to the judgment of the Labour Court and the pending appeal before the Labour Appeal Court in the current dispute.

[33] The Labour Appeal Court heard the appeal on 15 November 2016. It noted that section 12 rights (access to premises) remained the only live issue in dispute as the agreement between the DCS and SACOSWU regarding section 13 rights (access to stop-order facilities) had lapsed. However, it acceded to SACOSWU's request to determine this issue as well. It is, however, troubling that neither party appears to have drawn the Court's attention to the fact that the 2001 threshold agreement, which was at the centre of their dispute, had ceased to exist. Had they done so, which they were under a duty to, the Court would have had to consider whether the appeal was moot. It therefore adjudicated the dispute apparently unaware of this fact.

[34] On 31 May 2017, the Labour Appeal Court reversed the Labour Court's decision. It held that the 2001 threshold agreement did not bar SACOSWU from obtaining organisational rights from the DCS. Its order read as follows:

> "The collective agreement entered into with POPCRU in terms of section 18(1) of the LRA establishing representation thresholds for the exercise of organisational rights under section 12, section 13 and section 15 in the workplace of the Department of Correctional Services, does not prevent the Department from entering into a valid and enforceable collective agreement with SACOSWU in terms of section 20 to permit the union to represent its members at internal disciplinary and grievance proceedings in the workplace."[7]

[35] It appears, however, that the Labour Appeal Court inadvertently omitted a reference to the section 13 (access to stop-order facilities) dispute in its order, but nothing turns on this. However, the second judgment considers that the order erroneously suggests that collective agreements may be concluded "in terms of section 20", which, in its view, requires correction. I disagree with this view and shall deal with this issue shortly.

[36] POPCRU now applies for leave to appeal the Labour Appeal Court's order to this Court.

Mootness

[37] It is indisputable that the 2001 threshold agreement no longer exists. However, Resolution 3 of 2014, referred to earlier, does not bar the conclusion of future threshold agreements. Indeed, Resolution 2 of 2017, which came into operation on 27 June 2017, now establishes a new threshold of representativeness that registered trade unions must meet in order to exercise organisational rights in the public service. This means that if the new threshold agreement applies, SACOSWU will have to

[7] *South African Correctional Services Workers Union v Police and Prisons Civil Rights Union* [2017] ZALAC 30; (2017) 38 ILJ 2009 (LAC); [2017] 9 BLLR 905 (LAC) (Labour Appeal Court judgment).

satisfy the requirements of section 21(8C) in order to secure organisational rights from the DCS, as it had attempted to do unsuccessfully before this Resolution was passed.[8]

[38] Against this background, the issue as to whether the dispute is moot and should be entertained at all must be considered. The issue in this application, as I mentioned at the outset, is whether the 2001 threshold agreement prevented the DCS from concluding an organisational rights agreement with SACOSWU. The question of whether minority trade unions may acquire organisational rights was dealt with by this Court in *Bader Bop*[9] and both the Labour Court and the Labour Appeal Court therefore had to consider the effect of *Bader Bop* in determining the dispute between POPCRU and SACOSWU.

[39] The Labour Court distinguished *Bader Bop.*[10] The Labour Appeal Court, on the other hand, considered itself bound by it.[11] POPCRU contended in this Court that

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[8] Id paras 31-2.

[9] *National Union of Metalworkers of South Africa v Bader Bop (Pty) Ltd* [2002] ZACC 30; 2003 (3) SA 513 (CC); (2003) 24 ILJ 305 (CC) (*Bader Bop*).

[10] The distinction can be found at paras 31-2 of *POPCRU v Ledwaba N.O. and Others* (JR 636/2012) [2013] ZALCJHB 224; (2014) 35 ILJ 1037 (LC); [2013] 11 BLLR 1137 (LC) (Labour Court judgment), where the Labour Court discusses why the decision of *Bader Bop* was not applicable. In particular, at para 32, the Labour Court observed:

> "It is in this context where the distinction between the current matter and the judgment in *Bader Bop* comes in. In *Bader Bop*, the Court found that in the circumstances of that case, as set out above, none of the limitations in section 65 of the LRA of the right to strike found application. And indeed, it did not in that case, as in that case there was no other majority trade union in the employer armed with collective agreements concluded with the employer such as the collective agreements at stake in the current matter. In the current matter, POPCRU and its collective agreements with the Department completely changes the landscape. SACOSWU has no statutory entitlement to organisational rights because it is not a sufficiently representative in terms of Part A of Chapter III of the LRA and must thus collectively bargain for it."

[11] In particular, at para 33 (above n 7), the Labour Appeal Court pronounced as follows:

> "However, as was made clear in *Bader Bop*, there is nothing in Part A of Chapter III which expressly states that unions which do not meet the required threshold are prevented from using the ordinary processes of, as is relevant for current purposes, collective bargaining to persuade the employer to grant such rights to the minority union."

Further, at para 34, the Labour Appeal Court observed:

> "Were section 18(1) to be interpreted so as to bar the conclusion of such agreement under section 20, this would, as was cautioned in both *Bader Bop* and *AMCU*, serve to disregard the '*internationally recognised rights of minority unions to seek to gain access to the workplace*', to organize within the workforce or to canvass support to challenge the hegemony of established unions."

the case was indeed distinguishable because the issue in *Bader Bop* did not involve a threshold agreement.

[40] *Bader Bop* concerned an attempt by a trade union, the National Union of Metalworkers of South Africa (NUMSA) – which represented only 26% of the workforce – to acquire organisational rights conferred by sections 12 to 15 of the LRA. The rights identified by sections 12, 13 and 15 may be conferred upon "sufficiently representative" trade unions, whereas those under sections 14 and 16, only upon majority unions. The employer was willing to afford NUMSA access to its premises and to stop-order facilities in terms of sections 12 and 13, respectively, but was not prepared to recognise its shop-stewards in terms of section 14, or to bargain collectively because it was not a majority union. NUMSA contested the employer's view.

[41] The Court held that the fact that a trade union did not meet the requisite threshold membership levels did not bar it from using the ordinary processes of collective bargaining and industrial action to persuade an employer to grant it organisational facilities such as access to the workplace, stop-order facilities and recognition of their shop stewards.[12] It bears mentioning that in the course of its reasoning in *Bader Bop*, this Court considered a suggestion by Du Plessis AJA, writing for the majority in the Labour Appeal Court, to the effect that an interpretation permitting a non-representative trade union to acquire organisational rights in the face of a threshold agreement would render section 18 nugatory.[13] But, the Court concluded, the more plausible interpretation was one that avoided limiting the constitutional right to bargain collectively and to embark on industrial action to secure it. It accordingly upheld NUMSA's appeal.[14]

[12] *Bader Bop* above n 9 at para 40.

[13] *Bader Bop (Pty) Ltd v NUMSA* (2002) 2 BLLR 139 (LAC) at para 84.

[14] *Bader Bop* above n 9 at para 39.

[42] It is unnecessary to decide whether the fact that no threshold agreement was in issue in *Bader Bop* means this Court's *ratio decidendi* (rationale for a decision) does not apply to the facts of this case. What is clear, however, is that in the absence of a threshold agreement, SACOSWU's entitlement to acquire organisational rights through a collective agreement with the DCS is governed by *Bader Bop*. This means that the fact that SACOSWU is a minority union does not preclude it from acquiring organisational rights from DCS. I now turn to decide the issue of mootness.

[43] This Court's jurisprudence regarding mootness is well settled. As a starting point, this Court will not adjudicate an appeal if it no longer presents an existing or live controversy.[15] This is because this Court will generally refrain from giving advisory opinions on legal questions, no matter how interesting, which are academic and have no immediate practical effect or result.[16] Courts exist to determine concrete legal disputes and their scarce resources should not be frittered away entertaining abstract propositions of law.

[44] But mootness is not an absolute bar to the justiciability of an issue.[17] The Court may entertain an appeal, even if moot, where the interests of justice so require.[18] In making this determination the Court exercises a judicial discretion based upon a number of factors. These include, but are not limited to, considering whether any order may have some practical effect, and if so its nature or importance to the parties or to others.

[45] In my view, the appeal is moot and the interests of justice do not require that it be entertained for the reasons that follow.

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[15] See Loggerenberg *Erasmus Superior Court Practice* 2 ed (Juta & Co Ltd, Pretoria 2015) vol 1 at 8-9.

[16] See *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at fn 18.

[17] See *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) (*Langeberg Municipality*) at para 9.

[18] See *Minister of Mineral Resources v Sishen Iron Ore Company (Pty) Ltd* [2013] ZACC 45; 2014 (2) SA 603 (CC); 2014 (2) BCLR 212 (CC) at para 104.

[46] This dispute became moot as soon as the 2001 threshold agreement was revoked more than five years ago, in February 2013. Since then, other than the dispute with POPCRU that was referred to the CCMA regarding SACOSWU's attempt to vary its agreement with the DCS to allow it lunch time access to the premises, there has been no live dispute between the parties.

[47] The parties have been aware for a considerable period of time before this appeal that the 2001 threshold agreement was no longer in force. POPCRU must have been aware of this at least since February 2013, but failed to inform the Labour Court, contrary to its duty. SACOSWU says it only became aware that the 2001 threshold agreement had been revoked when POPCRU raised the issue before the CCMA in the dispute concerning the applicability of section 21(8C) of the LRA in 2015. It is, however, beyond cavilling that both parties failed in their duty to inform the Labour Appeal Court of the true state of affairs, as I mentioned earlier. It ill-behoves POPCRU to now accuse SACOSWU of opportunism in raising the mootness issue. So, even if the interpretation of section 18 has some residual relevance to the parties in this dispute – which I do not believe there is – it is not in the interests of justice to entertain it because this would merely condone their conduct.

[48] Should the dispute regarding the reach of threshold agreements concluded in terms of section 18 arise in the future, as it no doubt will, the new statutory regime governing threshold agreements, which now includes section 21(8) (and particularly sections 21(8A) and 21(8C)) will apply. In fact, there is currently precisely such a dispute regarding the application of section 21(8C) pending before the Labour Court.[19] The regime that existed at the time the 2001 threshold agreement came into force, when *Bader Bop* was decided in 2003, is now completely different. So, any future dispute regarding the binding effect of section 18 threshold agreements in the face of attempts by minority unions to acquire organisational rights will have to be determined having regard to the new statutory regime. In this regard, it must be noted

[19] Case Number JR740/2017.

that section 21(8D) provides that section 21(8C) applies to any dispute that is referred to the CCMA after the commencement of the Labour Relations Amendment Act 2014, irrespective of whether the collective agreement contemplated in subsection (8C) was concluded prior to such commencement date. This means that the new regime applies even if the collective agreement was concluded before section 21(8C) came into operation.

[49] Regarding the second judgment's conclusion that section 21(8C) has no bearing on the meaning of sections 18 and 20 in the future and their possible effect on disputes concerning threshold agreements, one must pose the question: what would have happened if a similar dispute to the present had arisen after section 21(8C) was enacted? The answer is self-evident. The resolution of the dispute would have taken an entirely different course. The issue before the arbitrator would have been whether SACOSWU, which does not meet the threshold of representativeness established by the threshold agreement, represented a "significant interest or substantial number of employees in the workplace" as contemplated in section 21(8C), and not whether the threshold agreement contemplated in section 18 precluded it from obtaining organisational rights. As I have pointed out earlier, this is exactly what happened earlier when SACOSWU referred a dispute regarding organisational rights to the CCMA in May 2015. It is therefore clear, with respect, that it is not only inappropriate to interpret sections 18 and 20 (without regard to section 21(8C)) but also not in the interests of justice to do so because this will have no practical effect on a future dispute of this nature.

[50] The second judgment, however, advances a further ground to support its conclusion that the interests of justice require that the appeal be heard: two apparent "errors" in the judgment of the Labour Appeal Court, which, it believes, would be binding, unless undone by this Court. It says that this "tips the scales in favour of reaching the merits". The first "error", it says, is that the Labour Appeal Court incorrectly held that the right to represent employees at disciplinary and grievance proceedings flows from section 12, whereas the right is explicitly recognised in

section 14(4).[20] The second is that the order of the Labour Appeal Court suggests, incorrectly, that section 20 permits employers and employees to enter into collective agreements whereas section 20 simply states that nothing in Part A of Chapter III precludes the conclusion of a collective agreement that regulates organisational rights.

[51] As regards the first "error", that section 14(4) and not section 12 confers a right of an employee to be represented at grievance and disciplinary proceedings by a union, it must be pointed out, as already mentioned, that the application for leave in this Court was argued on the basis that the right to be represented at grievance and disciplinary proceedings was a section 12 right. In other words this was not an issue between the parties and no argument was advanced to the contrary.

[52] Furthermore, the true issue in this case was whether a threshold agreement concluded in terms of section 18 precluded the acquisition of organisational rights by a minority union. The ratio of the judgment deals with this issue. What was said about whether section 12(1) includes within its ambit the right to represent members at disciplinary and grievance proceedings is arguably obiter, and not binding on any other court.

[53] The Labour Appeal Court's judgment approaches the issue on the basis that SACOSWU's contention that the right in issue was a section 14 right and not a section 12 right was misplaced.[21] Section 14 deals with the rights of *majority* unions – not minority unions – and section 14(4)(a), explicitly with the right of shop stewards of majority trade unions to represent employees in grievance and disciplinary proceedings. Section 12, on the other hand, deals with trade union access to the work place by "sufficiently representative" unions.

[20] See [78].

[21] See Labour Appeal Court judgment above n 7 at para 31 where the Court held that, "Part A of Chapter III expressly confers enforceable organizational rights on certain unions, unions that are either sufficiently representative (sections 12, 13 and 15) or majority unions (sections 14 and 16)". Further, at para 40, it goes on to state that, "[h]aving found this to be so, it is not necessary to deal with SACOSWU's contention that section 14 provided a right to such representation, save to state that the union's reliance on that provision was misplaced in the circumstances of this matter".

[54] The issue here is whether section 12(1), which permits access by shop stewards of sufficiently representative unions to enter the employers' premises "in order to recruit members or communicate with members or otherwise serve their interests" includes within its ambit the right to represent members in disciplinary and grievance proceedings, and if so whether this right also extends to minority unions, such as SACOSWU, that have secured this right through collective bargaining.

[55] Given the wide import of the language employed in section 12(1) it may well be that there is no reason not to include the right of shop stewards of sufficiently representative unions to gain access to the workplace in order to represent their members in grievance and disciplinary proceedings.[22] If this is so, then SACOSWU's right is also a section 12 right, as the Labour Appeal Court held. However, the second judgment's view that because this right is explicitly identified as a section 14 right and therefore cannot be a section 12 right, is also plausible.

[56] However, the issue was not argued in this Court, which places it at a disadvantage in trying to decide it. In *Langeberg Municipality*, this Court said that one of the factors to be taken into account in determining whether it is in the interests of justice to decide an issue is the "fullness or otherwise of the argument advanced".[23] It cannot be in the interests of justice to decide this issue where the answer is far from evident.

[57] But, if the second judgment is correct that section 12(1) cannot be interpreted to include the right to represent members in disciplinary and grievance proceedings, this would be a further ground on which not to entertain the appeal. This is because

[22] Id at para 40, where the Labour Appeal Court pronounced that:

> "It follows that the section 18(1) agreement was correctly interpreted by the arbitrator to permit the conclusion of the agreement with SACOSWU allowing the union section 12 rights, in order to serve members' interest by representing employees in disciplinary and grievance proceedings."

[23] *Langeberg Municipality* above n 17 at para 11.

the only persistent ground that gave rise to the dispute between the parties was the right of access under section 12. If section 12 does not apply to the dispute, then section 18, which concerns threshold for representativeness in respect of only sections 12, 13 and 15 rights (not section 14 rights) is not applicable to this dispute at all; all the more reason not to entertain the appeal.

[58] Regarding the second "error" of the Labour Appeal Court alluded to in the second judgment, this, I think, misconstrues the meaning of the order. The order is set out at paragraph 34 above. Properly understood, and read in the context of the judgment, it does not mean that collective agreements may be concluded in terms of section 20, as the second judgment says it does. It simply means that nothing in section 20 prevents SACOSWU from entering into a collective agreement to represent its members in grievance and disciplinary proceedings despite POPCRU's threshold agreement with the DCS having been concluded in terms of section 18(1). This is also clear from the judgment of the Labour Appeal Court.[24] There was therefore no error in the order of the Labour Appeal Court that requires correction. In any event, I cannot see how a mistake in an order of a court can give rise to a binding incorrect interpretation of section 20 when there is no suggestion in the body of the judgment that the section was incorrectly interpreted.

[59] It follows that, far from tipping the scales in favour of reaching the merits, the first "error" in the judgment of the Labour Appeal Court – if it is one – is an argument against entertaining the merits of the appeal. And the second "error" turns out not to be one.

[24] Labour Appeal Court judgment above n 7 at paras 34 and 35.

Conclusion

[60] In view of the conclusion to which I have come on the mootness question, this Court should not decide the merits of the dispute. I would therefore dismiss the application for leave to appeal. Ordinarily this Court makes no costs order regarding disputes over interpretations of provision of the LRA. In this case, I may have considered departing from the ordinary rule in light of the failure by the parties to inform the Court a quo that the appeal had become moot once the 2001 threshold agreement was revoked. However, as both parties failed in their duty to draw the attention of the Court a quo to this fact, I think each should bear its own costs.

[61] In the result I would not grant leave to appeal.

JAFTA J (Zondo DCJ, Dlodlo AJ, Goliath AJ, Khampepe J, Madlanga J, and Petse AJ concurring):

[62] I have had the benefit of reading the judgment prepared by my colleague, Cachalia AJ (first judgment). While I accept that the appeal is moot, I do not agree that the application for leave to appeal must be dismissed solely on that ground. It is true that this Court does exercise its discretion in favour of determining a moot appeal if the interests of justice so require.

[63] The question that arises at the outset is whether it is in the interests of justice to adjudicate the merits of the present appeal. Here lies the divergence between us. The first judgment concludes that it is not in the interests of justice to reach the merits because the parties were aware that the relevant collective agreement between POPCRU and the employer was no longer in force at the time the dispute was presented to the Labour Court for adjudication and both parties failed to bring this to

the attention of that Court.[25] Entertaining the appeal would, the first judgment holds, amount to condoning the parties' failure to inform the Labour Court of the true state of affairs. If a similar dispute arises in the future, it will be determined having regard to section 21 (8A) and (8C) of the LRA.

[64] I disagree. As is evident from the first judgment, the real dispute between the parties centred around the interpretation each party gave to sections 18 and 20.[26] POPCRU contended that section 18 of the LRA precluded the employer from concluding a collective agreement that was contrary to an existing agreement between the employer and a majority union, in relation to organisational rights. For its part, SACOSWU argued that, properly construed, section 18 read with section 20 of the LRA does not prohibit an employer from engaging in collective bargaining and concluding an agreement with a minority union which does not meet the threshold qualification for organisational rights set in a collective agreement between an employer and a majority union.

[65] Therefore, at the heart of the dispute lies the correct meaning of sections 18 and 20. That meaning may be determined only through the interpretation of those provisions. Section 21 plays a very limited role in that exercise. Sections 18 and 20 must be construed with reference to their own language and should be given the meaning they had from the date the LRA came into operation on 11 November 1996. That meaning could not and was not changed by the addition of section 21(8A) to (8C) to the LRA, which was introduced in 2014. Instead, section 21 regulates the exercise of all rights conferred by Part A of Chapter III. Subsections (8A) to (8C) constitute a new regulatory framework governing how the rights in Part A may be exercised.

[66] In particular, section 21(8C) mandates an arbitrator to grant organisational rights provided for in sections 12, 13 and 15 to a registered trade union "that does not

[25] See [47].

[26] Id [4] – [5].

meet thresholds of representativeness established by a collective agreement in terms of section 18" if certain conditions are met. These include the fact that the union concerned must represent a significant interest or a substantial number of employees.

[67] The arbitrator's power to grant rights has nothing to do with the interpretation exercise. Moreover, the meaning to be assigned to sections 18 and 20 is not restricted to the present dispute which has become moot. It will extend to all cases where these provisions find application. Therefore, I disagree with the conclusion implicitly reached in the first judgment that the determination of the merits here will have no practical effect on future disputes between other parties.[27]

[68] It is apparent from paragraph 49, that the first judgment holds that since the promulgation of section 21(8C), a minority trade union which fails to meet the thresholds of representativeness established by a collective agreement between the employer and a majority union, may have to apply for permission from an arbitrator, in order to exercise organisational rights. This is advanced as a reason that makes it unnecessary to interpret sections 18 and 20. The conclusion that if the present dispute had arisen after section 21(8C) came into operation, SACOSWU would have applied for organisational rights from an arbitrator, is based on an assumption that it was obliged to do so. This is not correct. As mentioned, section 21(8C) introduced a further option in terms of which trade unions may acquire organisational rights contained in sections 12, 13 and 15.

[69] But the section 21(8C) option is available only to trade unions which meet the "significant interest or substantial number of employees in the workplace" requirements. A minority union that has no significant interest or substantial number of employees may not be granted organisational rights by an arbitrator. The interpretation of sections 18 and 20 would particularly be of importance to minority trade unions which do not meet the requirements of section 21(8C). Such unions would like to know if they could exercise their constitutional right to collective

[27] See [49].

bargaining with a view to concluding an agreement that entitles them to organisational rights, if the employer is a party to a section 18 collective agreement with a majority union.

[70] The interpretation of sections 18 and 20 would also benefit minority unions which prefer to negotiate with the employer rather than acquiring organisational rights from an arbitrator. There is nothing in the LRA which obliges minority unions to follow the section 21(8C) route to acquisition of organisational rights. Therefore, it is necessary for this Court to determine whether section 18 has the effect of prohibiting a minority union from engaging in collective bargaining with an employer where a collective agreement that determines a threshold of representativeness exists between such employer and a majority union.

[71] Section 23 of the Constitution guarantees a number of rights, including the right to form or join a trade union of one's choice and the right of every trade union to engage in collective bargaining. These rights cannot be limited by a private agreement between an employer and a majority union. But they may be limited by a law of general application provided it meets the requirements of section 36 of the Constitution. This provision emphatically declares that rights in the Bill of Rights may be limited *only* in terms of a law of general application.[28]

[72] To conclude that the 2001 collective agreement precluded SACOSWU from bargaining with the employer here would constitute an impermissible limitation of SACOSWU's right to engage in collective bargaining unless the prohibition is authorised by section 18. The meaning given to this section will have a practical effect on all future disputes involving agreements that declare thresholds of representativeness. This illustrates that a decision of this Court on the merits will be of great benefit to workers, trade unions and employers in the future. This is because

[28] Section 36(1) of the Constitution provides:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors."

section 18 of the LRA continues to apply to their relationships and the Act was enacted to give effect to rights in section 23 of the Constitution.

[73] In *Langeberg Municipality* this Court formulated the test for adjudicating a moot appeal in these terms:

> "This Court has a discretion to decide issues on appeal even if they no longer present existing or live controversies. That discretion must be exercised according to what the interests of justice require. A prerequisite for the exercise of the discretion is that any order which this Court may make will have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity, and the fullness or otherwise of the argument advanced."[29]

[74] As mentioned, the interpretation to be given to sections 18 and 20 would clarify how these provisions should be implemented in the future. I do not agree that the coming into operation of section 21(8C) in particular has altered how sections 18 and 20 must be read and understood. In addition, factors like the importance of the issue involved in the merits of the case; its complexity and the fullness of the argument advanced on the interpretation of the relevant provisions, weigh heavily in favour of adjudicating the merits despite the mootness.[30]

[75] Another factor that tips the scale in favour of reaching the merits is the apparent errors in the judgment of the Labour Appeal Court. For example, the order issued by that Court declares that the collective agreement between POPCRU and the employer did not prevent SACOSWU and the employer from concluding a similar agreement "*in terms of section 20 to permit SACOSWU to represent its members at internal disciplinary and grievance proceedings*".[31]

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[29] *Langeberg Municipality* above n 17 at para 11.

[30] *MEC for Education: Kwazulu-Natal v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) at para 32.

[31] In relevant part the order reads:

> "2. The orders of the Labour Court are set aside and replaced with the following order:

[76] Justification for the order issued by the Labour Appeal Court is found in paragraphs 39 to 44 of its judgment. A number of statements are made in those paragraphs which appear to reflect an incorrect position in law. For instance, in paragraph 40 the Labour Appeal Court held:

> "It follows that the section 18(1) agreement was correctly interpreted by the arbitrator to permit the conclusion of the agreement with SACOSWU allowing the union section 12 rights, in order to serve members' interests by representing employees in disciplinary and grievance proceedings. Having found this to be so, it is not necessary to deal with SACOSWU's contention that section 14 provided a right to such representation, save to state that the union's reliance on that provision was misplaced in the circumstances of this matter."

[77] This statement reveals a number of legal issues as seen by the Labour Appeal Court. First, that in the Court's opinion, the question whether SACOSWU was entitled to bargain with the employer in light of an existing collective agreement between the employer and POPCRU was correctly answered by interpreting the terms of the latter agreement. In other words, the determination of that important constitutional issue depended solely on the terms of the agreement between POPCRU and the employer. I have demonstrated already that this approach is at variance with the requirements of section 36 of the Constitution. The prohibition would be constitutionally permissible only if it was authorised by section 18 of the Act.

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1. Save for the substitution of the arbitration award as set out below, the application to review and set aside the arbitration award is dismissed:

   'The collective agreement entered into with POPCRU in terms of section 18(1) of the LRA establishing representation thresholds for the exercise of organisational rights under section 12, section 13 and section 15 in the workplace of the Department of Correctional Services, does not prevent the Department from entering into a valid and enforceable collective agreement with SACOSWU in terms of section 20 to permit the union to represent its members at internal disciplinary and grievance proceedings in the workplace'.

2. There is no order as to costs.'"

[78] Second, the statement suggests that the right to represent employees at disciplinary and grievance proceedings flows from section 12. This may not be accurate. This right is explicitly conferred by section 14.[32] On the other hand, section 12(1) confers the right to enter the employer's premises for purposes of recruiting members; communicating with existing ones and "otherwise serve members' interests".

[79] The order issued by the Labour Appeal Court suggests that the collective agreement that existed between POPCRU and the employer did not preclude SACOSWU and the employer from concluding "a valid and enforceable collective agreement" in terms of section 20 "to permit the union to represent its members at disciplinary and grievance proceedings in the workplace". This order is based on the conclusion reached by the Labour Appeal Court that a collective agreement pertaining to organisational rights in sections 12, 13 and 15, may be concluded by a minority union and an employer under section 20 of the LRA. In paragraph 39 the Labour Appeal Court expressed itself in these terms:

> "[S]ince the threshold agreement does not provide a bar *to the conclusion of a section 20 collective agreement* with the minority union regarding sections 12, 13 or 15 organisational rights, the existence of the threshold does not distinguish the matter from *Bader Bop*."

[80] When this statement is read together with the order issued by the Labour Appeal Court, there can be no doubt that the Court held that collective agreements may be concluded under section 20. This is plainly incorrect. Section 20 of the LRA does not confer rights. Rather, it makes plain that there is nothing in Part A of Chapter III which precludes the conclusion of a collective agreement that regulates organisational rights.

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[32] Section 14(4) reads:

> "A trade union representative has the right to perform the following functions—
>
> (a) at the request of an employee in the workplace, to assist and represent the employee in grievance and disciplinary proceedings".

[81] Courts have entertained moot appeals in order to correct wrong statements of law in the judgments against which an appeal was brought.[33] In *AAA Investments* this Court held:

> "The issues may well be moot. Nonetheless, there are two conflicting judgments on these issues and, if we do not consider this aspect of the case, the judgment of the SCA with all its implications for future regulation would remain binding. In all the circumstances, I would hold that these issues are so crucial to important aspects of government as well as the rights contained in the Bill of Rights that it is in the interests of justice to grant leave to appeal. Neither the judgment of the Supreme Court of Appeal nor that of the High Court can be said to be unassailable.[34]

[82] For all these reasons, I conclude that it is in the interests of justice to determine the merits of this appeal, despite mootness.

Merits

[83] Two issues arise. The first is the proper interpretation of section 18 read with section 20 of the LRA. The second is the correctness of certain legal conclusions reached in the judgment of the Labour Appeal Court. But before construing the relevant provisions, it is necessary to recall the right approach to interpreting legislation that impacts on the rights guaranteed by the Bill of Rights.

Proper approach

[84] Section 3 of the LRA declares that its provisions must be construed purposively and in compliance with the Constitution and the public international law obligations of the Republic.[35] In this context compliance with the Constitution includes the

[33] *Centre for Child Law v The Governing Body of Hoërskool Fochville* [2015] ZASCA 155; 2016 (2) SA 121 (SCA) at para 14 and *Natal Rugby Union v Gould* [1998] ZASCA 62; 1999 (1) SA 432 (SCA) at 444-5.

[34] *AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council* [2006] ZACC 9; 2007 (1) SA 343 (CC); 2006 (11) BCLR 1255 (CC) (*AAA Investments*) at para 27.

[35] Section 3 of the LRA provides:

> "Any person applying this Act must interpret its provisions—

discharge of the obligation imposed by section 39(2) which obliges, in mandatory terms, every court to promote the objects of the Bill of Rights when interpreting legislation.

[85] Section 39(2) has received attention in many decisions of this Court. For present purposes a reference to one of them would suffice. In *Makate* we said:

> "The objects of the Bill of Rights are promoted by, where the provision is capable of more than one meaning, adopting a meaning that does not limit a right in the Bill of Rights. If the provision is not only capable of a construction that avoids limiting rights in the Bill of Rights but also bears a meaning that promotes those rights, the court is obliged to prefer the latter meaning."[36]

[86] Implicit in this statement is the fact that at the outset of interpreting a legislative provision, a court must determine whether that provision implicates rights in the Bill of Rights. For if it does, then the approach stipulated in section 39(2) must be followed. As mentioned, here the provisions to be interpreted affect guaranteed rights like every worker's right to form or join a trade union and the right to participate in the activities and programmes of the trade union. Section 18 also implicates the right of a trade union to engage in collective bargaining.

[87] The right to engage in collective bargaining lies at the heart of industrial relations. This right is conferred on trade unions and employers.[37] This is the only right which may be exercised simultaneously by protagonists in a labour dispute. This is so because the bargaining takes place between the trade union and the employer.

(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."

[36] *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) at para 89.

[37] Section 23(5) of the Constitution provides:

> "Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1)."

Participation of each side in the collective bargaining constitutes the exercise of the right. Absent the right, the objects of the LRA such as labour peace, social justice and the advancement of economic development may not be achieved.

[88] Notably, on the workers' side, the right is conferred on a trade union. This makes membership of a trade union the gateway to collective bargaining for workers. Therefore, the right of every worker to form and join a trade union is critically linked to the right to engage in collective bargaining.

[89] The right to form and join a trade union guarantees freedom of association for workers. Its importance is acknowledged not only in the Constitution but also in international law.[38] With regard to international law on freedom of association at the workplace, this Court observed in *Bader Bop*:

> "An important principle of freedom of association is enshrined in Article 2 of the Convention on Freedom of Association and Protection of the Right to Organise which states: '[w]orkers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.' Both committees have considered this provision to capture an important aspect of freedom of association in that it affords workers and employers an option to choose the particular organisation they wish to join. Although both committees have accepted that this does not mean that trade union pluralism is mandatory, they have held that a majoritarian system will not be incompatible with freedom of association, as long as minority unions are allowed to exist, to organise members, to represent members in relation to individual grievances and to seek to challenge majority unions from time to time."[39]

[90] Significantly, it emerges from this statement that the principle of majoritarianism which is embraced by our labour law is not incompatible with the principle of freedom of association which finds expression in the right to form and

[38] The Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

[39] *Bader Bop* above n 9 at para 31.

join a union of one's choice. Workers form and join trade unions for protecting their rights and advancing their interests at the workplace. Any statutory provision that prevents a trade union from bargaining on behalf of its members or forbidding it from representing them in disciplinary and grievance proceedings would limit rights in the Bill of Rights. Forcing workers who belong to one trade union to be represented by a rival union at disciplinary hearings seriously undermines their right to freedom of association described earlier.

[91] In *Bader Bop* it was stated:

> "Of importance to this case in the ILO jurisprudence described is firstly the principle that freedom of association is ordinarily interpreted to afford unions the right to recruit members and to represent those members at least in individual workplace grievances; and secondly, the principle that unions should have the right to strike to enforce collective bargaining demands. The first principle is closely related to the principle of freedom of association entrenched in section 18 of our Constitution, which is given specific content in the right to form and join a trade union entrenched in section 23(2)(a), and the right of trade unions to organise in section 23(4)(b). These rights will be impaired where workers are not permitted to have their union represent them in workplace disciplinary and grievance matters, but are required to be represented by a rival union that they have chosen not to join."[40]

[92] As it cannot be disputed that section 18 of the LRA implicates organisational rights of import, it goes without saying that in construing its provisions, we must avoid a meaning that limits those rights. If the section is reasonably capable of a meaning that promotes the rights concerned, it must be preferred above other meanings.

Meaning of section 18

[93] Section 18 reads:

[40] Id at para 34.

> "(1) An employer and a registered trade union whose members are a majority of the employees employed by that employer in a workplace, or the parties to a bargaining council, may conclude a collective agreement establishing a threshold of representativeness required in respect of one or more of the organisational rights referred to in sections 12, 13 and 15.
>
> (2) A collective agreement concluded in terms of subsection (1) is not binding unless the thresholds of representativeness in the collective agreement are applied equally to any registered trade union seeking any of the organisational rights referred to in that subsection."

[94] In unambiguous terms the section confers, on an employer and a majority union, the right to establish thresholds of representativeness. This right may be exercised by means of concluding a collective agreement in terms of which a threshold is agreed. This threshold relates to organisational rights mentioned in sections 12, 13 and 15 only. For a collective agreement so concluded to be binding, it must apply equally to all registered trade unions.

[95] The text of the section limits its content and scope to the right to determine a threshold in terms of a collective agreement. Section 18 does not authorise the employer and a majority union to determine which constitutional rights other unions that are not parties to the collective agreement, may exercise. The section does not refer at all to the right to engage in collective bargaining. Nor does it mention freedom of association, which enables every worker to form or join a trade union of their own choice.

[96] It is not surprising that section 18 does not prohibit collective bargaining between an employer and a minority union where there is a collective agreement between that employer and the majority trade union. Such a prohibition would be inconsistent with the Constitution and international law. Over and above that, the prohibition if it were to exist, would be meaningless. This is because section 20 declares that nothing in Part A of Chapter III, where section 18 is located, precludes the conclusion of a collective agreement that regulates organisational rights.

[97] In *Bader Bop* this Court rejected a narrow reading of section 20. O'Regan J said:

> "Section 20 of the Act which forms part of Chapter III, Part A confirms this as follows: 'Nothing in this Part precludes the conclusion of a collective agreement that regulates organisational rights.' Both Zondo JP and Du Plessis AJA were of the view that this provision did not mean that minority unions could conclude collective agreements affording organisational rights but is a 'clarificatory provision' which provides that agreements between representative unions (within the definition of the section) and employers may 'regulate' rights. Such a reading of section 20 is a narrow one and not one suggested by the ordinary language of the text which states that nothing in Part A of Chapter III prevents collective agreements being concluded. Any other provision of the chapter which suggests the contrary is to be read subject to this provision. In an Act committed to freedom of association and the promotion of orderly collective bargaining, which requires that employers and unions should have freedom to conclude agreements on all matters of mutual interest, a narrow reading of section 20 is an inappropriate one. Moreover, the rights conferred by Part A of Chapter III may in any event be regulated by the collective agreements expressly contemplated by section 21. In my view, a better reading is to see section 20 as an express confirmation of the internationally recognised rights of minority unions to seek to gain access to the workplace, the recognition of their shop-stewards as well as other organisational facilities through the techniques of collective bargaining."[41]

[98] It is important to note that this Court rejected the proposition that minority unions were precluded from concluding collective agreements on organisational rights where there was an existing agreement between the employer and a majority union. The Court preferred a wider reading of section 20, which was supported by the text and was also consonant with the LRA's commitment to freedom of association and the promotion of orderly collective bargaining. It was held, in addition, that the wider reading was in line with "the internationally recognised rights of minority unions to seek to gain access to the workplace . . . through the techniques of collective bargaining".

[41] Id at para 41.

[99] In an attempt to avoid the conclusion that section 20 precludes an interpretation that says a minority union is prohibited from concluding a collective agreement with an employer who is a party to a section 18 agreement with a majority union, POPCRU contended that section 20 does not apply because the latter agreement becomes binding in terms of section 23. Section 23, the argument continued, is not located in the part referred to in section 20.

[100] There is no merit in this submission. The collective agreement that determines a threshold of representativeness is not authorised by section 23. It is section 18 that confers upon the employer and the majority union the right to conclude such an agreement. If section 20, which is dominant, allows the conclusion of a collective agreement between an employer and a minority union where a section 18 agreement exists, it cannot be said that section 23 precludes the conclusion of that agreement. Section 23 does not define the scope and content of section 18 or a collective agreement concluded in terms of the latter. Moreover, section 23 does not create a prohibition of any kind. All that it does is to identify parties bound by a collective agreement.

[101] Therefore, neither section 18 nor section 23 precludes the conclusion of a collective agreement between an employer and a minority union where a section 18 agreement between the same employer and a majority union exists.

[102] When properly construed Chapter III of the LRA reveals that a minority union may access organisational rights in sections 12, 13 and 15 in a number of ways. First, it may acquire those rights if it meets the threshold set in the collective agreement between the majority union and the employer. In that event, a minority union does not have to bargain before exercising the rights in question. Second, such union may bargain and conclude a collective agreement with an employer, in terms of which it would be permitted to exercise the relevant rights. Third, a minority union may refer the question whether it should exercise those rights to arbitration in terms of

section 21(8C) of the LRA. If the union meets the conditions stipulated in that section, the arbitrator may grant it organisational rights in the relevant provisions.

[103] The interpretation of section 18 advanced by POPCRU here is not supported by the text of the provision. But not only that. POPCRU's construction would effectively deny minority unions the right to engage in collective bargaining. This right is conferred on every trade union by the Constitution, regardless of whether the union has a majority or minority status. In *SATAWU* this Court pronounced:

> "Constitutional rights conferred without express limitation should not be cut down by reading implicit limitations into them, and when legislative provisions limit or intrude upon those rights they should be interpreted in a manner least restrictive of the right if the text is reasonably capable of bearing that meaning."[42]

[104] Furthermore, POPCRU's interpretation of the relevant provisions is at variance with the constitutional canon of construction mentioned earlier. That interpretation is also dissonant with international law and in conflict with section 3 of the LRA which expressly demands that the provisions of the Act be construed in compliance with the Constitution and public international law. It follows that POPCRU's interpretation must be rejected. Properly construed the relevant provisions do not prohibit the conclusion of a collective agreement with a minority union where the employer has signed an agreement that sets a threshold of representativeness with a majority union.

Labour Appeal Court Judgment

[105] Although the outcome reached by the Labour Appeal Court may not be altered, the pillars on which that outcome rests cannot be left intact. This is because that judgment constitutes a binding judicial precedent. The inaccuracies in the judgment of the Labour Appeal Court must be corrected. The first error relates to whether it is the collective agreement between the employer and a majority union which may be

[42] *South African Transport and Allied Workers Union (SATAWU) v Moloto N.O.* [2012] ZACC 19; 2012 (6) SA 249 (CC); 2012 (11) BCLR 1177 (CC) at para 44.

construed as prohibiting agreements with minority unions. In a number of paragraphs, the Labour Appeal Court suggests that this is the position.[43]

[106] As mentioned earlier, the rights guaranteed by the Bill of Rights may be limited by a law of general application only. Section 23(5) of the Constitution expressly states that the right to engage in collective bargaining may be limited by legislation only if such legislation meets the requirements of section 36. Therefore, an agreement that seeks to limit the right to collective bargaining would be inconsistent with the Constitution and invalid. Such agreement would have no force and effect in law. The focus of the Labour Appeal Court should have been on the interpretation of sections 18 and 20 of the LRA.

[107] The other error in the judgment of that Court is the suggestion that a union's right to represent employees in grievance and disciplinary proceedings is sourced from section 12 of the LRA. Section 12 gives unions the right of access to the workplace to exercise rights specified in that section. These include the right to recruit members, hold meetings and communicate with members.

[108] The right to represent employees at grievance and disciplinary proceedings is explicitly conferred on a majority union by section 14(4) of the LRA. Importantly, that right does not fall within the scope of a section 18 collective agreement. Therefore, acquisition of the right to represent members at disciplinary proceedings may not depend on meeting a threshold of representativeness. Whereas all rights conferred by section 12 are subject to such thresholds.

[109] In *Bader Bop* this Court observed that the rights in sections 12, 13 and 15 are conferred on sufficiently representative unions and the rights in sections 14 and 16 are bestowed on majority unions. It was stated:

[43] Labour Appeal Court judgment above n 7 at [40] and [4].

> "Part A of Chapter III of the Act expressly confers enforceable organisational rights on certain unions – unions that are either sufficiently representative (sections 12, 13 and 15) or majority unions (section[s] 14 and 16). These are enforceable rights and the mechanism for their enforcement is also provided for in Part A. That mechanism is conciliation followed by arbitration. Unusually, in the overall scheme of the Act, unions and employers are given a choice between arbitration and industrial action should conciliation fail. There is nothing in Part A of Chapter III, however, which expressly states that unions which admit that they do not meet the requisite threshold membership levels are prevented from using the ordinary processes of collective bargaining and industrial action to persuade employers to grant them organisational facilities such as access to the workplace, stop-order facilities and recognition of shop stewards. These are matters which are clearly of 'mutual interest' to employers and unions and as such matters capable of forming the subject matter of collective agreements and capable of being referred to the CCMA for conciliation, the condition precedent to protected strike action."[44]

[110] However, I must hasten to mention that the conferment of rights on specified unions does not mean that other unions may not bargain with employers for entitlement to exercise any of the organisational rights in Part A of Chapter III. This is apparent from the decision of this Court in *Bader Bop*.[45]

[111] Lastly, the order granted by the Labour Appeal Court suggests that SACOSWU and the employer could enter into an agreement in terms of section 20, for the union to represent its members at the grievance and disciplinary proceedings. Section 20 does not regulate agreements for the right to represent employees at disciplinary hearings. The section merely confirms the absence of a prohibition. It is not a source of power to conclude collective agreements.

[44] *Bader Bop* above n 9 at para 40.

[45] Id at paras 42 and 45.

Order

[112] The following order is made:

1. Leave to appeal is granted
2. The appeal is dismissed.
3. There is no order as to costs.

ZONDO DCJ:

Introduction

[113] I have read Cachalia AJ's judgment (first judgment) and Jafta J's judgment (second judgment) in this matter. While I agree with the conclusion in both judgments that this matter is moot, I do not agree with the first judgment that it is not in the interests of justice that leave to appeal be granted. Instead, I agree with the conclusion in the second judgment that it is in the interests of justice to entertain this matter and to grant leave to appeal. I do so for the reasons given in the second judgment. I write separately to deal with the merits of the appeal from a somewhat different angle.

Constitutional and statutory background

[114] Section 23(2)(c) of the Constitution confers on every worker the right to strike. Section 23(5) reads:

> "(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that legislation may limit a right in this Chapter, the limitation must comply with section 36(1)."

[115] Section 18(1) and (2) of the LRA provides:

> "(1) An employer and a registered trade union whose members are a majority of the employees employed by that employer in a workplace, or the parties to a bargaining council, may conclude a collective agreement establishing a threshold of representativeness required in respect of one or more of the organisational rights referred to in sections 12, 13 and 15.
>
> (2) A collective agreement concluded in terms of subsection (1) is not binding unless the thresholds of representativeness in the collective agreement are applied equally to any registered trade union seeking any of the organisational rights referred to in that subsection."

Section 18(1) makes it legally possible for a majority trade union and an employer in a workplace to conclude a collective agreement that sets a threshold that any trade union would need to meet in order to enjoy the organisational rights in the workplace that are provided for in sections 12, 13 and 15 of the LRA.[46]

[116] Section 23(1) renders a section 18(1) collective agreement binding even on employees who are not members of the registered trade union that is party to a section 18(1) collective agreement if the requirements of section 23(1)(d) are satisfied. Section 23(1) reads:

> "(1) A collective agreement binds—
>
> (a) the parties to the collective agreement;
>
> (b) each party to the collective agreement and the members of every other party to the collective agreement, in so far as the provisions are applicable between them;
>
> (c) the members of a registered trade union and the employers who are members of a registered employers' organisation that are party to the collective agreement if the collective agreement regulates—
>
> (i) terms and conditions of employment; or

[46] First Judgment above n 2.

(ii) the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers;

(d) *employees who are not members of the registered trade union or trade unions party to the agreement if—*

(i) the employees are identified in the agreement;

(ii) the agreement expressly binds the employees; and

(iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace."

[117] It is also appropriate to quote section 23(2), (3) and (4). Those provisions read:

"(2) A collective agreement binds for the whole period of the collective agreement every person bound in terms of subsection (1) (c) who was a member at the time it became binding, or who becomes a member after it became binding, whether or not that person continues to be a member of the registered trade union or registered employers' organisation for the duration of the collective agreement.

(3) Where applicable, a collective agreement varies any contract of employment between an employee and employer who are both bound by the collective agreement.

(4) Unless the collective agreement provides otherwise, any party to a collective agreement that is concluded for an indefinite period may terminate the agreement by giving reasonable notice in writing to the other parties."

[118] The effect of a section 18(1) collective agreement that satisfies the requirements of section 23(1)(d) is that in a workplace employees who are not members of the union that is party to the section 18(1) collective agreement are bound by the threshold fixed in the section 18(1) collective agreement. This is despite the fact that they are not members of the union that is a party to the section 18(1) collective agreement. Also, a trade union that is not a party to the section 18(1) collective agreement but seeks to acquire the organisational rights in sections 12, 13 and 15 despite not being a sufficiently representative trade union is bound by the

section 18(1) collective agreement. This will be so if the employees on the basis of whose membership the union seeks the organisational rights are bound by the section 18(1) collective agreement in terms of section 18(1)(d). This would be despite the fact that such a trade union is not a party to the section 18(1) collective agreement.

Factual background

[119] The Department of Correctional Services (Department) concluded a section 18(1) collective agreement with POPCRU which was the majority union in the Departmental Bargaining Council. That collective agreement fixed 9 000 union members in the Department as the threshold that every union had to meet before it could acquire the relevant organisational rights provided for in the LRA. While the section 18(1) collective agreement with POPCRU was operational, the Department concluded a collective agreement with the South African Correctional Services Workers Union (SACOSWU) in terms of which it granted SACOSWU certain organisational rights despite the fact that that union did not meet the threshold fixed in the section 18(1) collective agreement between the Department and POPCRU.

[120] After the Department and SACOSWU had concluded the collective agreement, a dispute arose between POPCRU, on the one hand, and, the Department and SACOSWU, on the other. In effect the dispute was whether the Department was entitled to conclude a collective agreement with SACOSWU granting it the organisational rights that it granted it despite the fact that the Department was party to the section 18(1) collective agreement with POPCRU requiring any union seeking the organisational rights provided for in the LRA to meet the threshold of 9 000 union members. This dispute arose because SACOSWU did not meet that threshold.

Issue in the arbitration

[121] The dispute was referred to arbitration in terms of the LRA. The parties to the arbitration were POPCRU, on the one hand, and, the Department and SACOSWU, on

the other. In his arbitration award the arbitrator recorded the following as part of the Department's contentions:

> "12.3 There is, therefore, nothing to preclude *an agreement with an unrepresentative union [that] confers organisational rights on it*, provided such an agreement does not prevent *the exercise of statutory organisational rights by the representative union*."

In recording SACOSWU's allegations or contentions, the arbitrator included the following:

> "SACOSWU alleges the following:
>
> 13.1 That an agreement was concluded between the Department and itself, as a minority trade union, in terms of section 20 of the LRA and, in terms of which the Department granted to *it organisational rights outside chapter III of the LRA, namely, that:*
>
> …
>
> 13.4 SACOSWU contends further that POPCRU has, in the circumstances, suffered no prejudice in the rights granted by the Department to SACOSWU in that POPCRU *is in no way being prevented from exercising any of its statutory organisational rights*."

Again, we see a reference to the concept of statutory organisational rights.

[122] The arbitrator defined the issue that he was required to decide in the following terms:

> "The issue to be decided is:
>
> 14.1 whether SACOSWU is entitled to exercise any of the organisational rights provided for in section 12, 13, 14, 15 or 16 of the LRA in the workplace of the Department; and
>
> 14.2 whether SACOSWU, as a minority and 'unrepresented' trade union, is entitled to conclude an agreement with the Department in terms of which *the Department grants SACOSWU organisational rights outside chapter III Part A of the LRA and if so, whether such an agreement is valid and enforceable*."

[123] From the manner in which the arbitrator defined the issue that he was called upon to decide, it is clear that the dispute was based on whether in our law it can be said that we have statutory organisational rights and contractual organisational rights. As explained elsewhere in this judgment, the statutory organisational rights are those *conferred by* or "*provided for in*" the LRA as reflected in paragraph 14.1 of the arbitration award quoted above. The contractual organisational rights are those that paragraph 14.2 of the arbitration award quoted above describes as the "organisational rights outside Chapter III Part A of the LRA…"

[124] Even in its submissions before the arbitrator, as recorded in paragraph 17.10 of the arbitration award, SACOSWU made the following submission:

> "17.10 A narrow reading of section 20 is inappropriate. A better reading is to see it as an express confirmation of internationally recognised rights of minority unions to gain access to organisational facilities through the techniques of collective bargaining. Section 20 of the LRA permits [un]representative trade unions to regulate organisational rights outside the ambit of Part A of Chapter III of the LRA. The fact that it is silent on collective agreements with unrepresentative trade union[s] does not preclude such agreements, provided that such agreements do not prevent the exercise of statutory organisational rights by a representative union.
>
> 17.11 Chapter III Part A automatically gives the representative unions organisational rights without them having to bargain for them. This provision ought not to be read as to deny these rights to unrepresentative unions.
>
> …..
>
> 17.14 *POPCRU is entitled as of right to the statutory organisational rights. SACOSWU is seeking basic organisational rights outside Chapter III of Part A of the LRA.*"

[125] In his arbitration award the arbitrator concluded that:

> "(s)ection 20 of the LRA permits representative unions to regulate *organisational rights outside of the ambit of Part A and permits the modification of those rights by*

> *way of an agreement*. The section is silent on collective agreement(s) with unrepresentative unions. The LRA does not prohibit these agreements either. There is therefore nothing to preclude an agreement with an unrepresentative union which *confers* organisational rights on it, provided such agreement does not prevent the exercise of *statutory rights by a representative union*. Thus, properly construed, section 20 refers to agreement outside the ambit of Part A."

Later on, the arbitrator articulated his conclusion in these terms:

> "I find that SACOSWU is entitled and did enter into a valid collective agreement with the Department to exercise the organizational rights referred to in section 12, 13, 14, 15 and 16 of the LRA *outside Chapter III Part A of the LRA*."

The arbitrator concluded that the Department and SACOSWU were entitled to conclude the collective agreement that they concluded as the organisational rights which were the subject of that collective agreement fell outside Part A, of Chapter III of the LRA.

Labour Court and Labour Appeal Court

[126] POPCRU subsequently instituted a review application in the Labour Court to have the award reviewed and set aside. That application succeeded. However, on appeal, the Labour Appeal Court concluded that the Department and SACOSWU were entitled to conclude the collective agreement. Accordingly, the Labour Appeal Court overturned the decision of the Labour Court.

In this Court

[127] The question before us is whether the Department was entitled to enter into a collective agreement with SACOSWU granting that union the organisational rights that it did despite the fact that its section 18(1) collective agreement with POPCRU was still binding upon it and SACOSWU did not meet the threshold fixed in the section 18(1) collective agreement. Although the Labour Court may not have necessarily formulated the question in these terms, its conclusion was that the

Department was not entitled to do so. The Labour Appeal Court also did not formulate the question in these terms but the effect of its conclusion is that the Department was entitled to do so.

[128] The question is one that requires a construction of certain provisions of the LRA. Purposive interpretation must be invoked to interpret provisions of the LRA. This is consistent with section 3 of the LRA which tells us how the interpretation of provisions of the LRA should be approached. Section 3 provides that:

> "Any person applying this Act must interpret its provisions—
>
> (a) to give effect to its primary objects;
>
> (b) in compliance with the Constitution; and
>
> (c) in compliance with the public international law obligations of the Republic."

[129] The primary objects of the LRA are listed in section 1 thereof. In part section 1 reads:

> "The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are—
>
> (a) to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution of the Republic of South Africa, 1996;
>
> (b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;
>
> (c) to provide a framework within which employees and their trade unions, employers and employers' organisations can—
>
> (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and
>
> (ii) formulate industrial policy; and
>
> (d) to promote—
>
> (i) orderly collective bargaining;
>
> (ii) collective bargaining at sectoral level;

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

(iv) the effective resolution of labour disputes."

[130] The LRA did not occur in a vacuum. There was a labour law dispensation before the LRA. Indeed, much of the experience and knowledge that South Africa acquired before the current LRA was incorporated into it. A good example of this is that the provisions of the LRA relating to unfair dismissals are based on much that comes from our experience of labour law on unfair dismissal in the 1980's and early 1990's. One of the labour law experiences of the period prior to 1994 is that there was no statute that expressly conferred organisational rights on trade unions. Unions acquired organisational rights contractually, usually after some industrial action. That means by concluding agreements with an employer. To achieve that, a trade union would start by recruiting employees in a workplace as its members. Once it had reached a certain level of representativeness in the workplace, it would demand that the employer grants it certain organisational rights such as access to the workplace to serve the interests of its members, representing them in disciplinary and grievance proceedings and the deduction of monthly union dues from its members' wages and transmission thereof to the union. Usually, a recognition agreement that would be entered into would cover most, if not all, the organisational rights that we find in the LRA.

[131] Prior to the LRA, if a trade union did not acquire organisational rights contractually, it could acquire them judicially on the basis of the wide concept of an unfair labour practice which was provided for in the labour legislation of the time. To acquire organisational rights judicially, a trade union would initially refer an unfair labour practice dispute to the conciliation process in terms of section 35 of the Labour Relation Act, 1958, as amended. If that process failed, the trade union could then refer an unfair labour practice dispute to the Industrial Court for determination in terms of section 46(9)(c) of that Act.

[132] When the LRA was passed, it made provision for organisational rights. In fact it confers various organisational rights on any registered trade union in a workplace that is sufficiently representative of the employees of the employer in that workplace. To acquire most of the organisational rights for which the LRA make provision, a registered trade union does not need to have the status of a majority trade union in the workplace. It is enough if a union is sufficiently representative of the employer's employees in the workplace. However, there are one or two organisational rights that a trade union acquires only if it enjoys the status of a majority trade union.

[133] The question that arises is whether the fact that the LRA now makes provision for organisational rights means that an employer and a trade union that is not sufficiently representative of the employees of the employer in a workplace as envisaged in the LRA in regard to specific organisational rights may still conclude a collective agreement which confers upon the union organisational rights as was the position prior to the LRA or is the position that the only organisational rights that exist in our law now are the statutory organisational rights provided for in the LRA. In my view, there are no provisions in the LRA on the basis of which one can justify a conclusion that the contractual acquisition of organisational rights which was available to trade unions before the LRA is no longer available now or was abolished by the LRA. On the contrary, section 20 reveals that the opposite is true. Section 20 reads:

> "20. Certain organisational rights in collective agreements
> Nothing in this Part precludes the conclusion of a collective agreement that regulates organisational rights."

[134] I draw attention to two features of section 20. The first is that the heading or bold part thereof refers to "organisational rights in collective agreements" and that in referring to organisational rights, it does so without saying "conferred by this Part" or "referred to in this Part." It simply refers to "organisational rights". The significance of this is that the LRA recognises that there is a distinction between the organisational rights conferred by the LRA or the organisational rights referred to in Part A of

Chapter III of the LRA. So, section 20 contemplates organisational rights in collective agreements whereas the organisational rights dealt with in Part A of Chapter III of the LRA are not rights *in* a collective agreement but *in* a statute or conferred by statute.

[135] Support for the distinction referred to above is to be found in some of the sections in Part A of Chapter III where the phrase: "(t)he rights conferred by this section …" or similar phrases appear. Section 12(4) refers to "(t)he rights conferred by this section". Section 18 refers to "one or more of the organisational rights referred to in sections 12, 13 and 15". It also refers to "any of the organisational rights". Section 21(1) refers to the "rights conferred by this Part in a workplace". Section 21(8)(c) refers to "any of the organisational rights conferred by this Part". Section 21(8A) refers to "the rights referred to in section 14", "the rights referred to in sections 12, 13 and 15", "the rights referred to in section 16"; "the rights referred to in sections 12, 13, 14 and 15". Section 21(8C) refers to "the rights referred to in sections 12, 13 or 15". Section 21(11) refers to the "withdrawal of any of the organisational rights conferred by this Part".

[136] In *Bader Bop* this Court said about section 20:

> "In my view, a better reading is to see section 20 as an express confirmation of the internationally recognised rights of minority unions to seek to gain access to the workplace, the recognition of their shop stewards as well as other organisational facilities through the techniques of collective bargaining".[47]

[137] This Court held in *Bader Bop* that the dispute procedure in section 21 of the LRA is only available to a trade union that is sufficiently representative if it wishes to determine the manner in which the rights are to be exercised or when there is a dispute as to whether the union is sufficiently representative. The Court then said:

[47] *Bader Bop* above n 9 at para 41.

> "Section 21 on its own terms, however, is not available to a union that admits that it is not sufficiently representative as contemplated by the Act."48

The Court said that section 21 "should not be read to deny such unions the right to pursue organisational rights through the ordinary mechanisms of collective bargaining."[49]

[138] It seems to me that section 20 was enacted to make it clear that an employer and a trade union may still conclude a collective agreement concerning organisational rights outside of the LRA. The result is that in our law there are at least two types of organisational rights. The one type is that of statutory organisational rights – those that are provided for in the LRA. A trade union does not need any agreement with an employer in order to become entitled to statutory organisational rights. All that is required of a trade union is to be a registered trade union and to be sufficiently representative of the employer's employees in the workplace for purposes of those specific statutory organisational rights. Once a trade union meets those two requirements, it becomes entitled to those statutory organisational rights. The employer has no right in law to terminate any of the statutory organisational rights in relation to a trade union as long as the trade union remains sufficiently representative of the employees in the workplace concerned for purposes of that statutory organisational right.

[139] The other type of organisational rights is that of contractual organisational rights. The statutory organisational rights differ from the contractual rights in that their source is the statute whereas the source of contractual organisational rights is a contract in the form of a collective agreement between a trade union and an employer. Another distinction between the two types is that, whereas an employer has no right in law to terminate a registered trade union's statutory organisational rights, an employer may terminate a trade union's contractual organisational rights by lawfully

[48] Id at para 42.

[49] Id.

terminating the collective agreement. In other words, an employer may terminate a contractual organisational right on the normal principles of the law of contract such as a material breach of the contract or by giving the requisite notice of termination. In fact section 23(4) of the LRA makes this clear. It provides: "Unless the collective agreement provides otherwise, any party to a collective agreement that is concluded for an indefinite period may terminate the agreement by giving reasonable notice in writing to the other parties".

[140] The next question is whether what the Department granted to SACOSWU by way of the collective agreement concerning organisational rights was statutory organisational rights or contractual organisational rights. If it was statutory organisational rights, it was not entitled to do so while it was party to the section 18(1) collective agreement with POPCRU which fixed a certain threshold that SACOSWU did not meet. On general principles of contract, the Department needed to get out of the section 18(1) collective agreement with POPCRU before it could grant SACOSWU statutory organisational rights.

[141] A conclusion that says or implies that an employer may be party to both a section 18(1) collective agreement fixing a certain threshold of representativeness in the workplace that unions must meet if they want certain statutory organisational rights and at the same time also be party to a collective agreement granting those statutory organisational rights to a trade union which does not meet that threshold will spell the end of section 18(1) collective agreements. This is because such a conclusion will mean that a section 18(1) collective agreement has no efficacy and is not helpful to anybody, be it the employer or the majority union. The effect of such a conclusion will be that an employer who is party to a section 18(1) collective agreement may breach such an agreement with impunity.

[142] In my view, the organisational rights that the Department conferred on SACOSWU were not statutory organisational rights. They were contractual organisational rights. SACOSWU did not meet the conditions prescribed for the

acquisition of the relevant statutory organisational rights, namely being sufficiently representative of the Department's employees required for the relevant organisational rights. Therefore, SACOSWU did not qualify for any of the statutory organisational rights.

[143] In its answering affidavit in the Labour Court SACOSWU referred to the organisational rights it was seeking or it had acquired as organisational rights referred to in the LRA. However, in a number of areas in that answering affidavit the deponent also made it clear that these were organisational rights falling outside of the LRA. Contractual organisational rights fall outside of the chapter on organisational rights in the LRA. I do not think that SACOSWU's conduct in referring to the organisational rights as organisational rights provided for in the LRA converts contractual rights into statutory organisational rights.

[144] The threshold that a section 18(1) collective agreement fixes or imposes applies to statutory organisational rights and not to contractual organisational rights. I, therefore, conclude that an employer who is party to a section 18(1) collective agreement may conclude a collective agreement granting a union that does not meet the threshold fixed in the section 18(1) collective agreement contractual organisational rights. This is so because a section 18(1) collective agreement has nothing to do with contractual organisational rights. This, therefore, means that the Department was entitled to conclude the collective agreement that it concluded with SACOSWU concerning contractual organisational rights.

[145] The interpretation I have adopted above results in a regime in which statutory rights and contractual rights on the same subject exist side by side. That is not an unusual situation in our law. In employment law an employer may be obliged by section 37(1)(b) of the Basic Conditions of Employment Act[50] to give an employee at

[50] Section 37 of Basic Conditions of Employment Act 75 of 1997 reads:

> "(1) Subject to section 38, a contract of employment terminable at the instance of a party to the contract may be terminated only on notice of not less than—

least two weeks' written notice of the termination of the contract of employment whereas a clause in that employee's contract of employment may oblige the employer to give the employee a month's notice of termination. In such a case we can see that there is a right to notice of termination provided for in a statute and a right to notice of termination provided for in a contract of employment. A termination of the contract of employment in breach of either periods of notice or both periods may result in an invalid termination of the contract of employment. Indeed, a termination of the contract of employment in breach of either period of notice may well also constitute an unfair dismissal. Compliance with the statutory requirement of notice but not with the contractual notice requirement will not help the employer. There must be compliance with both the statute and the contract.

[146] Another example is that an employee whose contract of employment does not contain any clauses governing the procedural fairness for dismissal is entitled to the statutory rights of procedural fairness contained in the LRA.[51] Another example is where an employee's contract has a clause dealing with rights to procedural fairness even though the LRA also has provisions relating to procedural fairness in regard to the termination of his or her contract of employment. The contractual provisions relating to procedural fairness exist as long as the contract exists but they may be amended. The statutory provisions relating to procedural fairness exist as long as the statute has not been repealed. A breach of the contractual provisions relating to procedural fairness which may render the dismissal either unlawful or unfair but a breach of the provisions of the LRA relating to procedural fairness result in a procedurally unfair dismissal.

(a) one week, if the employee has been employed for six months or less;

(b) two weeks, if the employee has been employed for more than six months but not more than one year;

(c) four weeks, if the employee—

(i) has been employed for one year or more; or

(ii) is a farm worker or domestic worker who has been employed for more than six months."

[51] Section 188(1)(b) of Labour Relations Act 66 of 1995 "that the dismissal was effected in accordance with a fair procedure" read with Code of Good Practice of Dismissal.

[147] In so far as SACOSWU relied on this Court's decision in *Bader Bop,*[52] it is important to bear in mind that the issue that this Court had to decide in that case was not the same as the issue we are called upon to decide in the present case. In *Bader Bop* the issue was whether or not a trade union that is not sufficiently representative in a workplace may call upon workers to withhold their labour in support of a demand for organisational rights. There was no section 18(1) collective agreement in the picture in that case. In the present case the issue that was before the arbitrator was whether an employer who is party to a section 18(1) collective agreement with a majority trade union fixing a certain threshold to be met by any registered trade union seeking organisational rights provided for in the LRA may conclude a collective agreement with a trade union that does not meet the threshold fixed in the section 18(1) collective agreement granting the union organisational rights. The question is whether the decision of the arbitration is unreasonable and falls to be reviewed and set aside.

[148] Although the issue that this Court had to decide in *Bader Bop* was different from the issue that we are required to decide in the present case, there are, nevertheless a number of statement (dicta) made in *Bader Bop* which support the conclusion that the Department and SACOSWU were within their rights to conclude their collective agreement. In *Bader Bop* this Court inter alia said:

> "[25] So far, the scheme of the Act is clear. Sufficiently representative trade unions, and those unions that claim to be sufficiently representative, may seek to enforce those organisational rights which they claim the Act confers upon them by adjudication (mediation and arbitration) or by industrial action. It is not clear what options (if any) those unions that are not sufficiently representative to be the beneficiaries of the rights conferred by Chapter III, Part A of the Act have to obtain organisational rights. There is no express provision of the Act regulating their position. The question that arises is whether the Act must necessarily be interpreted

[52] *Bader Bop* above n 9.

> to preclude non-representative unions from obtaining organisational rights, either through agreement with the employer, or through industrial action."

[149] For the above reasons I agree that the appeal should be dismissed. It is just and equitable that no order as to costs be made.

For the Applicants:	CE Watt-Pringle SC and KS McLean instructed by Allardyce & Partners Attorneys.
For the First Respondent:	JG Grogan and L Voultsos instructed by Neville Borman & Botha Attorneys.