A demarcation of majoritarianism within the South African and German labour law context

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Mini-Dissertation submitted in fulfilment of the requirements for the degree *Master of Law* in Labour Law

at the Potchefstroom Campus of the North-West University

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November 2016

ABSTRACT

Trade unions play a significant role during the collectively bargaining with the employer in order to uphold the interests and protection of employees' rights within the labour relations framework of South Africa. Organised labour has evolved over the years, from not having been adequately protected in the past, to having constitutionally entrenched fundamental rights underpinned by international law. Furthermore, trade unions have the right to freedom of association and the right to organise, among others, and govern their own affairs. However, current trade union system is based on the classification of various types of unions on account of their membership representatives.

Majority trade unions are subsequently afforded more privileges and organisational rights than minority unions. This institution is based on the majoritarian principle for the protection of collective bargaining. However, the current situation is that, this principle has the propensity of impinging on the rights of other smaller unions. Thus, the legislature is has made some significant changes to allow the commissioner to grant smaller unions leeway into the workplace. This dissertation aims to analyse the extent to which the South African legal system has gone to demarcate the majoritarian principle and its adverse implications. This will be done with the aid of a comparative study of the German labour law system of trade unions.

Key words

Trade unions; majoritarian principle; collective bargaining; majority trade unions; minority trade unions; organisational rights; freedom of association.

ACKNOWLEDGEMENTS

I would like to thank Christ Jesus my Lord for making all things possible in my life.

I would also like to humbly extend my sincere gratitude my supervisor, Mr G Stopforth, for the immense amount of assistance and time he invested in my work. I am indebted to him for his advice and guidance. I would also like acknowledge and thank Professor A Combrink for having been so helpful editing this document.

I would like to extend my profound appreciation to my parents, Dennis Sr and Euphrasia Beenzu, together with my brothers, Dennis Jr and David, for all the sacrifices they have made to help me reach where I am today.

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LIST OF ABBREVIATIONS

AMCU	Association of Mineworkers and Construction Union
BJIR	British Journal of Industrial Relations
CAA	Collective Agreements Act
CBU	Collective Bargaining Unity
CILSA	Comparative and International Law Journal of Southern Africa
CLL	Comparative Labour Law
CLLPJ	Comparative Labour Law and Policy Journal
COSATU	Congress of South African Trade Unions
EJIL	European Journal of International Law
FAWU	Food and Allied Workers Union
ICA	Industrial Conciliation Act
IICLR	Indiana International and Comparative Law Review
IJCLLIR	International Journal of Comparative Labour Law and Industrial Relations
IJSS	International Journal of Social Sciences
ILJ	Industrial Law Journal
ILO	International Labour Organisation
ILRReview	Industrial Labour and Relations Review
JCMS	Journal of Common Market Studies
LCA	Labour Courts Act

LRA	Labour Relations Act
McGill LJ	McGill Law Journal
MJSS	Mediterranean Journal of Social Sciences
NEDLAC	National Economic Development and Labour Council
NUM	National Union of Mineworkers
NUMSA	National Union of Metal Workers of South Africa
PER/PELJ	Potchefstroomse Elektroniese Regstydskrif/Potchefstroom Electronic Law Journal
POPCRU	Police and Prisons Civil Rights Union
PUTCO	Public Utility Transport Corporation
SABAR	South African Bar Law Journal
SAFDU	South African Freight and Dock Workers Union
SAJBM	South African Journal of Business Management
SAJE	South African Journal of Education
SAJEMS	South African Journal of Economic and Management Sciences
SAJHR	South African Journal of Human Rights
SALJ	South Africa Law Journal
SA Merc LJ	South African Mercantile Law Journal
SANDU	South African National Defence Union v Minister of Defence
Stell LR	Stellenbosch Law Review
TAWUSA	Transport and Allied Workers Union of South Africa
THRHR	Tydskrif vir hedendaagse Romeins-Hollandse Reg

TSAR	Tydskrif vir die Suid-Afrikaanse Reg
UDHR	Universal Declaration of Human Rights
WCA	Works Constitution Act

Chapter 1 Introduction and problem statement

1.1 Introduction

The South African constitutional dispensation brought with it the rights and protection necessary for employees in the Republic of South Africa.[1] Section 23 of the *Constitution of the Republic of South Africa*, 1996[2] provides that everyone has the right to fair labour practices. Cheadle[3] submits that the word "everyone" should be interpreted holistically, in the sense that it should be envisaged to mean all the parties mentioned in the said constitutional provision. These include employees, employers, trade unions and employers' organisations. Section 23(2) of the *Constitution of South Africa*, affords an employee the right to join a trade union of his or her choice, hence exercising the right to freedom of association provided for in section 18 of the *Constitution of South Africa*.[4] The aim of trade unions is to further the interests of employees in the workplace environment. This is essential in the balancing of the bargaining power that is prevalent and inherently of more substance on the side of the employer.[5]

In order for trade unions to assist employees in the workplace, they also have to be protected and given rights that they can exercise. Section 23(4) and 23(5) of the *Constitution of South Africa* grants every trade union the right "to organise" and the right to "engage in collective bargaining" respectively.[6] Moreover, section 23(5) stipulates that national legislation "may be enacted to regulate collective bargaining".[7] The word "may" indicates that this is not a peremptory provision. This may be due to the fact that there is no longer a duty placed on collective bargaining. It is a voluntary process. However, in order for the labour relations system to function effectively, it is argued that legislative measures need to be implemented. This is why the *Labour Relations Act* aims to endorse and allow a platform for collective bargaining.[8] Therefore, the *Constitution of South Africa*

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1 Esitang and Van Eck "Big Kids on the Block" 1.
2 Section 23(1) of the *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution of South Africa*).
3 Cheadle "Labour relations" 18-3.
4 Sections 23(2) and 18 of the *Constitution of South Africa*.
5 Tshoose and Tsweledi 2014 *Law, Democracy and Development* 340.
6 Sections 23(4) and 23(5) of the *Constitution of South Africa*.
7 Section 23(5) of the *Constitution of South Africa.*
8 The preamble of the *Labour Relations Act* 66 of 1995 (hereafter the *LRA*).

and the *LRA* have established a framework of labour relations that ensures that all parties are allowed to function and to be protected against unfair labour practices.

One major aspect established by the *LRA* is a majoritarianism model of trade union activities. Majoritarianism is a principle that endorses the concept of the "will of the majority".[9] Majority trade unions are registered unions that have fifty per cent plus one members represented in the workplace.[10] Such unions are afforded the right, in terms of section 18 of the *LRA*, to conclude collective agreements with an employer that establish a threshold of representivity.[11] The setting of a threshold is a regulation mechanism which is used to acquire certain organisational rights. However, one finds that larger trade unions and employers tend to exclude minority trade unions from organising by setting thresholds that are excessively high. This has negative implications for other trade unions in that they could be excluded from obtaining some organisational rights. The effect of this is that it becomes unreasonably challenging for them to effectively represent their members. This can be argued to be an abuse of power. There is no definition for minority trade unions in the *LRA*. Therefore, Esitang and Van Eck define them as unions that have neither a majority nor sufficient representivity in the workplace.[12]

The *LRA* provides trade unions with organisational rights. According to Van Niekerk *et al*[13] organisational rights are granted so as to enable and promote "industrial self-government and collective bargaining". They comprise the rights of access to the workplace, deduction of the trade union subscription and leave for trade union activities.[14] Also included are the right to trade union representatives, the right to information and the right to establish thresholds for acquiring organisational rights.[15] However, not all trade unions enjoy these rights.[16] Majority trade unions enjoy all these rights[17] while sufficiently representative unions are only afforded a few rights, such as access to the workplace.[18] Additionally, the rights of access to the workplace, deduction of the trade union

9 Malan 2010 *TSAR* 436.
10 Van Niekerk *et al Law@Work* 332; Kruger and Tshoose 2013 *PER/PELJ* 289 / 487.
11 Section 18(1) of the *LRA.*
12 Esitang and Van Eck 2016 *ILJ* 766.
13 Van Niekerk *et al Law@work* 377.
14 Sections 12, 13 and 15 of the *LRA.*
15 Sections 14(1), 16(1) and 18(1) of the *LRA*.
16 Van Niekerk *et al Law@work* 374.
17 Okharedia 2007*Africa Insight* 95.
18 Okharedia 2007*Africa Insight* 94.

subscription and leave for trade union activities are automatically granted to those registered unions that are party to Bargaining Councils.[19] Therefore, it is submitted that majority trade unions enjoy an immense amount of power which leaves minority trade unions side-lined.[20]

In *Fakude v Kwikot (Pty) Ltd*,[21] the court held that majoritarianism affords a trade union the power and authority to decide how a dispute is resolved for the benefit of the majority regardless of whether the minority are disadvantaged. The benefit of majoritarianism over the prejudice on minority trade unions, was also reiterated in *United Transport and Allied Trade Union/SA Railways and Harbours Union v Autopax Passenger Services (SOC) Ltd*.[22] The rationale for the support of dominant trade unions can furthermore be seen in *Kem-Lin Fashions CC v Brunton*.[23] The court held that this is a policy choice made by the legislature as an aspect advantageous "for orderly collective bargaining" and "for the democratization of the workplace and sectors".[24] The implication to be drawn from these cases is that the courts recognise and prefer the 'majority rules' principle.

Collective bargaining is a voluntary process where employees represented by trade unions and the employers negotiate matters of mutual interests such as working conditions and remuneration.[25] It is submitted that emphasis has to be placed on the phrase "every trade union" in section 23(4) of the *Constitution of South Africa*, as it entails that even minority trade unions are now recognised as worthy of having these rights.[26] However, it is usually majority unions that are afforded a place at the collective bargaining table.[27] Collective bargaining is largely adversarial in nature as the parties conduct their negotiations in a rather hostile manner in order to come to a mutual resolution.[28] The legislature attempted to remedy the adversarial nature by introducing workplace forums to allow employee involvement on matters other than wage and work conditions issues.

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19 Section 19 of the *LRA.*
20 Esitang and Van Eck "Big Kids on the Block" 2.
21 *Fakude v Kwikot (Pty) Ltd* 2013 34 ILJ 2024 (LC) para 24.
22 *United Transport and Allied Trade Union /SA Railways and Harbours Union v Autopax Passenger Services (SOC) Ltd* 2014 35 ILJ 1425 (LC) para 51.
23 *Kem-Lin Fashions CC v Brunton* 2001 22 ILJ 109 (LAC) para 19 (hereafter the *Kem-Lin Fashions* case).
24 The *Kem-Lin Fashions* para 19.
25 Du Toit 2000 *ILJ* 1544; Du Toit 2007 *ILJ* 1407.
26 Section 23(4) of the *Constitution of South Africa*.
27 Kruger and Tshoose 2013*PER/PELJ* 318.
28 Du Toit 2007 *ILJ* 1407.

However, only majority trade unions can establish workplace forums.[29] Again the *LRA* gives majority trade unions greater power. It is due to this that Botha[30] argues that this overriding power granted to majority trade unions has a negative bearing on what the *LRA* intends to achieve, viz. "promoting employee participation". Therefore, it is submitted that the presence of dominance has only gone as far as compromising the protection and interests of employees especially those represented by minority trade unions.

Minority trade unions can nevertheless obtain organisational rights through strikes in terms of section 65(2) of the *LRA*, particularly the rights of access to the workplace and leave for trade union activities.[31] In *NUMSA v Bader BOP (Pty) Ltd*,[32] the Constitutional Court held that minority trade unions have the right to recruit and represent members, as well as strike in order to obtain organisational rights. The court held that this was in line with the constitutional rights and ILO conventions of trade unions: the right to freedom of association, as well as the right to strike.[33] Additionally, the right to strike is an essential part of collective bargaining.[34] Even though collective bargaining is not expressly conferred on minority unions, the court held that section 20 could be read as a provision that expressly confirms internationally recognised rights that minority unions have, that allow them to obtain various organisational through collective bargaining mechanisms.[35] Therefore, what the court establishes is that section 20 does not pre-empt minority trade unions from concluding collective agreements for the purposes of obtaining organisational rights.[36] This is so as long as the majority trade unions are not deprived of their rights.[37]

Section 23(1)(d) of the *LRA* allows for collective agreements to be binding on employees of minority unions and who are non-parties, provided they are identified in the agreement *inter alia*.[38] In *Chamber of Mines of SA acting in its own name and on behalf of Harmony*

29 Section 79(b)-(c) of the *LRA.*
30 Botha 2015 *PER / PELJ* 1831.
31 Section 65(2) of the *LRA*.
32 *NUMSA v Bader BOP (Pty) Ltd* 2003 (3) SA 513 (CC); 2003 24 ILJ 305 (CC) paras 35 and 25 (hereafter *Bader BOP*).
33 *Bader BOP* para 35.
34 *Bader BOP* para 36.
35 *Bader BOP* para 41.
36 *Bader BOP* para 64.
37 *Bader BOP* para 64.
38 Section 23(1)(d) of the *LRA*.

Gold Mining Co Ltd v Association of Mineworkers and Construction Union,[39] the Labour Court held that this extension of collective agreements is a manifestation of the majoritarianism principle. On appeal, the Labour Appeal Court in *Association of Mineworkers and Construction Union v Chamber of Mines of SA acting in its own name and on behalf of Harmony Gold Mining Co Ltd*[40] ruled that the majoritarian principle was not unconstitutional. To support this, the court held that majoritarianism is a principle acknowledged in international law, particularly in the *International Labour Organisation* (hereafter the *ILO*) recommendations and conventions.[41] Additionally, binding a non-party minority union to a collective agreement was held to be justified by section 36 of the *Constitution of South Africa*.[42]

Section 39 of the *Constitution of South Africa* requires that international law must be referred to when interpreting the rights in the Bill of Rights.[43] However, what should be remembered is that these conventions do not replace constitutional rights. The essence of the legislative framework on trade unions clearly indicates that minority trade unions are marginalised.[44] The limitation placed on fundamental constitutional rights of freedom of association and freedom to organise is disproportionate to what can be considered as reasonable. It should be noted that the *ILO* allows the principle of majoritarianism as long the right freedom of association is not compromised.[45] Therefore, it is for these reasons that one would not agree with the Labour Appeal Court.

The court in *Transport and Allied Workers Union of South Africa v PUTCO*[46] held that majoritarianism is fundamental. However, the court argued that it was untenable to bind a union that was not a party to a dispute to the collective agreement.[47] This case illustrates that there are certain circumstances where this principle does not apply: in the case of extension of a collective agreement where a union is not party to a dispute. Therefore,

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39 *Chamber of Mines of SA acting in its own name and on behalf of Harmony Gold Mining Co Ltd v Association of Mineworkers and Construction Union* 2014 35 ILJ 3111 (LC) para 57.
40 *Association of Mineworkers and Construction Union v Chamber of Mines of South Africa* (JA103/2014) 2016 ZALAC 11 (24 March 2016) para 105 (hereafter *AMCU v Chamber Mines*).
41 *AMCU v Chamber Mines* para 105.
42 Section 36 of the *Constitution of South Africa*.
43 Section 39 of the *Constitution of South Africa*.
44 Esitang and Van Eck 2016 *ILJ* 777.
45 Esitang and Van Eck "Big Kids on the Block" 23.
46 *Transport and Allied Workers Union of South Africa v PUTCO Limited* (CCT94/15) [2016] ZACC 7; (2016) 37 ILJ 1091 (CC); [2016] 6 BLLR 537 (CC); 2016 (4) SA 39 (CC) (8 March 2016) para 66 (hereafter *TAWUSA*).
47 *TAWUSA* para 60.

this indicates that the courts have divergent views on the application of majoritarianism to collective agreements imposed on non-party unions. Of course this would depend on the facts of each case.

It is palpably true that the legislature, through the amendments made to the *LRA* in 2014, is endeavouring to remedy the negative implications of majoritarianism, hence, attempting to demarcate application of the principle.[48] The *LRA* now confers on a commissioner in an arbitration the power to grant minority trade unions certain rights. The conditions are that no other trade should already have these rights in the workplace and that all parties to a collective agreement should have been part of the arbitration proceedings *inter alia*.[49] The traditional position is that acquiring organisational rights is subject to a threshold set in majority trade union.[50] Even though minority trade unions have other options such as striking or concluding a collective agreement, majority trade unions could simply enforce the binding nature of their collective agreements in terms of section 23 and in terms of section 32 of the *LRA*.[51] The effect of the amendments is that a commissioner now has the discretion to overrule the threshold set by majority trade unions and the employer.[52]

In as much as these amendments are significant, it is submitted that the legislature has been far from successful in the demarcation of majoritarianism. It is inevitable that as long as certain ambiguities still clutter the *LRA*, crises such as the Marikana situation where matters were taken into private hands will still ensue in the future.[53] The bone of contention is that section 18 of the *LRA* still stands and thus majoritarianism still dominates.[54] It is submitted that having a commissioner bypass the threshold and confer organisational rights to minority trade unions does not prevent majority trade unions from imposing their rights.[55] Majority trade unions still have the weapon of collective agreements in their arsenal which may lead to a new conflict between these unions and

48 Olivier 1996 *ILJ* 810; Botha 2015 *PER / PELJ* 1835.
49 Sections 21(8A)(a)(i) and (b)(i) and 21(8C) of the *LRA.*
50 See 2.4.5.2 on the discussion about Majority representivity.
51 See 2.4.5.2 on the discussion about majority representivity; 3.5 on curbing the proliferation of trade unions; and 3.7 on the implications of majoritarian collective agreements.
52 See 2.4.6 on the discussion about amendments on acquisition of organisational rights and 4.2 on the effects of section 21 amendments.
53 Leppan 2016 *Employment Alert* 2.
54 Esitang and Van Eck 2016 *ILJ* 777.
55 Esitang and Van Eck "Big Kids on the Block" 24.

the commissioner.[56] Accordingly, it will be considered whether the current developments are sufficient to protect the rights of minority trade unions.

Similar to South Africa, the German labour law endorses majoritarianism which it followed in the past. The *Collective Agreements Act* of 1969 regulates collective bargaining and its agreements.[57] Initially, only one collective agreement was allowed to regulate collective bargaining and trade union influence in the workplace. This was called the collective bargaining unity principle, or *tarifeinheit*.[58] However, in 2010 the Federal Labour Court of Germany, known as *Bundesarbeitsgericht* (BAG) in German, abolished this principle.[59] The rationale was that collective bargaining was set above the right to freedom of association and that trade unions competed for members.[60] This was seen as detrimental not only in terms of the infringement of rights, but also to the cooperation of trade unions in matters of joint interest.[61] Therefore, it was eventually established that various collective bargaining agreements should be allowed to regulate employment relationships within the workplace.[62]

With no overriding principle, the agreements were binding on the members of the particular unions that concluded them.[63] Unfortunately, having many collective agreements still led to trade unions competing against one another, which inevitably led to various conflicts that manifested in waves of strikes.[64] The German legislature recently enacted the *Act on Collective Bargaining Unity* of 2014, also known as the *Tarifeinheitsgesetz*, which was ratified in 2015. The aim was to try and resolve the prevalent problem by reverting back to the principle of collective bargaining unity.[65] In an aim to obliterate the conflicts referred to above, it provides that only a collective

56 Esitang and Van Eck "Big Kids on the Block" 24.
57 The Collective Agreements Act of 1969.
58 Geck and Fiedler 2015 http://www.kwm.com:*Tarifeinheit* means/implies "One business, one collective agreement".
59 Zimmermann 2015 http://www.mondaq.com.
60 Zimmermann 2015 http://www.mondaq.com.
61 Zimmermann 2015 http://www.mondaq.com.
62 Gesley 2015 http://www.loc.gov.
63 Jung 2001 http://www.ilo.org
64 Zimmermann 2015 http://www.mondaq.com.
65 Zimmermann 2015 http://www.mondaq.com.

agreement by majority trade unions can be concluded in the workplace.[66] Therefore, the legislature reintroduced majoritarianism back into the legal system.[67]

The difference between German legislation and the South African *LRA* is that minority trade unions are not marginalised. The *Act on Collective Bargaining Unity* confers upon minority unions a right to be heard as well as a right to sign a corresponding collective bargaining agreement which is identical to the main collective agreement.[68] This assists in ensuring that all demands of all trade unions in the workplace are heard so as to conclude a comprehensive collective agreement. Another important development is that minority trade unions have recourse to the courts where these new rights are infringed. The current labour law legislative framework of Germany has introduced significant measures to ensure a proper and less conflicted state of affairs. These changes may provide essential recommendations for South Africa. Consequently, this research investigates the degree to which South Africa has limited the scope of majoritarianism within the labour relations framework, and in what way majoritarianism within the German context can contribute to the current South African demarcation.[69]

66 Zimmermann 2015 http://www.mondaq.com.
67 Zimmermann 2015 http://www.mondaq.com.
68 Geck and Fiedler 2015 http://www.kwm.com.
69 See 2.4.6; see 3.2, 3.3, 3.5, 3.8, 3.9; see 4.3; see 5.4 and 5.5; see 6.2 and 6.3.

Chapter 2 A constitutional and legislative framework of the rights of trade unions

2.1 Introduction

The aim of the *Constitution of the Republic of South Africa*, 1996[70] and the *Labour Relations Act*[71] is to make rectifications pertaining to the disparity of power between the employee and the employer.[72] This has been achieved through an established system in which trade unions are empowered to ensure the protection and promotion of the rights of employees[73] in a sustainable and democratic manner.[74] This chapter deals with the framework of trade unions in terms of the rights and function provided for in the *Constitution of South Africa* and the *LRA.* It highlights the fundamental constitutional rights of freedom of expression, collective bargaining and the right to organise that are also firmly entrenched in, and recognised by international law instruments. Additionally, the chapter goes into detail in discussing how the *LRA* puts section 23 of the *Constitution of South Africa* into effect and affirms these rights and regulates the functioning of trade unions.

2.2 The establishment of a constitutional democracy in the workplace

The *Constitution of South Africa*[75] is heralded as the supreme law of the country. Not only does it charge everyone to fulfil the obligations imposed by it, but it also invalidates all laws and conduct that unjustifiably challenge or infringe any right thereof.[76] Moreover, it promotes a society based on democratic values, social justice and fundamental human rights[77] for all persons through its "chief strut"[78] the Bill of Rights.[79] The essence thereof,

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70 The *Constitution of the Republic of South Africa*, 1996 (hereafter, the *Constitution of South Africa*).
71 The *Labour Relations Act* 66 of 1995 (hereafter the *LRA*).
72 *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) para 74.
73 Botha 2015 *De Jure* 336.
74 Botha 2015 *De Jure* 335.
75 The preamble and section 2 of the *Constitution of South Africa*.
76 Section 2 of the *Constitution of South Africa*.
77 The preamble of the *Constitution of South Africa*.
78 Mureinik 1994 *SAJHR* 32.
79 Section 7(1) of the *Constitution of South Africa* provides that "This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

is an "egalitarian ethos"[80] that allows for constitutional democracy[81] in all avenues of the South African legal system.[82] In the context of labour relations, this entails "the protection of human rights and the democratisation of the workplace"[83] which is vital to the efficient functioning of the labour relationship. Consequently, the *Constitution of South Africa* is not only a point of departure that lays a foundation but is "there to provide anchorage"[84] for the legislative framework for labour relations.

Section 23 of the *Constitution of South Africa* is the pinnacle of all matters pertaining to labour relations and the foundation of the operation of trade unions. It provides for the right to fair labour practices,[85] the right to form and join trade unions, the right for trade unions to determine their own administration, programmes and activities,[86] to organise and to engage in collective bargaining.[87] Additionally, the section requires that the legislature enact relevant statutes to regulate collective bargaining.[88] The *Constitution of South Africa* is a bridge that leads to principles demanding that "every exercise of power is expected to be justified".[89] Thus, section 23 also demands that any limitation on any right thereof should be justified in terms of section 36(1).[90]

The principal constitutional values are those of an open and democratic society based on human dignity, equality, and freedom.[91] Hence, when considering the framework of trade unions, it should be noted that the requirement of fairness in labour relations[92] is firmly established and resonates in the entire section 23. It therefore follows that the interpretation of the rights in the section should be carried out with a particular aim of

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80 *S v Makwanyane* (CCT3/94) 1995 ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; 1996 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995) para 261.
81 Tshoose and Tsweledi 2013 *PER / PELJ* 289; Rapatsa 2014 *MJSS* 887.
82 Grogan *Workplace Law* 5.
83 Botha 2015 *De Jure* 328.
84 Muntingh 2007 http://www.csvr.org.za.
85 23(1) of the *Constitution of South Africa*.
86 23(4)(a) of the *Constitution of South Africa*.
87 23(5) of the *Constitution of South Africa*.
88 23(5) of the *Constitution of South Africa*.
89 Mureinik 1994 *SAJHR* 32; Davis and Le Roux Precedent and Possibility 7; Currie and De *Waal The Bill of Rights Handbook* 17; Hoexter *Administrative Law in South Africa* 20; Huscroft *et al Proportionality and the Rule of Law* 197.
90 23(5) of the *Constitution of South Africa.*
91 39(1)(a) of the *Constitution of South Africa*.
92 *National Union of Metalworkers of SA v Bader Bop (Pty) Ltd* 2003 (3) SA 513 (CC); 2003 24 ILJ 305 (CC) para 13 (hereafter *Bader BOP*); Grogan *Collective Labour Law* 95; Currie and De Waal *The Bill of Rights Handbook* 491; Brand *et al Labour Dispute Resolution* 65; *Transport and Allied Workers Union of South Africa v PUTCO Limited* (CCT94/15) 2016 ZACC 7; 2016 37 ILJ 1091 (CC); 2016 6 BLLR 537 (CC); 2016 (4) SA 39 (CC) (8 March 2016) para 46.

understanding the significance in endorsing fairness.[93] Cheadle[94] states that in collective labour law, the right to fair labour practices relates to the complex conflict of power between trade unions and the employers, *inter alia,* which encompasses "the right to bargain collectively and the right to exercise economic power". This indicates that these rights are intertwined and need to be interpreted holistically. In other words, in order for there to be fairness, all trade unions should be allowed to exercise their rights in line with constitutional values.

2.3 A constitutional interpretation of union rights: International law instruments

Section 39(1)(b) of the *Constitution of South Africa*[95] places a fundamental duty on the courts to consider international law during a Bill of Rights interpretation. This is because international law serves as a standard amid significant developments for national laws that are promulgated to protect human rights.[96] Not only that, the Bill of Rights itself embodies the "international character" within its values.[97] International law is significant in giving a broad scope of the regulation of labour rights,[98] particularly in the form of conventions and recommendations provided for by the *International Labour Organisation*.[99] The *ILO* is the epitome of labour relations at an international level. The court in the *Bader Bop*[100] case recognised the *ILO* conventions and recommendations as a fundamental source of international law in interpreting section 23 of the *Constitution of South Africa*. Therefore, it is an obligation to consider international contexts where labour relations, constitutional and legislative rights are concerned.

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93 *Bader BOP* para 13; Cheadle "Labour relations"18-2.
94 Cheadle "Labour relations"18-15.
95 Section 39(1)(b) of the *Constitution of South Africa*.
96 Budeli 2009 *De Jure* 139.
97 *South African National Defence Union v Minister of Defence* 2006 SCA 90 (RSA) para 6.
98 Articles 20 and 23 of the *Universal Declaration of Human Rights* 1948 (*UDHR*) and the Article 8(a) and (c) of the *International Covenant on Civil and Political Rights* 1966 both provide for the right to freedom of association which is expressed through the right to form and join a trade union. Furthermore, article 8 of the *International Covenant on Economic, Social and Cultural Rights* 1966 prohibits any restrictions on these rights, with the exception of limitations provided for by national law necessary for protecting rights and freedoms in a democratic sphere. Such instruments like the *UDHR* are not binding on countries because they are not treaties. However, they do provide significant guidelines to national laws. This is evident in the labour law rights reflected in the Bill of Rights.
99 Cooper 2005 *Comparative Labor Law Journal and Policy Journal* 201; the *International Labour Organisation* (hereafter the *ILO*).
100 *Bader BOP* para 28.

South Africa subscribes to the *ILO Freedom of Association and Protection of the Right to Organise Convention*[101] and the *Right to Organise and Collective Bargaining Convention*[102] which were both ratified by South Africa in 1996.[103] Section 232 of the *Constitution of South Africa* which lauds customary international law as in the country, except where it infringes on constitutional and legislative provisions.[104] This is so, for instance, where South Africa ratifies a convention.[105] Moreover, section 233 places a duty on the courts to interpret legislation in a reasonable fashion in line with international law.[106] In *SANDU v Minister of Defence*,[107] the court relied heavily on the *ILO* conventions when it decided that employees in the military, when it found legislative provisions denying such employees the right to freedom of association, to be unconstitutional. This illustrates that they have the power to influence developments in the legal system.[108] Keightly[109] states that it is imperative to incorporate applicable international instruments in order to function as a yardstick that reinforces human rights within national laws. However, in *S v Makwanyane*,[110] it was held that the consideration of international law is a constitutional mandate, regardless of whether an international instrument is binding or not. It is important to note that none of this implies that the courts are bound to follow it.[111] The vital aspect is the derivation of assistance from it.[112]

Article 2 of the *ILO Convention* 87 grants workers and employers the right to form and join organisations of their choice.[113] Article 3 gives these parties the freedom to establish

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101 The *Freedom of Association and Protection of the Right to Organise Convention* 87 of 1948 (hereafter the *ILO Convention 87*) ratified by South Africa on 19 February 1996.
102 The *Right to Organise and Collective Bargaining Convention* 98 1949 (hereafter the *ILO* Convention 98).
103 Manamela 2012 *SA Merc LJ* 107.
104 Section 232 of the *Constitution of South Africa*; Dugard (1997 *EJIL* 79) is of the view that "There can be little doubt that the 'constitutionalization' of this rule gives it additional weight Moreover, customary international law is no longer subject to subordinate legislation"; Gericke 2014 *PER / PELJ* 2604.
105 Brassey 2012 *ILJ* 5.
106 Section 233 of the *Constitution of South Africa*.
107 *SANDU v Minister of Defence* 1999 (6) BCLR 615 (CC) (hereafter *SANDU*) para 8.
108 *Government of the Republic of South Africa and Others v Grootboom* (CCT11/00) 2000 ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000) para 26: "where the relevant principle of international law binds South Africa, it may be directly applicable".
109 Budeli 2009 *De Jure* 140; Keightly *SAJHR* 172.
110 *S v Makwanyane* (CCT3/94) 1995 ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; 1996 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995) para 35; Moseneke (2010 *SABAR* 65) states that the *Constitution of South Africa* "requires a court to consider (a) international conventions, whether general or particular establishing rules recognised by the contracting states, (b) international custom, as evidence of a general practice accepted as law".
111 Aust and Nolte *The Interpretation of International Law by Domestic Courts* 142.
112 *Makwanyane* para 39.
113 Article 2 of the *ILO Convention* 87.

their own constitutions and regulations as well as to elect representatives and engage in relevant labour activities.[114] However, in terms of article 8, these parties have an obligation to uphold the law of the land and such law must not conflict the provisions of the convention.[115] The *ILO Convention* 98 complements *Convention 87* in that it protects employees against anti-union discrimination.[116] In terms of article 1 of *Convention* 98, this comprises inducing employees to not join or to leave a trade union or dismissing an employee for his/her association and activities with a trade union.[117] The convention also requires that mechanisms be established to provide for the realisation of the right to organise[118] and the promotion of voluntary collective bargaining.[119]

It has been established that international law consideration by the courts is a "mandatory canon of constitutional interpretation"[120] allowing an international friendly approach.[121] The reality is that constitutional rights cannot be adequately "promoted and enforced" at the national level if no emphasis is placed on their "protection under international instruments."[122] The *ILO* conventions and international law protect and promote the "core standards"[123] of freedom of association, to organise and collective bargaining, also provided for in the *Constitution of South Africa*.[124] International law comprises rules and customs that have advanced during the course of time.[125] Hence, highlighting the *ILO* conventions is essential in understanding origins, and the way forward, of the legal inspiration and standard within the context of a trade union framework of South African labour law in order to reinforce the significance of the trade union function within the legal system.

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114 Article 3 of the *ILO Convention* 87.
115 Article 8 of the *ILO Convention* 87.
116 Article 1 of the *ILO Convention* 98.
117 Article 1 of the *ILO Convention* 98.
118 Article 3 of the *ILO Convention* 98.
119 Article 4 of the *ILO Convention* 98.
120 Moseneke 2010 *SABAR* 64.
121 Olivier "The End of Labour Law in the global context" 33-34.
122 Budeli 2009 *De Jure* 139.
123 Klabbers International Law 122.
124 Budeli 2009 *De Jure* 139.
125 Aletter and Van Eck 2016 *SA Merc LJ* 299.

2.4 The Labour Relations Act structure of trade unions

2.4.1 The meaning and role of trade unions

Trade unions, also known as organised labour,[126] have a significant place in labour relations.[127] Trade unions can be defined as agents,[128] conventional representatives of employees,[129] or organisations aimed at furthering and protecting the interests of employees in the workplace.[130] According to section 213 of the *LRA*, a trade union is defined as:[131]

> an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers' organisations.

It is from this definition that the function of trade unions can be deduced.[132] Trade unions engage with the employer on work-related issues that are significant to employees, such as wage negotiations and terms and conditions of employment.[133] This can be derived from the phrase "principal purpose", which is to "regulate" labour relations. This also includes employment security[134] (pertaining to dismissals and business rescue) which is deemed as a means for economic and social benefits.[135] Du Toit[136] alludes to the fact that the *LRA* definition of trade unions is too broad. This entails, according Manamela,[137] that trade unions are not limited regarding the role they play in labour relations. In other words, they are not restricted to workplace issues such as wage negotiations. They also assist employees in social and economic problems that affect them,[138] as well as assume a vital part in building up a dynamic, responsive, and responsible government.[139]

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126 Grogan *Workplace Law* 1; Budeli 2012 *CILSA* 455.
127 Botha 2015 *De Jure* 329.
128 Opara 2014 *IJHSS* 302.
129 Seweryński 2007 *Electronic Journal of Comparative Law* 2.
130 Opara 2014 *IJHSS* 302.
131 Section 213 of the *LRA*.
132 Manamela *The Social Responsibility of South African Trade Unions* 12.
133 Section 1(c)(i) of the LRA; *SA Commercial Catering and Allied Workers Union v Interfare (Pty) Ltd* 1991 12 ILJ 1313 (IC) 1321 (hereafter *Interfare*); Jenkins and Mortimer *The Kind of Laws the Unions ought to Want* 7-8.
134 *Interfare* 1321; Jenkins and Mortimer *The Kind of Laws the Unions ought to Want* 7.
135 Loubser and Joubert 2015 *ILJ* 21.
136 Du Toit 2007 *ILJ* 1417.
137 Manamela *The Social Responsibility of South African Trade Unions* 12.
138 Botha 2015 *De Jure* 334.
139 Dafel 2015 *SAJHR* 80.

Essentially, trade unions have economic, political and social power[140] to effect change for the benefit of the employees.

In order to understand the emphasis on the fundamental role of trade unions, a consideration of the pre-democratic era of the union movement is vital. South Africa's trade union history is tainted with political and socio-economic repression through the marginalisation of workers and restraint on freedom of association by the colonial and apartheid regimes.[141] However, it is also symbolised by a relentless struggle by trade unions to realise and fight for the rights of employees mostly through industrial action. Trade union industrial action was prohibited. Workers involved in industrial action faced dismissal for being absent from work.[142] Further, The *Railway Regulation Act* provided that the striking white South African citizens would face criminal prosecution.[143] However, violent strikes like the Rand Rebellion by (white workers), caused a paradigm shift in legislation.[144] The strike was the result of the retrenchment of some semi-skilled white mineworkers, leaving many wounded and dead.[145] Following this, the legislature enacted the *Industrial Conciliation Act.*[146] This piece of statute allowed union registration, giving a legal basis for a collective bargaining system.[147] However, black trade unions were not recognised in the *ICA* in because black workers were not included as employees within the definition of "employee".[148] Dating back to the 1900s and onwards, trade unionism was fragmented along racial, language and provincial lines.[149] Apart from the *ICA,* centralised bargaining in the mining industry was reserved for trade unions that represented white workers.[150] The outcome was that black workers had no collective

140 Botha 2015 *De Jure* 341.
141 Calitz and Conradie 2013 *Stell LR* 145; Hepple 2012 *Acta Juridica* 10.
142 Du Toit and Ronnie 2012 *Acta Juridica* 207; Myburgh 2004 *Industrial Law Journal* 966.
143 Myburgh 2004 *Industrial Law Journal* 962; The *Railway Regulation Act* of 1908.
144 Myburgh 2004 *Industrial Law Journal* 963.
145 Budeli, Kalula and Okpaluba 2008 *Monograph* 23.
146 *Industrial Conciliation Act* 11 of 1924 (hereafter the *ICA*).
147 Myburgh 2004 *ILJ* 964.
148 Calitz and Conradie 2013 *Stell LR* 140; Myburgh 2010 *Stell LR* 548.
149 Heystek and Lethoko 2001 *SAJE* 223; Bhorat, Naidoo and Yu 2014 http://www.dpru.uct.ac.za: "the 1911 *Mines and Works Act* reserved skilled mining jobs for whites…the Pass Laws curtailed the free flow of black South African labour, thereby forcing many black workers into low-wage sectors and occupations".
150 Godfrey and Bamu 2012 *Acta Juridica* 232-233.

bargaining power.[151] However, employers saw this as an opportunity to dismiss their employees and to hire black employees for lesser salaries.[152]

The increase in trade union activity by black workers, particularly through strikes, led to the detention or imprisonment of those in the forefront for defying the government.[153] However, the government eventually attempted to introduce a different approach. It advised employers to improve the working and wage conditions[154] and also allowed for the establishment of workers' enterprise level committees through the *Black Labour Relations Regulation Act* in 1973 to liaise with the employers .[155] This was meant to cut trade unions out. However, black workers took advantage of the committees to establish "militant independent trade unions".[156] The gravity of union uprisings by black South African workers led to their recognition, through the amendment of the *ICA* in 1979 which brought about the recognition of black trade unions,[157] hence upholding freedom of freedom of association to all workers.[158]

In light of the above, Budeli[159] argues that despite the suppression that trade unions face, they still managed to establish institutional forums in order to achieve the relevant rights of workers. The significance thereof is that trade unions have fought in the political arena to allow for democracy to be realised and they still fight for employees to fully have social freedom.[160] The preamble of the *Constitution of South Africa*,[161] sets the tone for the current constitutional rights of trade unions and workers. It strives to redress[162] past abuses[163] and empower those previously disadvantaged. This is evident in the current "unique entrenchment" of trade union rights to freedom of association, organisation and collective bargaining.[164]

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151 Calitz and Conradie 2013 *Stell LR* 140; Myburgh 2010 *Stell LR* 548.
152 Myburgh 2010 *Stell LR* 548.
153 Benjamin 2012 *Acta Juridica* 23.
154 Anstey 2004 *ILJ* 1839.
155 Anstey 2004 *ILJ* 1840; The *Black Labour Relations Regulation Act* of 1973.
156 Anstey 2004 *ILJ* 1840.
157 Myburgh 2004 *ILJ* 964.
158 Anstey 2004 *ILJ* 1840.
159 Budeli 2009 *Fundamina* 74.
160 Hepple 1990 *ILJ* 646.
161 The preamble of the *Constitution of South Africa*.
162 The preamble of the *Constitution of South Africa*.
163 Kruger and Tshoose 2013 *PER/PELJ* 286 / 487.
164 Kruger and Tshoose 2013 *PER/PELJ* 286 / 487.

2.4.2 The right to freedom of association

Section 18 of the *Constitution of South Africa* provides that "[e]veryone has the right to freedom of association".[165] This provision is general, which means that all persons have a choice to affiliate with others[166] so as to "express opinions" with "associations and groups of like-minded people".[167] Freedom of association grants unions the right to operate independently[168] by being able to conduct lawful activities[169] such as organising[170] and recruiting members to gain recognition by the employer,[171] as well as collective bargaining and engaging in strikes.[172] Essentially, freedom of association ensures an equipoise of power for collective bargaining between organised labour and employers[173] for the purpose of promoting and protecting the interests of employees.[174]

Chapter II of the *LRA* provides for the legislative structure of freedom of association for employees and employers, as well as trade unions and employers' organisations. Section 4(1) and (2) of the *LRA* stipulate that employees have the right to form or join trade unions[175] and to take part in elections or holding official or representative positions.[176] This section reiterates section 23(2) of the *Constitution of South Africa* which grants workers the right of joining and forming trade unions *inter alia*.[177] Additionally, section 8 allows unions to manage their constitutions and rules, to take part in elections and to

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165 Section 18 of the *Constitution of South Africa.*
166 Budeli 2009 *De Jure* 137.
167 *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security* 1996 (3) SA 617 B (CC) ([1996] 5 BCLR 609) para 27; *SANDU* para 8: In this case, the court held that the *Constitution of South Africa* undoubtedly allows the military to form a union to care for their labour interests (para 8).
168 Budeli 2009 *De Jure* 137.
169 Section 4(2)(a) of the *LRA*.
170 Budeli 2009 *De Jure* 139.
171 Esitang G and Van Eck S "Big Kids on the Block" 5.
172 Van Niekerk *et al Law@work* 366.
173 Van Niekerk *et al Law@work* 366; Esitang G and Van Eck S "Big Kids on the Block" 4; Budeli 2009 *De Jure* 137.
174 Budeli 2012 *CILSA* 454.
175 Section 4(1)(a) and (b) of the *LRA*.
176 Section 4 (2) of the *LRA*: "(b) to participate in the election of any of its office-bearers, officials or trade union representatives; (c) to stand for election and be eligible for appointment as an office bearer or official and, if elected or appointed, to hold office; and (d) to stand for election and be eligible for appointment as a trade union representative and, if elected or appointed, to carry out the functions of a trade union representative in terms of this Act or any collective agreement"; in *Food and Allied Workers Union and Another v The Cold Chain* (C324/06) 2007 ZALC 17; 2007 7 BLLR 638 (LC) (8 March 2007), the court made it clear that an employee in a managerial position also has the right to freedom of association except where the law of general application limits it in terms of section 36 of the *Constitution of South Africa* (para 32).
177 See para 2.2 on the establishment of a constitutional democracy in the workplace.

arrange lawful activities.[178] Section 4 of the *LRA* also states that all union members are bound by the constitution of the union they join.[179] In *National Union of Mineworkers and Paintrite Contractors*,[180] the court held that this entails that an employee is regarded as a member of a union if he or she is subject to its constitution.

Section 5 of the *LRA* bans "anti-union discrimination"[181] and gives effect to the *ILO Convention* 98 in this respect. This section should be read with section 4 of the *LRA*[182] because they complement one another. Section 5 prohibits anyone from discriminating against employee exercising any rights in the *LRA*.[183] It also forbids all persons from preventing[184] employees or potential employees from joining, or coercing them to leave, a trade union.[185] Additionally, subsection (2)(c) bars any manner of prejudice against an employee or potential employee on the premise of his or her previous, current or expected membership in a union.[186] This also includes participation in forming the union or in its activities.[187] Subsection (3) proscribes giving or promising any advantages to make employees give up the exercise of their rights.[188]

In *SAFCOR Freight (Pty) Ltd v South African Freight and Dock Workers Union*,[189] the appellant established a system where it financially induced employees not to join or to cease being members of the trade union by awarding non-union employees an increase in wages and not providing the same for unionised employees. The court found that this conduct had no "commercial rationale"[190] and was based on "illegitimate motives"[191] because it had the consequence of weakening the bargaining position of the union. In *Elliot International (Pty) Ltd v Veloo*[192] the court found that the retrenchment of some

178 Section 8(a) to (c) of the *LRA.*
179 Section 4(1)(b) and (2) of the *LRA*.
180 *National Union of Mineworkers and Paintrite Contractors CC* 2008 29 ILJ 806 (CCMA) paras 24 and 25.
181 *SAFCOR Freight (Pty) Ltd v South African Freight and Dock Workers Union* 2013 JDR 0168 (LAC) para 21 (hereafter *SAFDU*).
182 *SAFDU* para 20.
183 Section 5(1) of the *LRA* provides that "[n]o person may discriminate against an employee for exercising any right conferred by this Act."
184 Section 5(2)(b) of the *LRA*.
185 Section 5(2)(a)(i) and (iii) of the *LRA*.
186 Section 5(2)(c)(i) and (iii) of the *LRA*.
187 Section 5(2)(c)(i) and (iii) of the *LRA*.
188 Section 5(3) of the *LRA*.
189 *SAFDU* para 28.
190 *SAFDU* para 28.
191 *SAFDU* para 21.
192 *Elliot International (Pty) Ltd v Veloo* 2015 36 ILJ 422 (LAC) para 50 (hereafter *Veloo*).

employees was motivated by them joining the trade union and amounted automatically to unfair dismissal. In both cases, the courts held that the employers had contravened the employees' freedom of association and section 5 of the *LRA*.[193] These cases illustrate the fact that it is not enough to merely provide the right to join a trade union. It is also necessary to prohibit ulterior motives that prevent employees from freely exercising their rights without prejudice. Therefore, employees should not be treated unfairly for, and should not be coerced or induced into not, exercising his or her right of freedom of expression.

2.4.3 Registering a trade union

Registering a trade union allows for its legitimate recognition and operation. The Ministerial Legal Task Team[194] states that registration may enable a union to obtain organisational rights and become a member of a bargaining council. Furthermore, the aim was to have an easy registration system that would ensure the realisation of freedom of association.[195] Section 95 lays down requirements for registration.[196] It stipulates that a union may apply to the registrar of labour relations if, among other things, it has its own constitution and it is independent.[197] This entails that it should have its own guidelines, procedures[198] and requirements for admission and for termination of membership.[199] Section 95(2) requires that a union be under no direct or indirect control or influence of an employer or its organisation.[200] Moreover, section 95(7) requires that the union should be a genuine one,[201] hence it must indicate in its constitution that its existence is not for gain.[202] Failure to meet the requirements warrants the registrar the authority not to register a union.[203] However, in terms of section 96(4)(a) the registrar has to issue a written notice giving reasons for denying registration and requiring that the union must satisfy the requirements within 30 days.[204]

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193 *SAFDU* paras 30 and 32; *Veloo* paras 44 and 50.
194 Ministerial Legal Task Team 1995 *ILJ* 323.
195 Ministerial Legal Task Team 1995 *ILJ* 324.
196 Section 95 of the *LRA*.
197 Section 95(b) and (c) of the *LRA*.
198 De Vos 2015 *SAJHR* 35.
199 Section 95(5)(b) and (d) of the *LRA*.
200 Section 95(2)(a) and(b) of the *LRA*.
201 Section 95(7) of the *LRA*.
202 Section 95(5)(a) of the *LRA*.
203 Section 95(7) of the *LRA*.
204 Section 96(4)(a) of the *LRA*.

2.4.4 Establishing collective bargaining

The purpose of the *LRA* is to further economic growth, social justice, peace and democracy within the workplace.[205] This can be achieved by accomplishing, and interpreting the *LRA* in a manner that gives effect to,[206] the principal objects stipulated in it. These objects include giving effect to constitutional provisions and international labour standards;[207] the establishment of a framework for collective bargaining regarding remuneration, "terms and conditions of employment and other matters of mutual interest";[208] and to promote orderly collective bargaining at a sectorial level.[209] What this depicts is that the *LRA* stresses collective labour law more than individual labour law[210] and this is indubitably compatible with the *Constitution of South Africa*.[211]

Collective bargaining is an aspect of freedom of association as well as the right to organise.[212] It is a platform that allows both employees and trade unions to bargain or negotiate with the employers and their organisations.[213] It is a voluntary process[214] that ensures "workplace governance"[215] rather than legislative or judicial interference.[216] In order to complement the voluntary aspect, the legislature introduced organisational rights[217] that enable unions to function in the workplace. Additionally, in order to encourage democracy in the workplace the *LRA* provides for a system of representivity in which different trade unions are able to participate in collective bargaining.[218]

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205 Section 1 of the *LRA*.
206 Section 3(a)-(c) of the *LRA*.
207 Section 1(a)-(b) of the *LRA*; *National Education Health and Allied Workers Union v University of Cape Town* 2003 (3) SA 1 (CC); 2003 24 ILJ 95 (CC) para 41; *Booysen v South African Police Services* (C60/08) [2008] ZALC 87; 2008 10 BLLR 928 (LC); 2009 30 ILJ 301 (LC) (14 February 2008) para 22.
208 Section 1(c)(i) of the *LRA*.
209 Section 1(d)(i)-(ii) of the *LRA*.
210 Mischke 2004 *CLL* 51; Ministerial Task Team 1995 *ILJ* 284.
211 *Association of Mineworkers and Construction Union v Chamber of Mines of SA acting in its own name and on behalf of Harmony Gold Mining Co (Pty) Ltd* 2016 37 ILJ 1333 (LAC) para 102.
212 Selala 2014 *International Journal of Social Sciences* 119.
213 Holtzhausen 2012 http://ilera2012.wharton.upenn.edu.
214 Du Toit 2007 *ILJ* 1407.
215 Jordaan 1997 *Law, Democracy and Development* 1.
216 Ministerial Task Team 1995 *ILJ* 284.
217 Esitang and Van Eck 2016 *ILJ* 765.
218 Cohen 2014 *PER/PELJ* 2210.

2.4.5 Representative trade unions and their organisational rights

2.4.5.1 Sufficiently representative trade unions

The *LRA* does not define "sufficiently representative",[219] although it mentions it in various provisions. According to section 11 of the *LRA*, unless otherwise mentioned somewhere else in the Act, a representative union is a registered union, or two or more acting in unison, that has sufficient representivity in the workplace.[220] For a trade union to function, it requires a substantial amount of power.[221] This power is realised through obtaining organisational rights. Such rights can be defined as rights that enable trade unions to gain a foothold[222] within the workplace, so that they may recruit members and gain recognition from the employer. This is necessary for the adequate establishment of trade unions with the aim of engaging in collective bargaining.[223] However, only some unions are afforded organisational rights;[224] those that are sufficiently representative and those with majority representativeness. Therefore, the obtaining of organisational rights is customarily dependent on their representivity in the workplace meaning the number of employees they represent.[225]

Sufficiently representative unions are vested with three organisational rights. These include access to the workplace,[226] deduction of trade union subscriptions and levies,[227] and leave for union representatives. [228] In terms of section 12, a representative trade union has access to the workplace of the employer for the purposes of recruiting or communicating with the members of the union (through its office-bearers or officials).[229] Furthermore, the section also allows such unions to conduct meetings with their members on the premises of the employer after business hours as well as to conduct elections there.[230] This is so as long as such activities do not cause any disruption to the place or

219 Grogan *Workplace Law* 383; Van Niekerk *Law@work* 375.
220 Section 11 of the *LRA*.
221 Ministerial Task Team 1995 *ILJ* 293.
222 Mischke 2004 *CLL* 60.
223 Esitang and Van Eck 2016 *ILJ* 765.
224 Van Niekerk *et al Law@work* 374.
225 Theron, Godfrey and Fergus 2015 *ILJ* 857.
226 Section 12 of the *LRA.*
227 Section 13 of the *LRA*.
228 Section 15 of the *LRA*.
229 Section 12(1) of the *LRA.*
230 Section 12(2) and (3) of the *LRA.*

harm to life and property.[231] Section 13(1) authorises an employee who is a representative member to allow an employer to deduct from the remuneration of employees who are union members, subscriptions or levies that the union is entitled to.[232] Moreover, section 15(1) allows for an employee who is also an office-bearer of a representative trade union to go on leave for when such a time arrives where he or she has to perform official duties.[233] This arrangement is decided upon by the trade union and the employer, particularly pertaining to the length of the leave and remuneration matters.[234]

2.4.5.2 Majority trade unions

A majority union is a union that is registered and represents fifty per cent plus one of employees as its members in a workplace.[235] A status of majority can be obtained by either one union with this percentage or two or more unions who join together to reach it.[236] Even though the *LRA* does not provide for a definition of what a majority trade union is, the essence of what it comprises can be deduced from the various organisational rights that it is afforded. Such a union is entitled to all the organisational rights in the *LRA.*[237]

The rights to of union representative elections and to release information in sections 14(1) and 16(1) of the *LRA*[238] respectively, are exclusively reserved for majority trade unions. These sections stipulate that (for these particular sections) a representative trade union is either one registered union, or two or more registered unions acting together, that have the majority of the employees as their members in a workplace.[239] Section 14(2) allows for employees to elect union representatives depending on how many of them are members of a majority trade union.[240] Ten members constitute the least number prescribed to be entitled to vote for one representative.[241] The union representative has a duty to represent employees' grievances and disciplinary proceedings to ensure that

231 Section 12(4) of the *LRA.*
232 Section 13(1) and (3) of the *LRA.*
233 Section 15(1) of the *LRA.*
234 Section 15(2) of the *LRA.*
235 Theron, Godfrey and Fergus 2015 *ILJ* 853; Van Niekerk *et al Law@work* 377.
236 Theron, Godfrey and Fergus 2015 *ILJ* 853; Van Niekerk *et al Law@work* 377.
237 Theron, Godfrey and Fergus 2015 *ILJ* 853; Van Niekerk *et al Law@work* 377.
238 Section 14(1) and 16(1) of the *LRA*.
239 Section 14(1) of the *LRA*.
240 Section 14(2) of the *LRA*.
241 Section 14(2)(a) of the *LRA*.

the employer complies with the *LRA*, the collective agreement or any other statute pertaining to the workplace and to report any contraventions thereof.[242]

Section 16 of *LRA*, obliges an employer to release information for the purpose of assisting a union representative to conduct his or her tasks, to enable the union to bargain meritoriously.[243] However, the employer does not have to release any information that has legal privilege or confidential *inter alia*.[244] Confidential information can be disclosed on condition that the union is informed in writing that it is so.[245] Section 18 of *LRA* envisages that a union that represents the majority of employees has the right to conclude a collective agreement with an employer to set the threshold at which unions can obtain certain organisational rights:[246] union access to the workplace, stop-orders and leave for official duties.[247]

2.4.5.3 Minority trade unions

Esitang and Van Eck[248] are of the view that minority unions are those that do not have sufficient representivity in the workplace. Having sufficient representivity is the standard of obtaining organisational rights and this sufficiency depends on the threshold that majority unions set with the employers. However, it should be noted that representativeness and threshold are not the only means of obtaining organisational rights. According to section 20 of the *LRA*, nothing forbids a union from concluding a collective agreement with an employer for the purposes of regulating organisational rights. In *National Union of Metalworkers of SA v Bader BOP (Pty) Ltd*[249] the court interpreted section 20 to mean that trade unions, regardless of representivity, can obtain organisational rights outside the ambit of part A of the *LRA* that regulates organisational rights. However, the limitation placed on this section is that whatever agreement is concluded, the terms of any such agreement are only binding on unions that are not part of its conflicts with section 18 of the *LRA*.[250]

242 Section 14(4)(a) to (c) of the *LRA*.
243 Section 16(2) and (3) of the *LRA*.
244 Section 16(5) of the *LRA*.
245 Section 16(4) of the *LRA*.
246 Section 18(1) of the *LRA*.
247 Sections 12, 13 and 15 of the *LRA*.
248 Esitang and Van Eck "Big Kids on the Block" 6.
249 *Bader Bop* para 64.
250 Theron, Godfrey and Fergus 2015 *ILJ* 855.

2.4.5.4 Bargaining Councils

A union that belongs to a bargaining council can also obtain various organisational rights. According to section 19 of the *LRA,* a registered union that is party to a bargaining council automatically has the rights to enter the premises of the workplace and to the deduction of subscriptions and levies.[251] What is also significant about this provision is that these rights are available notwithstanding trade union representivity.[252]

2.4.6 Amendments on acquisition of organisational rights

Section 21 of the *LRA* also allows registered trade unions to inform the employer of their intention to exercise organisational rights in the workplace.[253] This is done by way of notice in which the union also includes the workplace where it intends to use the rights it requires, the representativeness it has and the rights it requires and how it intends to apply them.[254] The parties can then make an undertaking within 30 days to settle a collective agreement on the organisational rights.[255] If all this is not accomplished, they can then refer the matter to the Commission for Conciliation, Mediation and Arbitration for conciliation for conciliation[256] and if not, then for arbitration.[257] Failure to this, the commissioner has the power to prevent the fragmentation of, or where necessary to allow more unions in the workplace to trade and to lessen the monetary and managerial burden that comes with the employer giving unions organisational rights.[258]

The commissioner has to reflect on, among other things, the nature of the workplace, organisational rights sought and the organisational history of the workplace.[259] In *SACTWU v Marley*,[260] the commissioner tried to avoid the proliferation of unions where the applicant only had 42% and both the applicant and the larger union belonged to COSATU. This would have them compete for members and would cause much conflict.

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251 Section 19 of the *LRA*.
252 Section 19 of the *LRA*.
253 Section 21(1) of the *LRA*.
254 Section 21(2)(a)-(c) of the *LRA*.
255 Section 21(3) of the *LRA*.
256 Section 21(4) of the *LRA*.
257 Section 21(7) of the *LRA*.
258 Section 21(8)(a)(i) and (ii) of the *LRA*.
259 Section 21(8)(b)(i), (ii) and (iv) of the *LRA*.
260 *SACTWU v Marley (SA) (Pty) Ltd* (2000) 21 ILJ 425 (CCMA) 428.

In *Organisation of Labour Affairs (OLA) v Old Mutual Life Assurance Co*,[261] on the other hand, Organisation of Labour Affairs was granted organisational rights even though it only represented 2% of the employees because the company had previously conferred on other similar unions such organisational rights.

In 2014 the legislature amended section 21 of the *LRA* to include subsections (8A) to (8D).[262] Subsection (8A) allows an arbitrator to confer the right of a trade union representative (a shop steward) upon a union that is not a majority union as long as it has the rights to workplace access, deduction of subscriptions and leave for union activities.[263] However, a union can only be entitled to the shop steward's right if no other union has it in the workplace.[264] If a union has all these four rights, it can also be entitled to the right of access to information as long as no other union has this right conferred on it.[265] Therefore the amendments bestow upon an arbitrator the power to grant organisational rights that are usually granted to majority unions, upon unions that are sufficiently representative in the workplace.

Subsection (8C) on the other hand goes further to allow an arbitrator to grant the rights of access to the workplace *inter alia*,[266] to a registered union that does not meet the threshold concluded according to section 18 of the *LRA*, by majority unions and an employer.[267] This is on condition that the parties to the threshold agreement should have been part of the arbitration and that the union or unions seeking organisational representivity "represent a significant interest, or a substantial number of employees, in the workplace".[268] This entails that a minority trade union can obtain organisational rights regardless of threshold agreements. Therefore, this amendment acts as a limitation on the right to establish a threshold of a majority union. The justification for such a limitation would be "significant interest" and "a substantial number of employees".

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261 *Organisation of Labour Affairs (OLA) v Old Mutual Life Assurance Co* (SA) 2003 9 BALR 1052 (CCMA) 1055.
262 Only section 21(8A) and (8C) of the *LRA* will be discussed for the purposes of this research.
263 Section 21(8A)(a)(i) of the *LRA.*
264 Section 21(8A)(a)(ii) of the *LRA.*
265 Section 21(8A)(b)(i) and (ii) of the *LRA.*
266 The rights to workplace access, deduction of subscriptions and leave of for union activities.
267 Section 21(8C) of the *LRA.*
268 Section 21(8C)(a) and (b) of the *LRA.*

2.4.7 Collective agreements

A collective agreement is defined as an agreement concluded in writing by registered unions and employers or employers' organisations or both, pertaining "terms and conditions of employment or any other matter of mutual interest".[269] Section 23(1) of the *LRA* stipulates that a collective agreement has a binding effect on all parties to it, including their members.[270] Such an agreement even binds workers who are non-members to the unions party to it.[271] This is so as long as such workers are recognised in the agreement, or that they are expressly bound and that the unions to the agreement are majority unions.[272]

Bargaining councils comprise registered trade unions and employers' organisations.[273] They exercise their powers and perform functions according to the *LRA*.[274] One of these is the conclusion and enforcement of collective agreements in terms of section 28 of the *LRA*.[275] In terms of section 31, such agreements only bind the parties to it and their members.[276] Therefore, the legislature included section 32 that confers on a bargaining council the privilege to request the Minister of Labour to extend a collective agreement to members not party to the collective agreement but are within its registered scope.[277] The registered union or unions requesting the extension should represent the majority of employees in the workplace[278] otherwise this, among other things, could cause the Minister to deny the extension.[279] However, the Minister cannot deny the request if the council parties are sufficiently representative and if the Minister is content with the fact that a non-extension could undermine sectoral collective bargaining.[280] Therefore, various factors influence the granting or denial of the extension of a collective agreement.

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269 Section 213 of the LRA; *Concor Projects (Pty) Ltd t/a Concor Opencast Mining v Commission for Conciliation, Mediation and Arbitration* 2014 35 ILJ 1959 (LAC) para 30.
270 Section 23(a) and (b) of the *LRA*.
271 Section 23(d) of the *LRA*.
272 Section 23(c)(i)(iii) of the *LRA*.
273 Section 27(1) of the *LRA.*
274 *Confederation of Associations in the Private Employment Sector v Motor Industry Bargaining Council* 2015 36 ILJ 137 (GP) para 33.
275 Section 28(1)(a)-(b) of the *LRA.*
276 Section 31(1)(a)-(c) of the *LRA.*
277 Section 32(1) of the *LRA.*
278 Section 32(1)(a) of the *LRA.*
279 Section 32(3)(c) of the *LRA.*
280 Section 32(5)(a) and (b) of the *LRA.*

2.5 Workplace forums

One of the purposes of the *LRA* is to promote employee participation in the process of making decisions pertaining to the workplace.[281] This is achieved through the establishment of a workplace forum system aimed at regulating non-wage matters in the workers: for instance, establishing "new technologies and work methods".[282] Section 213 of the *LRA* defines workplace forums those created according to Chapter V.[283] Section 79 of the *LRA* states that a workplace forum has the function of striving for the promotion of the interest of the workers and the enhancement of efficiency in the workplace.[284] Moreover, it emphasises the participation of workers in joint decision-making[285] on matters such as disciplinary codes and procedures.[286] Section 80(2) provides that any representative trade union can ask for a workplace forum by applying to the commissioner.[287] However, for the purposes of chapter V section 78 stipulates that a representative union is one that has membership of the majority of employees in the workplace.[288] Thus, workplace forums are formed by majority trade unions. The *LRA* also grants majority unions the power to regulate the issues that are to be dealt with in the joint decision-making through a collective agreement with the employer.[289] This entails including matters that are or are not listed in the *LRA*.[290]

2.6 Conclusion

The constitutional and legislative frameworks of trade unions demonstrate the significance of having an efficient mechanism that entrenches fundamental labour rights founded in international law instruments. The rights to freedom of association, collective bargaining and the right to organise, are structured in such a manner that it ensures that union activity occurs in a democratic sphere. Further, in an effort to add more weight to this, the *Constitution of South Africa* has entrenched a system of seeking guidance from

281 Section 1(d)(iii) of the *LRA*.
282 Davis and Le Roux 2012 *Acta Juridica* 318.
283 Section 213 of the *LRA*.
284 Section 79(a) and (b)of the *LRA*.
285 Section 79(d) of the *LRA*.
286 Section 86(1)(a) of the *LRA*.
287 Section 80(2) of the *LRA*.
288 Section 78(b) of the *LRA*.
289 Section 86(1) of the *LRA*.
290 Section 86(2)(a) and (b) of the *LRA*.

international law, during the interpretation process of the Bill of Rights. After all, international principles are founded upon the constitutional provisions of labour law.

In line with the above, it is evident that trade unions need adequate protection because they play a well-rounded role in labour regulations. This encompasses remuneration and employment conditions which branch off into the general socio-economic and political welfare of employees. The South African labour history and current dispensation testify to this. Previously, trade unions had to contend with past regimes to gain recognition at a political, social and even legal level. The legislature now entrenches freedom of association to give effect to its constitutional and international law mandate. One important aspect is that not only is there a right to join or form unions, the *LRA* also proscribes any conduct that prevents this right, hence drawing on international law instruments. Further, the process of registration simple, allowing for collective bargaining to function alongside organisational right. The leitmotif is to have continuous play of peace and democracy within the workplace.

The current framework of trade unions confers on majority trade unions more rights and influence than other unions. Such unions are entitled to more organisational rights and the right to establish workplace forums. These forums are necessary for allowing employees participate in the workplace. The discrepancy with the *LRA* structure is that it places a limitation on sufficiently representative and minority trade unions to fully exercise their constitutional rights. Sufficiently representative unions only obtain a handful of rights, while minority unions are afforded none. The 2014 amendments attempt to broaden the structure to accommodate these smaller unions. Therefore, the structure of trade unions is dynamic, firmly established and extensively protected.

Chapter 3 Majoritarianism in terms of collective bargaining and Workplace Forums

3.1 Introduction

From the previous chapter, it is clear that the principle of majoritarianism plays an important role within the legislative framework of trade unions. The current chapter deals with what majoritarianism entails, and the support it enjoys under international law and the *Labour Relations Act*.[291] Furthermore, the chapter highlights the overriding mechanisms available for majority trade unions[292] namely voluntary collective bargaining and self-governance; proliferation and thresholds; collective agreements; and workplace forums, all through a system of representivity.[293] It will also be seen that for collective bargaining to be successful, there is a need for fewer and more resilient unions.[294] However, it will also be expounded on, as argued by academic writers, that majoritarianism has shortcomings. Brassey[295] contends that the principle is "too unresponsive" and "too crude" to adequately consider the welfare of smaller unions. Organised Labour, Organised Business and Government have acknowledged the fact that majoritarianism causes "unintended consequences" that go as far as the possible violation of the rights of other unions.[296] Further, the question to be asked is whether the principle is a true reflection of a constitutional multi-party democracy within the ambit of our South African labour law framework. Therefore, the call is that majoritarianism now needs evaluation.[297]

3.2 The meaning of majoritarianism

Majoritarianism is a principle that entails the rule of the majority.[298] It allows an inclination towards "what behoves the strongest" or in other words the "will and preferences of the

291 The *Labour Relations Act* 66 of 1995 (hereafter the *LRA*).
292 *Ndlovu v SA Commercial Catering and Allied Workers Union* 2011 32 ILJ 697 (LC) para 23.
293 Seweryński 2007 *Electronic Journal of Comparative Law* 4.
294 Cohen 2014 *PER / PELJ* 2210.
295 Brassey 2013 *ILJ* 834; Leppan 2016 *Employment Alert* 2: the *LRA* fails to address the grievances of minority unions.
296 Organised Labour, Organised Business and Government 2013 www.goldwagenegotiations.co.za.
297 Organised Labour, Organised Business and Government 2013 www.goldwagenegotiations.co.za.
298 *Free Market Foundation v Minister of Labour* 2016 37 ILJ 1638 (GP) para 37 (hereafter *Free Market Foundation*).

majority", notwithstanding the bearing it has on the minority.[299] The rationale is simply that what the majority decides represents the views of everyone.[300] This entails that there is no need to necessarily consider the views of the minority because they probably share the same or similar interests. It simply does not matter if the application of the principle of majoritarianism "prejudices the rights of, minorities".[301] Consequently, the superseding aim is to satisfy the welfare of the majority[302] and this is also the case within the labour context.

3.3 The endorsement of majoritarianism

The principle of majoritarianism is firmly established in the "labour market regulatory system".[303] It is the subject matter[304] that symbolises the dominance of majority trade unions in the workplace.[305] Majoritarianism is reinforced under international labour law.[306] The Committee of Experts on the Application of Conventions and Recommendations and the Freedom of Association Committee are two main supervisory bodies of the *International Labour Organisation*.[307] They hold that majoritarianism is attuned to freedom of association and that majority unions might have exclusive privileges to bargaining rights as long this does not pre-empt minority trade unions from operating and representing their members in individual disputes.[308] This is a vital resource[309] that affords "authoritative interpretations of the conventions" of the *ILO*, even though the manner in which they are implemented in practice differs from state to state.[310]

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299 Malan 2010 *TSAR* 436.
300 Malan 2010 *TSAR* 436.
301 Snyman 2016 *ILJ* 865; *POPCRU v Ledwaba 2014 JDR* 1450 (LC) para 47 (hereafter *POPCRU*); *United Transport and Allied Trade Union /SA Railways and Harbours Union v Autopax Passenger Services (SOC) Ltd* 2014 35 ILJ 1425 (LC) para 51 (hereafter Autopax Passenger Services).
302 *Ramolesane v Andrew Mentis* 1991 12 ILJ 329 (LAC) 335 (hereafter *Ramolesane*).
303 Organised Labour, Organised Business and Government 2013 www.goldwagenegotiations.co.za; Harvey 2013 *South African Institute of International Affairs* 32.
304 Brassey 2013 *ILJ* 834.
305 Kruger and Tshoose 2013 *PER/PELJ* 289 / 487.
306 *Free Market Foundation* para 58.
307 ILO 2016 http://www.ilo.org; ILO 2016 http://www.ilo.org .
308 Cohen 2014 *PER/PELJ* 2220; Esitang and Van Eck "Big Kids on the Block" 23; *Association of Mineworkers and Construction Union v Chamber of Mines of SA acting in its own name and on behalf of Harmony Gold Mining Co (Pty) Ltd* 2016 37 ILJ 1333 (LAC) para 110 (hereafter *Chamber of Mines II*); *Free Market Foundation* para 112.
309 *Chamber of Mines II* para 110.
310 Compa 2014 *ILRReview* 432.

The *LRA* unapologetically endorses this principle.[311] In *Kem-Lin Fashions CC v Brunton*,[312] the court held that this principle is one of the policies that the legislature had adopted in order to establish an "orderly collective bargaining" and democracy in labour relations. These are objectives that stand as pillars of the *LRA.* Additionally, in *Ramolesane v Andrew Mentis*[313] the court held that even where a substantial number of persons place rational arguments for the sake of their interests, these would be disregarded because the will of the majority has to be upheld. This implies that majoritarianism enjoys preference, as larger unions are deemed to formulate resolves on relevant disputes so that the majority of employees benefit.[314] Hence, the trade union or joint unions with more members than others have more power and influence over the affairs of the workplace.

3.4 A voluntary and self-governing collective bargaining

Collective bargaining is a process that comprises negotiations between trade unions representing their members and employers[315] on conflicting issues of interest[316] to each. This includes working conditions and other matters of mutual interest.[317] In *National Union of Metal Workers of SA v Bader BOP (Pty) Ltd*[318] the court held that collective bargaining is a significant facet of fair labour relations. Khan-Freund is famously known for his view that collective bargaining ensures peace in the workplace for the former and "distribution of work" as well as job security for the latter.[319] Therefore, it benefits both employers and employees and balances up the bargaining power.[320]

311 *NUMSA Obo Members v Transnet Soc Ltd* (P88/16) 2016 ZALCPE 14 (13 May 2016) para 27; Snyman 2016 *ILJ* 865; *Autopax Passenger Services* para 50; Cohen 2014 *PER/PELJ* 2210; Kruger and Tshoose 2013 *PER/PELJ* 286 / 487; Esitang and Van Eck 2016 *ILJ* 763; Baskin and Satgar *New Labour Relations* 12.

312 *Kem-Lin Fashions CC v Brunton* 2001 22 ILJ 109 (LAC) para 19 (hereafter *Kem-Lin Fashions*).

313 *Ramolesane*; Grant 1993 *ILJ* 313.

314 *Fakude v Kwikot (Pty) Ltd* 2013 34 ILJ 2024 (LC) para 24; *United Transport and Allied Trade Union /SA Railways and Harbours Union v Autopax Passenger Services (SOC) Ltd* (2014) 35 ILJ 1425 (LC) para 51.

315 Godfrey *et al Collective Bargaining in South Africa* 1; Van Niekerk *et al Law@work* 385.

316 Botha 2015 *De Jure* 330.

317 Du Toit 2000 *ILJ* 1544.

318 *National Union of Metalworkers of SA v Bader Bop (Pty) Ltd* 2003 (3) SA 513 (CC); (2003) 24 ILJ 305 (CC) para 13 (hereafter *Bader BOP*).

319 Godfrey *et al Collective Bargaining in South* Africa 1 and 4; Du Toit 2000 *ILJ* 1405.

320 Du Toit 2016 *ILJ* 1.

The legislature promotes a voluntarism and self-regulation, or workplace governance in collective bargaining,[321] rather than the duty to bargain.[322] Voluntarism entails that trade unions are not forced to bargain and hence neither the state nor the judiciary can impinge on their decisions. In the place of a duty to bargain, the *LRA* provides majoritarian driven incentives or inducements for majority unions.[323] These include setting thresholds, concluding collective agreements (and their extensions thereof) and establishing workplace forums.[324] Previously collective bargaining was always voluntary until the industrial court imposed a duty to bargain[325] in order to protect individual rights.[326] However, the Task Team identified the fact that this jurisprudence was rather quite confusing because the court did not apply this notion consistently.[327] Furthermore, the concern was that imposing would create a rigid system that would not be compatible with future labour market developments.[328] However, in *South African National Defence Union v Minister of Defence*[329] in answering the question of where there is a duty to bargain, the court held that neither the *Constitution of South Africa*[330] nor the *LRA*[331] imposes anything other than a voluntary process.[332] The Committee on Freedom of Association has stated that collective bargaining has to be voluntary in order for it to be successful.[333] The implication is that a duty to bargain would pre-empt self-governance or self-regulation.[334]

In *Free Market Foundation v Minister of Labour*,[335] the court held that majoritarianism is one of the foundations of self-regulation which in turn is premised on the principle of industrial pluralism. Carney[336] describes industrial pluralism as a concept that envisages

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321 Du Toit 2007 *ILJ* 1407.
322 Godfrey, Theron and Visser 2007 http://poseidon01.ssrn.com.
323 Du Toit *et al Labour Relations Law A Comprehensive Guide* 31; *Free Market Foundation* para 63: The court held that the law is equitably fashioned in the sense that it does not enforce the majoritarian principle.
324 Du Toit *et al Labour Relations Law A Comprehensive Guide* 31.
325 Kruger and Tshoose 2013 *PER/PELJ* 308; Vettori 2005 *De Jure* 382.
326 Managerial Task Team 1995 *ILJ* 292.
327 Managerial Task Team 1995 *ILJ* 292.
328 Van Niekerk *et al Law@work* 46; Benjamin 2016 http://www.r4d-employment.com.
329 *South African National Defence Union v Minister of Defence; Minister of Defence v South African National Defence Union* 2007 (1) SA 402 (SCA) para 2 (hereafter *SANDU*).
330 The *SANDU* case para 25.
331 *The Labour Relations Act* 66 of 1995 (here after the *LRA*).
332 *SANDU* para 18.
333 Molusi 2010 *Obiter* 159.
334 *Food and Allied Workers Union v Ngcobo No 2014* (1) SA 32 (CC) para 29: In terms of self-regulation unions are "free from outside control" and can choose "how they promote the interests of their members through self-chosen programmatic activities."
335 *Free Market Foundation v Minister of Labour* 2016 37 ILJ 1638 (GP) para 29.
336 Carney 1982-1983 *Dickenson Law Review* 253.

collective bargaining as an embodiment of self-governance.[337] This entails that parties can determine their own rules and regulations and establish tribunals to administer matters of mutual interest[338] at their own terms.[339] The legislature has promoted the principle of self-regulation between the employer and organised labour from the beginning. This is evident in the Explanatory Memorandum where the Task Team unanimously preferred a model of collective bargaining where parties are free to regulate their own measures over a statutory duty to bargain or court intervention.[340] Moreover, it also adopted self-regulation through collective agreements which are enforceable through arbitration rather than the courts.[341] In this way, self-regulation aids in cutting down litigation costs.[342] Therefore, self-regulation is the principle where majoritarianism and collective bargaining meet.

3.5 Curbing the proliferation of trade unions

Majority trade unions have the authority to set thresholds for unions to obtain organisational rights in terms of section 18 of the *LRA*. Cohen[343] states that it is the primary object of the section to uphold majoritarianism. This is due to the fact that, as the court identified in *POPCRU v Ledwaba*,[344] section 18 prevents the proliferation of trade unions in the workplace. The court held that where there is already a bargaining relationship between a majority union and an employer, having too many minority unions becomes detrimental in that it weakens collective bargaining.[345] As pointed out earlier, the recent amendments to the *LRA* now allow the commissioner to grant minority unions organisational rights on certain conditions.[346] However, it is still prevalent that a commissioner has the discretion to avoid proliferation when deciding whether to grant organisational rights.[347] Hence, one finds that, among others, the prevention of too many unions is one of the factors that can influence the decision of the commissioner.

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337 Jordaan 1997 *Law, Democracy and Development* 1.
338 Section 1 of the *LRA*; *Kem-Lin Fashions* para 17.
339 Carney 1982-1983 *Dickenson Law Review* 253; Jordaan 1989 *ILJ* 794 and 799.
340 Ministerial Task Team 1995 *ILJ* 292.
341 Ministerial Task Team 1995 *ILJ* 295.
342 Ministerial Task Team 1995 *ILJ* 295.
343 Cohen 2014 *PER/PELJ* 2211.
344 *POPCRU* para 46.
345 *POPCRU* para 46.
346 See 2.4.6 discussion on amendments on acquisition of organisational rights and 4.2 on effects of the amendments made to section 21 of the *LRA*.
347 See 2.4.6 discussion on amendments on acquisition of organisational rights.

An employer can refuse to recognise smaller unions.[348] However, section 22(4) of the *LRA*[349] pertaining to disputes on organisational rights, where a matter has been taken to the Commission for Conciliation, Mediation and Arbitration for conciliation for an arbitration has been interpreted to impose a duty to bargain. In terms of this, the commissioner can force an employer to grant a union organisational rights.[350] However, if there is no resolution under conciliation, a union may take the dispute for arbitration or strike.[351] *Buscor (Pty) Ltd v Transport and Allied Workers Union of South Africa*,[352] in the court held that it is an established principle that unions can strike in order to effect collective bargaining. Trade unions can engage in strike[353] for the purpose of obtaining to access to the workplace and leave for trade union activities.[354]

3.6 The character of bargaining partners

One of the validations for postulating the principle of majoritarianism, as the court in *Kem-Lin Fashions*[355] explained, is to ensure orderly collective bargaining. In *POPCRU*,[356] the court held that collective bargaining and collective agreements are the definitive objective in collective labour relations. Orderly collective bargaining requires unions that are "strong bargaining partners", effectual and influential,[357] because of its adversarial nature.[358] In *National Union of Public Service and Allied Workers Obo Mani and Others v National Lotteries Board*[359] the Constitutional Court pointed to the fact that parties have to be tactically confrontational. This means that the parties negotiate their demands and counter-demands in a hostile manner in the hope that others will concede.[360] Thus, collective bargaining indeed requires robust and relentless parties for it to be effective.

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348 Macun 1997 *Law, Democracy and Development* 75.
349 Section 22(4) of the *LRA*.
350 Gilesfiles 2016 http://www.gilesfiles.co.za.
351 *Bader BOP* para 36; Benjamin 2016 http://www.r4d-employment.com.
352 *Buscor (Pty) Ltd v Transport and Allied Workers Union of South Africa* (Pty) Ltd (J 2316/10, J1604/10) 2013 ZALCJHB 277 (24 October 2013) para 755 (hereafter *Buscor*); *Bader BOP* paras 34 and 13: "The right to strike is an important component of a successful collective bargaining system".
353 See 3.7 on "collective agreements".
354 Section 65(2) of the *LRA*.
355 Kem-Lin Fashions para 19.
356 *POPCRU* paras 20 and 29.
357 Macun 1997 *Law, Democracy and Development* 69 and 70.
358 Davis and Le Roux 2012 *Acta Juridica* 319; Steadman 2004 *ILJ* 1183.
359 *National Union of Public Service and Allied Workers Obo Mani v National Lotteries Board* 2014 (3) SA 544 (CC) 195.
360 Brand "Strike Avoidance – How to Develop an Effective Strike Avoidance Strategy" 9-10.

3.7 The implications of majoritarian collective agreements

The main aim of collective bargaining is to conclude a collective agreement[361] that establishes a workable regulatory system for employees and employers in the workplace.[362] It should be remembered that collective agreements can be concluded outside the scope of the bargaining council in terms of section 23 and within the scope of the bargaining council, in terms of section 32.[363] Since the section 32 agreements are not automatically binding upon non-parties, the minister can extend them.[364] This is due to the fact that they govern the terms and conditions of the employment relationship, including other matters of mutual interest.[365] Therefore, this is significant in that collective agreements thoroughly express the will of the parties in a way an individual contract cannot for the benefit of both parties.

Collective agreements are an expression of the majoritarian principle.[366] Since the courts respect this principle, they cannot restrict the bargaining process in a manner not provided for by the *LRA*.[367] In *Minister of Safety and Security v Safety and Security Sectoral Bargaining Council*[368] the court highlighted the fact that such agreements ought to be granted priority over the *LRA*. This is evident from section 65(1)(a) of the *LRA* that prohibits striking over issues stipulated in a collective agreement.[369] In *Buscor*,[370] the court held that a minority union had the right to continue striking until an agreement had been concluded. If the strike continues, it becomes unprotected.[371] In *Chamber of Mines of SA acting in its own name and on behalf of Harmony Gold Mining Co Ltd v Association*

361 *Buscor* para 757.
362 McGregor *et al Labour Law Rules* 173.
363 See 2.4.7.
364 See 2.4.7.
365 Van Niekerk *et al Law@work* 400 and 403: Among these matters include leaves, bonuses and trade union facilities in terms of a section 32 agreement.
366 Cohen 2014 *PER/PELJ* 2211.
367 *Concor Projects (Pty) Ltd t/a Concor Opencast Mining v Commission for Conciliation, Mediation and Arbitration* 2013 34 ILJ 2217 (LC) para 25.
368 *Minister of Safety and Security v Safety and Security Sectoral Bargaining Council* (J5646/00) 2001 ZALC 83 (6 June 2001) para 13; *SA Breweries v Commission for Conciliation, Mediation and Arbitration* 2002 23 ILJ 1467 (LC) para 12; The *Code of Good Practice: Dismissal* also stipulates that collective agreements are to be afforded prevalence of legislative provisions.
369 Section 65(1)(a) of the *LRA*; See also 3.5.
370 *Buscor* para 777.
371 *Buscor* para 747.

of Mineworkers and Construction Union,[372] the court held that the right to strike is not absolute and can be trampled upon by a section 23(1)(d) collective agreement. The court argued that this is justifiable under majoritarianism for the purposes of orderly collective bargaining.[373] This was reiterated in the Labour Appeal Court[374] which maintained the need for an organised bargaining system complemented by labour peace and fair labour practices. Hence, the aim is to promote a bargaining structure that underpins consistency[375] and order in the work environment.

In keeping with the factor of consistency, Van Niekerk *et al*[376] illustrate that in terms of section 23, there are cases where a union and the employer would agree that remuneration would be reduced in exchange for employment security.[377] The employer is then inclined to apply a uniform standard to all workers, even those who are not party to the agreement. Calitz[378] states that in terms of section 32 extensions, an employer within a sector but not party to the council agreement would be at liberty to grant its workers lesser remuneration and lower working conditions. She argues that this leads to unfair competition for parties to the council.[379] Therefore, for the sake of not only consistency, but also to avoid abuses of the legal system, the extension of collective agreements is necessary.

In *Free Market Foundation*[380] the applicant argued that the extension of agreements was unconstitutional because it fell short of sufficient judicial oversight and ministerial discretion at the expense of non-parties. However, the court upheld majoritarianism on the premise that the *LRA* entrenches mechanisms to protect non-parties against discrimination.[381] This again reinforces the concept of majoritarianism that allows the will of the majority to be upheld. Furthermore, it should be noted that the court in *Transport*

372 *Chamber of Mines of SA acting in its own name and on behalf of Harmony Gold Mining Co Ltd and others v Association of Mineworkers and Construction Union* 2014 35 ILJ 3111 (LC) para 50 (hereafter *Chamber of Mines I*).
373 *Chamber of Mines I* para 55.
374 *Chamber of Mines II*.
375 *Chamber of Mines I* para 56.
376 Van Niekerk *et al Law@work* 402.
377 Van Niekerk *et al Law@work* 402.
378 Calitz 2015 *SA Merc LJ* 2.
379 Calitz 2015 *SA Merc LJ* 2.
380 *Free Market Foundation* paras 51 and 57.
381 *Free Market Foundation* para 118; See 4.5 for the full discussion of the case.

and Allied Workers Union of South Africa v PUTCO,[382] refused to allow a collective agreement to be extended to a minority union that was not party to the dispute. The court argued that the majoritarian principle does not cause a dispute to come to be.[383] Therefore, extending an agreement to a non-party could not possibly entail that such a party became a party to the dispute between the bargaining parties as well.

3.8 Majoritarianism verses a multi-party democracy

The implication of majoritarianism is that the activities and rights of smaller unions are limited. The question one then has is whether majoritarianism is a justifiable rationale for restricting other unions. This requires a consideration of the principle of proportionality[384] which involves the assessing of competing interests.[385] Esitang and Van Eck[386] submit that the majoritarian principle is disproportional with section 23 of the *Constitution of South Africa* because nothing it declares entails that trade union rights should be limited through a legislative approach.[387] Additionally, they argue that the framework of freedom of association in chapter II of the *LRA*, does not demand a threshold system.[388] Macun[389] is of the view that it is unfavourable to deny smaller unions organisational rights based on merely on administrative reasons such as proliferation.[390] A union that does not reach the threshold is prevented from having a representative.[391] This entails that employees in a minority or sufficiently representative union cannot be represented in disputes because their right to choose a representative is tied to the threshold requirement.[392] Theron,

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382 Transport and Allied Workers Union of South Africa v PUTCO Limited (CCT94/15) 2016 ZACC 7; 2016 37 ILJ 1091 (CC); 2016 6 BLLR 537 (CC); 2016 (4) SA 39 (CC) (8 March 2016) para 66.

383 See 4.4 for the full discussion of the case.

384 *S v Makwanyane* (CCT3/94) 1995 ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; 1996 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995) 104; Alon-Shenker and Davidov 2013 *McGill LJ* 2013 375: Proportionality aims "to limit abuse of power and infringement of human rights and freedoms"; see also Botha 2016 *THRHR* 373.

385 Petersen 2014 *SAJHR* 405.

386 Esitang and Van Eck 2016 *ILJ* 777.

387 Esitang and Van Eck *ILJ* 2016 773: they argue that the only justifiable limitation on freedom of association that the Constitution of South Africa allows is that of closed shop agreements.

388 Esitang and Van Eck *ILJ* 2016 768.

389 Macun 1997 *Law, Democracy and Development* 81.

390 *United Association of SA v BHP Billiton Energy Coal SA Ltd* 2013 34 ILJ 2118 (LC): the court went to the extent of holding that majority unions have the right amend their agreements to set the threshold even higher (where necessary). In simple terms, the aim is to allow order to prevail by curbing over-crowdedness and creating an environment where only a handful of larger trade unions can operate (Macun 1997 *Law, Democracy and Development* 70). If they do not grow (Baskin and Satgar *New Labour Relations* 12) they deteriorate (Du Toit *et al Labour Relations Law: A Comprehensive Guide* 39)

391 Esitang and Van Eck 2016 *ILJ* 768.

392 Esitang and Van Eck 2016 *ILJ* 768.

Godfrey and Fergus[393] challenge collective agreement parties to concede to the fact that all workers have a choice on who should represent them. They warn about too much emphasis being placed on trying to preserve the conventional system that other factors can be overlooked.[394] Accordingly, majoritarianism is not suitable any more in the current labour relations sphere.[395] It needs to evolve to allow for flexibility[396] and an adequate realisation of constitutional rights.

Section 1 of the *Constitution of South Africa* promotes a system of democracy on the premise of the founding values such as equality, freedom and a multi-party government,[397] hence, endorsing pluralism.[398] This establishes a multi-party democracy model that is especially seen in the political sphere that allows all persons to freely associate and to be treated equally based on their choices.[399] Additionally, the minority are given a voice within political parties.[400] This has been argued to also apply in labour relations.[401] Malan[402] argues that the utilitarian concept central to majoritarianism is undemocratic as it supports only the majority.[403] He further contends that section 23 of the *Constitution of South Africa* has to be interpreted in the light of section 1, in that collective bargaining should be exercised equally by all unions to allow democracy to prevail within the workplace.[404] Smaller unions are capable of sustaining the interests of their members and provide for "good lines of communication and participation".[405] Additionally, Kruger and Tshoose[406] state that minority unions are instrumental in equalising bargaining power. Therefore, it can be argued that multi-unionism should be practised based on a multi-party model.[407]

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393 Theron, Godfrey and Fergus 2015 *ILJ* 867.
394 Theron, Godfrey and Fergus 2015 *ILJ* 867: they refer to the fact that situations like Marikana can occur; see 4.8 on the discussion about inter-union rivalry and the deteriorating role of trade unions.
395 Benjamin 2016 http://www.r4d-employment.com.
396 Leppan 2016 *Employment Alert* 3.
397 Section 1 of the *Constitution of South Africa*.
398 Malan 2010 *TSAR* 427-440.
399 Esitang and Van Eck 2016 *ILJ* 772.
400 Esitang and Van Eck "Big Kids on the Block" 1-18.
401 Botha 2015 *De Jure* 329.
402 Malan 2010 *TSAR* 427-440.
403 Malan 2010 *TSAR* 427-440.
404 Malan 2010 *TSAR* 427-440; Kruger and Tshoose 2013 *PER/PELJ* 312 / 487.
405 Macun 1997 *Law, Democracy and Development* 71.
406 Kruger and Tshoose *PER / PELJ* 287 / 487; Macun 1997 *Law, Democracy and Development* 71: This is contrary to the view that minority unions "fragment the trade union movement" and pre-empt worker participation.
407 Esitang and Van Eck "Big Kids on the Block" 1-18.

3.9 Majoritarianism in workplace forums

The idea of adopting workplace forums was triggered by the confrontational and antagonistic manner of bargaining amongst trade unions and the employer.[408] Hence, the incorporation was intended to balance the adversarial nature of collective bargaining.[409] The workplace forum notion purports to function alongside collective bargaining, and not to undercut it.[410] In essence, it ensures the meticulous realisation of the bargaining system.[411] It achieves this by creating an "ongoing dialogue" between the workers and the employer[412] giving workers the opportunity to be involved in the decision-making power[413] and improved efficiency and competence.[414] Therefore, the framework of workplace forums gives effect to section 1(d)(iii) of the *LRA* that advocates for workers to be part and parcel of making decisions in the workplace,[415] in short, worker participation. The return of South Africa into the international market arena entails competition at an international level, and thus there was a need to "improve productivity levels".[416] This is evident in section 7 of the *LRA*[417] which requires the boosting of dynamic involvement in "economic organisation, management and productivity".[418]

There are vital issues such as production that collective bargaining cannot cover.[419] Allowing for an accommodating platform that incorporates flexibility is fundamental as market demands grow.[420] Further, one significant characteristic is that all workers are involved and not just those who belong to a (majority) union.[421] This grants employees belonging to minority unions a chance to contribute[422] and to consider various interests with the employer, leading to the execution of constructive mechanisms.[423] One would argue that this allows diversity and motivation for employees that are usually overlooked.

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408 Du Toit *et al The Labour Relations Act of 1995* 45; Van der Walt 2008 *SAJBM* 45.
409 Wiese 2013 *ILJ* 2468; Botha 2015 *PER/PELJ* 1812.
410 Ministerial Task Team 1995 *ILJ* 310; Botha 2015 *PER / PELJ* 1813.
411 Kruger and Tshoose 2013 *PER/PELJ* 314 / 487.
412 Ministerial Task Team 1995 *ILJ* 310.
413 Botha 2015 *PER/PELJ* 1813.
414 Ministerial Task Team 1995 *ILJ* 310.
415 Section 1(d)(iii) of the *LRA*.
416 Ministerial Task Team 1995 *ILJ* 310.
417 Section 7 of the *LRA*.
418 Wiese 2013 *ILJ* 2470.
419 Botha 2015 *PER/PELJ* 1813.
420 Ministerial Task Team 1995 *ILJ* 312.
421 Ministerial Task Team 1995 *ILJ* 312.
422 Kruger and Tshoose 2013 *PER/PELJ* 314 / 487.
423 Seweryński 2007 *Electronic Journal of Comparative Law* 9.

The system of workplace forums is, however, rooted in majoritarianism. It works by granting majority unions the power to form of workplace forums.[424] Again, the rationale is to underpin strong actors that can be more efficient within labour relations.[425] What this implies is that worker participation places its reliance on strong unions and not necessarily on the involvement of workers.[426] Kruger and Tshoose[427] argue that this muffles the voice of minority unions and reinforces "majority trade union monopoly".[428] Accordingly, one would agree with Verotti[429] who states that allowing majority unions to dominate workplace forums is simply allowing adversarialism to infiltrate such forums as the distinction of the role of trade unions becomes unclear.

The irony of it all is that trade unions are unwilling to establish these forums because they view it as the relinquishing or undermining their power and collective bargaining.[430] Kirsten and Nel[431] argue that the legislature should review workplace forums' frameworks so that it is given an extensive coverage to be "worker-driven rather than union-driven". The researcher agrees with the aforementioned authors about forums being more "worker-driven" because, as seen, unions are reluctant to establish them. This makes a useful mechanism dormant at the expense of employees.[432] It can be argued that indeed, if the *LRA* professes to improve worker interests and economic developments, then workplace forums should be allowed to operate independently of unions. Consequently, this makes the entire aim to advance worker participation improbable[433] "depriving the workplace forum of the ability to be proactive"[434] and has caused the institution of workplace forums to be unsuccessful.[435]

3.10 Conclusion

The principle of majoritarianism upholds the desires of the masses. This principle thrives under international law and the *LRA* promoted the institution of a voluntary collective

424 See 2.5 for a discussion on workplace forums.
425 Verotti 2005 *SA Merc LJ* 301.
426 Verotti 2005 *SA Merc LJ* 301.
427 Kruger and Tshoose 2013 *PER/PELJ* 314 / 487.
428 Brassey 2013 *ILJ* 833.
429 Verotti 2005 *SA Merc LJ* 302.
430 Verotti 2005 SA *Merc LJ* 301; Steadman 2004 *ILJ* 1190.
431 Kirsten and Nel 2000 *South African Journal of Labour Relations* 52.
432 Verotti 2005 *SA Merc LJ* 302
433 Benjamin 2012 *Acta Juridica* 23.
434 Botha 2015 *PER / PELJ* 1827.
435 Olivier 1996 *ILJ* 810; Kruger and Tshoose 2013 *PER/PELJ* 313 / 487.

bargaining system based on self-regulation. A duty to bargain is not preferred because of restrictive and unwanted reins that would been tied to collective bargaining. It should be remembered that this has not always been the case, given the state of past struggles. The perks that come with majoritarianism are that majority unions can prevent the fragmentation of small unions through thresholds, as this may undermine collective bargaining. Further, majority unions can also conclude collective agreements as an inducement for underpinning majoritarianism.

On the other hand, smaller unions may strike too, or with the aid of a commissioner, obtain organisational rights. This indicates the changing concept of majoritarianism within the labour context. However, there are still restrictions. Thus the argument still persists that majoritarianism unjustifiably impinges on the rights of other unions, particularly freedom of association. Apart from evoking the rights to constitutional labour rights, some writers have argued that majoritarianism does not reflect the true constitutional model of democracy. Ironically, the *LRA* opines to uphold democracy.

The *LRA* also provides for workplace forums for the benefit of allowing workers to participate in decisions that cannot be made in collective bargaining. However, these have been criticised for being quiescent because their establishment is reliant on majority unions who are unwilling to form them. Therefore, one finds majoritarianism being extended to a system meant to further worker participation. In this case, it is clear that the principle has been established in an area where it does not belong. Nevertheless, regardless of some concerns of constitutional infringements, majoritarianism and its reinforcing mechanisms are the underlying foundations to an effectively functioning system of orderly collective bargaining.

Chapter 4 The interpretation and application of majoritarianism by the South African judiciary

4.1 Introduction

The preceding chapter has illustrated the seemingly unshakeable stronghold that majoritarianism has in labour relations. However, it is also prevalent that there is a shift within the legislative framework. This chapter will highlight the identified implications of the legislative amendments to decode how effective they are. The legislature has established the provisions in the *LRA*,[436] in a manner that is clear for unions to determine what rights apply to them.[437] However, this is currently not the case. Hence the chapter will analyse the judicial (this includes the interpretation by the courts and Commission for Conciliation, Mediation and Arbitration for conciliation) and legislative (ministerial decisions and the provisions of the *LRA*) interpretations of majoritarianism. This will be for the purpose of illustrating that smaller unions are experiencing difficulties in obtaining organisational rights because the judiciary is rather conflicted in interpreting and applying majoritarianism.

The aspects of smaller unions being part of disputes and being bound by collective agreements in terms of case law will also be discussed. This will also include the determination of what the workplace entails and the significance of ministerial extensions. The essence of all this is to establish a clear demarcation of where majoritarianism applies and where it does not. Moreover, it will also be seen that union rivalry has heightened in the face of the current legislative framework because smaller unions are asserting their right to freedom of association. This will also include a discussion of the deteriorating role of larger unions and the issue of Marikana to illustrate the adverse effects of neglecting worker interests over union interests. Therefore, what will be demonstrated is the current South African perspective regarding majoritarianism.

436 The *Labour Relations Act* (hereafter the *LRA*).
437 Du Toit *et al Labour Relations Law* 251.

4.2 The effects of section 21 amendments

The Memorandum of Objects Labour Relations Amendment Bill of 2012 explains that the section 21 amendments increase the discretion of a commissioner when granting organisational rights.[438] This is so where a union is sufficiently representative in terms of the current section 21(8A) of the *LRA* as amended, and even where this is not the case, in terms of section 21(8C), as long as majority unions are involved in the process.[439] The significant aspect of the amendments is that the commissioner has to balance the rights of the union seeking organisational rights and the majority unions in the workplace.[440] This implies that the decision of a commissioner would prevail over the threshold established in the workplace where such prejudices other unions.[441] In addition, certain rights that were only available to majority unions can now be extended to minority unions.[442] Furthermore, the coverage or scope of collective bargaining might just be broadened because now smaller unions are granted the opportunity to have access to the workplace.[443]

One of the concerns about the amendments is whether the *LRA* still upholds majoritarianism.[444] However, section 18 of the *LRA* still exists, although this has the potential to arouse conflict between this section and section 21.[445] A majority unions can also utilise industrial action to induce the employer to set a threshold agreement that would govern organisational rights.[446] Furthermore, where a union does not satisfy the criteria of "a significant interest" and/or "a substantial number of employees",[447] it cannot obtain the rights it wants.[448] The *LRA* does not explain what the phrases "significant interest", what "a substantial number of employees" entails or how this is determined. Furthermore, the fact that a majority union is entitled to participate in arbitration means

438 Memorandum of Objects 2012 www.labour.gov.za.
439 See 2.4.6 on the amendments on acquisition of organisational rights.
440 Memorandum of Objects www.labour.gov.za.
441 See 2.4.6 on the amendments on acquisition of organisational rights.
442 Van Niekerk *et al Law@work* 376.
443 Coetzee and Kelly 2013 http://www.hrpulse.co.za.
444 Esitang and Van Eck "Big Kids on the Block" 1-10; Snyman 2016 *ILJ* 865.
445 Esitang and Van Eck "Big Kids on the Block" 1-10; Snyman 2016 *ILJ* 865; Esitang and Van Eck (2016 *ILJ* 777) are of the view that scrapping off section 18 would have rectified the problem. However, it can be argued that this might be too drastic and lead to the downfall of majoritarianism.
446 Esitang and Van Eck "Big Kids on the Block" 10.
447 This criterion is criticised to be ambiguous (see Esitang and Van Eck 2016 *ILJ* 777).
448 Snyman 2016 *ILJ* 865.

that it has an influence in determining these phrases. Consequently, resolving the discrepancies is far from over.[449]

4.3 Acquisition of organisational rights by minority unions

Section 21 of the *LRA* furnishes a procedural framework of obtaining organisational rights. Section 20 allows unions to regulate their organisational rights through a collective agreement with an employer, outside the ambit of section 18.[450] Grogan[451] avers that section 20 buttresses the procedural mechanism of obtaining organisational rights by allowing unions to negotiate with the employer. Cohen[452] argues that discord arises between sections 18 and 20 where minority unions want to use the latter section. He[453] avers that a literal interpretation would lead to the conclusion that the two sections can operate in the same sphere, while a purpose approach demands that the majoritarian principle be upheld. Therefore, this causes conflict between trade unions because a smaller union wanting to conclude an agreement would be challenged by a larger union asserting its majority status.

In *National Union of Metalworkers of SA v Bader Bop (Pty) Ltd*,[454] the constitutional court argued that denying minority unions an opportunity to utilise section 20 was a constricted and incorrect way of interpreting it. O'Regan J[455] held that majoritarianism should allow minority unions to exercise their freedom of association and to occasionally "challenge majority unions".[456] In his concurring judgement, Ngcobo J[457] held that unrepresentative trade unions have to negotiate for organisational rights, while representative unions already have them at their disposal. In *POPCRU v Ledwaba*[458] on the other hand, Snyman J particularly argued that there was nothing spectacular about section 20.[459] The

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449 Esitang and Van Eck "Big Kids on the Block" 1-10.
450 See 2.4.5.3 on the discussion about minority trade unions.
451 Grogan *Workplace Law* 423.
452 Cohen 2014 *PER / PELJ* 2216.
453 Cohen 2014 *PER / PELJ* 2216.
454 *National Union of Metalworkers of SA v Bader Bop (Pty) Ltd* 2003 (3) SA 513 (CC); 2003 24 ILJ 305 (CC) para 41 (hereafter Bader BOP).
455 *Bader BOP* para 41.
456 *Bader BOP* para 31
457 *Bader BOP* para 66.
458 *POPCRU v Ledwaba NO 2014 JDR 1450 (LC)* para 14 (hereafter *POPCRU*): the arbitrator relied on *Bader BOP* in finding that denying the minority the right to conclude an agreement violates the unions' right to engage in collective bargaining section 23(5) of the Constitution of South Africa.
459 In both *Bader BOP* and *POPCRU*, the courts acknowledged that section 20 can be utilised by both representative and non-representative unions, subject to section 18.

concern was that upholding section 20 would make it have the same implications as section 18 which would in turn become redundant.[460] The court eventually held that in order to prevent the subversion of section 18 and its binding effect, the majority agreement should override the minority.[461]

What can be surmised from *Bader BOP is* that minority unions have the right to freedom of association and can thus challenge larger unions. Section 20 is one of the few means by which they can achieve this. However, in *POCRU* it is clear that upholding section 20 agreements causes confusion by allowing smaller unions to use the back door rather than go through the proper channel which is section 18. Nevertheless, section 20 cannot be entirely disregarded because it exists for a reason, as illustrated in *Bader BOP.* The point is that minority unions should not be denied processes to obtain them.

4.4 Minority unions as parties to a dispute

In *Transport and Allied Workers Union of South Africa on behalf of Members v Algoa Bus Company (Pty) Ltd*,[462] the Labour Court concluded that since a demand cannot be made of employees with whom the employer does not have a dispute; it was impermissible to lock out the members of TAWUSA as they were not on strike. However, on appeal in *Putco (Pty) Limited v Transport and Allied Workers Union of South Africa*,[463] the Labour Appeal Court concluded that TAWUSA rejected PUTCO's demand and that the lock-out was lawful. The Constitutional Court, in *Transport and Allied Workers Union of South Africa v PUTCO Limited*,[464] found that in order for an exclusion of employees from a workplace to amount to a lock-out in terms of section 213 of the LRA, that exclusion must serve the purpose of compelling the excluded employees to accept a demand. This means that a demand must have been made to the employees sought to be locked out. As no such demand was made in this case, TAWUSA's members could not be locked

460 *POPCRU* para 44: the court argued that all provisions that apply to all collective agreements would also apply to a section 20 agreement if upheld.
461 *POPCRU* para 56; Cohen 2014 *PER / PELJ* 2217.
462 *Transport and Allied Workers Union of South Africa on behalf of Members v Algoa Bus Company (Pty) Ltd* 2013 ZALCJHB 187; 2013 34 ILJ 2949 (LC) paras 13 and 16.
463 *PUTCO (Pty) Limited v Transport and Allied Workers Union of South Africa* 2015 ZALAC 14; 2015 36 ILJ 2048 (LAC) paras 67 and 70 (hereafter *PUTCO LAC*).
464 *Transport and Allied Workers Union of South Africa v PUTCO Limited* (CCT94/15) 2016 ZACC 7; 2016 37 ILJ 1091 (CC); 2016 6 BLLR 537 (CC); 2016 (4) SA 39 (CC); 2016 (7) BCLR 858 (CC) (8 March 2016) paras 16, 36 and 40 (hereafter *PUTCO*).

out.[465] The Court further found that even if PUTCO's conduct did constitute a lock-out for the purposes of section 213, it did not comply with section 64(1) of the *LRA*.[466] The Court reasoned that because there had been no attempt at conciliation between PUTCO and TAWUSA, no industrial action, including a lock-out, was yet permitted.[467] The fact that TAWUSA had an interest in the outcome of the dispute at the Bargaining Council did not mean that it was a party to the dispute for the purposes of section 64(1).[468]

The Labour Court of Appeal contended that a lock-out aims to uphold majoritarianism.[469] The Constitutional Court, acknowledged the fact that not locking out all employees puts the employer in a difficult position[470] and that the majoritarian principle is fundamental.[471] However, the Court highlighted the fact that parties to a dispute cannot change halfway through the process.[472] This would allow the "perversion of the principle" of majoritarianism.[473] Therefore, the court held that the principle was not pertinent in the current case.[474] One has to agree with the court ruling as it clearly illustrates that a reliance on majoritarianism in every situation could have adverse implications. The *LRA* requires that the criteria used to bind non-parties is fair.[475] Allowing the employer to lock-out employees not party to a dispute would have been detrimental to their interests. Therefore, it is noted that in exercising the majoritarian principle, parties in labour relations should not neglect or overlook certain processes that govern it, in order to avoid abusing the principle.

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465 *PUTCO* para 39.
466 *PUTCO* para 40; Section 64(1) stipulates that an employee may strike and an employer has recourse lock-out striking employees (see also *PUTCO* para 41).
467 *PUTCO* paras 45, 47 and 71.
468 *PUTCO* para 51: "Contrary to the Labour Appeal Court's finding, TAWUSA's interest in the dispute at the Bargaining Council amounts to a mere hope or expectation (spes); its interest in the negotiations was confined to a hope that a favourable collective agreement would eventually be forthcoming".
469 *PUTCO LAC* para 68.
470 *PUTCO* para 71.
471 *PUTCO* para 61.
472 *PUTCO* para 49.
473 *PUTCO* para 62.
474 *PUTCO* para 62.
475 Section 32(2) of the *LRA*; *PUTCO* paras 55.

4.5 The extension of collective agreements to employees in the workplace who are not members of the majority trade union

In *Association of Mineworkers and Construction Union v Chamber of Mines of SA acting in its own name and on behalf of Harmony Gold Mining Co (Pty)*[476] the first respondent, the Chamber of Mines of South Africa (Chamber), is an employer's organisation that found itself in two separate disputes of mutual interests with the other respondents (National Union of Mineworkers and Solidarity) and with the appellant (AMCU). The Chamber eventually entered into an agreement with the other unions, which it contemplated to be binding in terms of section 23.[477] However, the appellants argued that the Chamber was a bargaining council and that section 32 was applicable in terms of collective agreements concluded at sectoral level.[478] AMCU embarked on a strike, which the Chamber argued to have been unprotected on the premise of there being a binding collective agreement.[479] The courts had to establish whether the agreement was concluded in terms of section 23 or section 32 of the *LRA*.[480] Based on the labour court finding that an agreement is determined not by its nature but rather by the institution that concluded it,[481] the labour appeal court held that the chamber was not a bargaining council.[482] Thus, section 23 applied.

The appellants argued that section 23(1)(d)(iii) of the *LRA* read with section 65(3) of the *LRA* was unconstitutional.[483] This was because section 23(1)(d) read with section 65(1)(a) infringed on their right to strike as a minority due to its binding nature.[484] The

476 *Association of Mineworkers and Construction Union v Chamber of Mines of SA acting in its own name and on behalf of Harmony Gold Mining Co (Pty) Ltd* 2016 37 ILJ 1333 (LAC) paras 8 to 12 (hereafter *AMCU v Chamber*).
477 *AMCU v Chamber* paras 13 to 14.
478 *AMCU v Chamber* para 27.
479 *AMCU v Chamber* paras 13, 15 and 17.
480 *AMCU v Chamber* paras 5; The differences between the two have already been discussed in 2.4.7 and 3.7.
481 *Chamber of Mines of SA acting in its own name and on behalf of Harmony Gold Mining Co Ltd v Association of Mineworkers and Construction Union* 2014 35 ILJ 3111 (LC) 2014 ILJ para 21.
482 *AMCU v Chamber* para 30; the court argued that both sections allow for multiple parties to an agreement and that they still uphold collective bargaining (paras 41, 42 and 47). Hence, the absence of a council did not pre-empt this. The court held that the "similarities do not make one into the other" (para 46). This entails that just because an agreement can have a number of parties on each side does not make the parties a bargaining council and it does not temper with the bargaining process. Therefore, the court places emphasis on the importance of drawing a clear distinction between the two different agreements.
483 *AMCU v Chamber* paras 1.
484 *AMCU v Chamber* para 93.

appellants also challenged the operation of majoritarianism in that it lacked safeguards in section 23 that were found in section 32.[485] However, the court held that the measures found in section 32 "are not a less restrictive means at all".[486] According to the court it was feasible for the appellants to be bound by the agreement "concluded at workplace level between the employer".[487] This was justifiable in terms of section 36 of the *Constitution of South Africa* based on majoritarianism.[488] Anything else would have been impractical and would undercut the efficiency an agreement and collective bargaining.[489] Accordingly, the case affirms the limitation of the rights of smaller unions for the purposes of protecting a majoritarian collective bargaining.[490]

Similarly, in *NUMSA Obo Members v Transnet Soc Ltd*,[491] the applicant argued, among other things, that the existing agreement concluded at the Transnet Bargaining Council was not binding because it was not extended in terms of section 32. The agreement allowed for the termination of employment of those employed on fixed-term contracts. However, the respondent argued that section 23(1)(d) was applicable.[492] In considering section 23, the court found that the employees that were non-parties to the agreement were identified in it and were expressly bound.[493] The rationale was premised on the sanctity of collective bargaining and the majoritarian principle.[494] Therefore, the court agreed that section 23, and not 32, applied because the former applied to all employees while the latter is particularly purposed for non-parities.[495] This entails that the applicant and its members were bound to the agreement and that the termination of its members was justifiable. The court also held that if the employer wanted to have the agreement bind the applicant as a non-party, it would have done so.[496]

The supposition the court gives is that a bargaining council can choose whether to rely on sections 23 or 32. However, one cannot agree with the findings of the court. This is

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485 *AMCU v Chamber* paras 93 and 104.
486 *AMCU v Chamber* para 117.
487 *AMCU v Chamber* para 117; See 4.6 on establishing the "workplace".
488 *AMCU v Chamber* paras 111 and 118.
489 *AMCU v Chamber* para 117.
490 See 3.7 on the implications of majoritarian collective agreements.
491 *NUMSA Obo Members v Transnet Soc Ltd* (P88/16) 2016 ZALCPE 14 (13 May 2016) para 10 (hereafter *NUMSA and Transnet*).
492 *NUMSA and Transnet* para 10.
493 *NUMSA and Transnet* para 17.
494 *NUMSA and Transnet* para 27
495 *NUMSA and Transnet* paras 27 and 33.
496 *NUMSA and Transnet* para 28

because, the *LRA* specifically distinguishes between the two sections.[497] It is suggested that the court should have upheld that the agreement needed to be governed by section 32. Such a decision would not have proscribed the council to request the minister to extend the agreement to non-parties. Further, such a decision would have still allowed majoritarianism to be upheld, only under proper provisions. Consequently, one can argue that the court erred and that the kind of interpretation it used could cause even more adverse implications in the face of the current highly criticised majoritarian principle.

In *City of Cape Town v Independent Municipal and Allied Trade Union*,[498] the court recently held that there was a difference between sections 23 and 32. The court had to answer a question as to whether a collective agreement that was invalid in terms of the constitution of the council could bind the parties under section 23.[499] Additionally, the court had to decide whether both sections 23 and 32 could apply to a bargaining council collective agreement.[500] Rabkin-Naicker J[501] held that bargaining councils and collective agreements were created to govern collective bargaining at sectoral level. This entails, he argued, that such an agreement is binding in terms of part C of chapter III of the *LRA.*[502] Therefore, a bargaining council collective agreement is a distinctive kind that "cannot 'morph' into an s 23 collective agreement" where it does not comply with the constitution of a council.[503] This case places emphasis on the fact that the *LRA* provisions are clear as to the application and binding nature of bargaining council collective agreements and those concluded outside the council. It can be argued that if it were not so, the legislature would have provided otherwise. Thus, a bargaining council cannot rely on section 23 or both when it deems it convenient for its interests and neither can it do so under the auspices of majoritarianism.

497 See 3.7 on the implications of majoritarian collective agreements.
498 *City of Cape Town v Independent Municipal and Allied Trade Union* 2016 37 ILJ 147 (LC) para 15 (hereafter *City of Cape Town*).
499 *City of Cape Town* para 11.
500 *City of Cape Town* para 12.
501 *City of Cape Town* para 12.
502 *City of Cape Town* para 12: Sections 31 and 32 of the LRA deal specifically with the binding nature of collective agreements concluded in a bargaining council.
503 *City of Cape Town* para 15.

4.6 Establishing the 'workplace'

Trade unions that are unsuccessful in negotiations and cannot strike or approach commissioner to assist them to resolve their dispute.[504] However, the commissioner has to consider, among others, the workplace.[505] Determining the term "workplace" entails where a company has different operations has proved to be a challenge.[506] One of the definitions of the workplace in section 213 of the *LRA* states that this entails "the place or places where the employees of an employer work" and this includes the independent operations in which each is construed as a workplace.[507] This is dependent on provided criteria[508] the "size, function, or organisation" of the operation.[509] In *Oil Chemical General and Allied Workers Union v Volkswagen of SA (Pty) Ltd*,[510] the commissioner held that the phrase *workplace* in section 18 should be regarded as bargaining units. He contended that the legislature did not intend to promote majoritarianism in a manner that would weaken the rights of majority unions.[511] Therefore, this decision strengthens the standing of the majority that have already established themselves in a unit. It also makes the standard of threshold reasonable for those unions who are seeking organisational rights. The definition is clear and rational[512] and thus applies throughout the *LRA* as "an established principle of interpretation of statutes" unless stated otherwise.[513]

4.7 Majoritarianism and ministerial discretion

In *Free Market Foundation v Minister of Labour*,[514] the applicant filed an application arguing that ministerial extensions of collective agreements to non-parties[515] violate the

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504 See 2.4.6 on the amendments on acquisition of organisational rights" for a discussion of the considerations by the commissioner.
505 See 2.4.6 on the amendments on acquisition of organisational rights" for a discussion on the considerations by the commissioner.
506 Du Toit *et al Labour law relations* 255.
507 Section 213 of the *LRA*: The LRA defines the workplace, among others, as "the place or places where the employees of an employer work", this includes the independent operations with each being deemed as a workplace.
508 *AMCU v Chamber* para 50.
509 Section 213 of the *LRA*.
510 *Oil Chemical General and Allied Workers Union and Volkswagen of SA (Pty) Ltd* 2002 23 ILJ 220 (CCMA) 229.
511 It was identified that not even NUMSA, the majority union, had the majority of members in the entire workplace.
512 *AMCU v Chamber* para 48.
513 *AMCU v Chamber* para 51.
514 *Free Market Foundation v Minister of Labour* 2016 37 ILJ 1638 (GP) para 1 (hereafter *Free Market Foundation*).
515 *Free Market Foundation* para 14.

certain rights in the Bill of rights[516] and rule of law envisaged in section 1(c) of the *Constitution of South Africa*.[517] According to the applicant, section 32 had to be declared invalid to the extent that extensions may be made even where the requirement of majoritarianism was not satisfied.[518] The minister has more discretion where agreements of parties with sufficient representivity exist, than where they are the majority. This makes private actors decide the fate of the rest, especially when such actors are only sufficiently representative.[519] Therefore, the applicant wanted ministerial discretion to be widened where the parties were the majority and for ministerial extensions to be completely disallowed where the parties were only sufficiently representative.[520]

The court held that what was significant was not the "strict numerical form of majoritarianism", but the aspect of its coverage on employees at sectoral level.[521] This entails that there is a flexible application of majoritarianism when it comes to ministerial extensions. Therefore, having sufficient representivity also suffices to allow extensions.[522] The court relied on section 39(1)(b) of the *Constitution of South Africa* and the *ILO* instruments, as well as section 3 of the *LRA* that reinforces the application of international law to justify ministerial extensions.[523] The prevalent voluntary system does not force the

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516 *Free Market Foundation* para 9: The applicant argued that section 32 infringes fundamental rights in the Bill of rights such as the equality, dignity, administrative justice, freedom of association and fair labour practices.

517 Section 1(c) of the *Constitution of the Republic of South Africa*, 1996; *Free Market Foundation* para 9; At para 44, the appellant also argued that the role of ministerial should be subjected to substantive review because it allows the binding non-parties without sufficient discretion in consideration of public interest (para 1 of the *FMF vs Minister of Labour* notice of motion http://www.politicsweb.co.za). Thus, it violates legality and administrative action (*Free Market Foundation* para 45). However, even though the court acknowledged that there could be room for review, it held that reading into the *LRA*, the duty to consider public interest would not establish an adequate standard of review (para 48). The rationale was that considering public interest would entail using a criteria of enquiry and this requires a "case-by-case" analysis (para 48). Therefore, establishing a single criteria of review would be difficult as many factors have to be considered and so current mechanisms appear to be sufficient.

518 Para 2 of the *FMF vs Minister of Labour* notice of motion *http://www.politicsweb.co.za*; Section 32(2) requires that the minister "must" extend a collective agreement, at the request of the council, where certain requirements, such as the fulfilment of the majoritarian numerical element, are met. On the other hand, section 32(5) which states that the minister "may" make an extension using his discretion even where the parties to the agreement are only sufficiently representative. This is the entails that the minister can refuse to extend the agreement. However, he may extend if denying the extension would weaken sectoral collective bargaining (section 32(5)(b).

519 *Free Market Foundation* para 44.

520 This would be a "shift in policy"(*Free Market Foundation* para 30).

521 *Free Market Foundation* paras 39, 40 and 112: The applicant abandoned its majoritarianism challenge when the respondents gave in their answering affidavits. Nevertheless, the court decided to evaluate it (paras 35, 36and 43).

522 *Free Market Foundation* paras 37 and 40.

523 *Free Market Foundation* para 112.

establishment of bargaining councils.[524] The minister is only involved to give statutory effect to agreements of the bargaining council.[525] This government favoured policy[526] and an intentional legislative move aims to restrict ministerial discretion and review[527] so as to protect majoritarianism[528] and to foster sectoral collective bargaining and the welfare of workers without collective bargaining power.[529]

The court also highlighted the fact that the *LRA* creates measures to ensure that the minister applies her mind in that the agreement terms are not prejudicial to non-parties.[530] Further, as a "safety valve" for the protection of their interests,[531] non-parties have the right to apply for an exemption from being covered by the agreement.[532] Moreover, the legislature has set factors that guide the minister to make sound decisions for the protection of non-parties. The 2014 amendments were intended to develop the proficiency and fairness of exemption mechanism.[533] Where the bargaining council does not constitute a majority, the minister has to invite comments on the proposed extensions before they are implemented.[534] Consequently, the ministerial extensions at sectoral level play a vital role in reinforcing and upholding international and constitutional principles that aim at protecting the interests of workers.

4.8 Inter-union rivalry and the deteriorating role of trade unions

Currently, it is evident that minority unions are fighting for influence within the workplace regardless of legislative restrictions.[535] The conflict between National Union of Mineworkers (NUM), the majority union and Association of Mineworkers and Construction Union (AMCU), the minority union,[536] is a symbolic pinnacle of this inter-union rivalry and the deteriorating role of trade unions. AMCU broke away from NUM weakening its

524 *Free Market Foundation* para 11.
525 *Free Market Foundation* para 11.
526 *Free Market Foundation* para 8.
527 *Free Market Foundation* para 106.
528 *Free Market Foundation* para 86.
529 *Free Market Foundation* para 8.
530 Section 32(3)(g) *Free Market Foundation* para 20.
531 *Free Market Foundation* para 29.
532 Section 32(3)(dA) to (e) of the *LRA.*
533 Benjamin 2016 http://www.r4d-employment.com.
534 Benjamin 2016 http://www.r4d-employment.com.
535 Cohen 2014 *PER / PELJ* 2209.
536 Cohen 2014 *PER / PELJ* 2209; Theron, Godfrey and Fergus 2015 *ILJ* 850.

influence.[537] In *National Union of Mineworkers v Lonmin Platinum*,[538] NUM which had lost recognition within the workplace, claimed that AMCU forced many of its members to join it, hence undermining their freedom of choice.[539] However, NUM has been accused of having abandoned lower-skilled workers and rather focussing on higher-skilled workers[540] thus, fragmenting workers' solidarity.[541] The heightened clashes saw workers taking matters into their hands[542] and eventually led to the Marikana crisis, resulting in the death of thirty-four workers.[543]

Section 200 of the *LRA* allows for a registered union to act within its own interest, on behalf of its members and in the interest of any of its members.[544] However, there is a danger that majority unions can find themselves in. According to Hartford,[545] this danger comprises an "illusionary co-dependent comfort zone" where larger unions neglect their members. In *Ramolesane v Andrew Mentis*[546] the court held that the "corruption of the principle of majoritarianism" is prevalent where a union decides to act in its own interests and not necessarily in the interests of the majority of its affected members. This can be argued to be an exploitation of the majoritarian principle. Further, in *Food and Allied Workers Union v Ngcobo*,[547] the court held that a union could not escape the consequences of failing to represent its members in a reasonable manner.[548] Therefore, emphasis has to be placed on the fact that the reason why unions exist in the first place, is to promote the welfare of workers and freedom of association.

4.9 Conclusion

It is an established fact that majoritarianism has not escaped criticism for its implications. The 2014 amendments are a step towards a comprehensive realisation of the rights of smaller unions. A commissioner can grant sufficiently representative unions and smaller

537 Leppan 2016 *Employment Alert* 3.
538 *National Union of Mineworkers v Lonmin Platinum* (J 1118/2013) 2013 ZALCJHB 139; 2013 10 BLLR 1029 (LC); 2014 35 ILJ 486 (LC) (15 July 2013) para 34 (hereafter *Lonmin Platinum*).
539 *Lonmin Platinum* para 28.
540 Harvey 2013 *South African Institute of International Affairs* 14.
541 Chinguno 2013 *Global Labour Journal* 161.
542 Chinguno 2013 *Global Labour Journal* 160; Theron, Godfrey and Fergus 2015 *ILJ* 851.
543 Ngcukaitobi 2013 *ILJ* 836; Anstey 2013 *SAJLR* 140.
544 Section 200(1)(a) and (b) of the *LRA.*
545 Hartford 2012 www.groundup.org.za.
546 *Ramolesane v Andrew Mentis* (1991) 12 ILJ 329 (LAC) 336.
547 *Food and Allied Workers Union v Ngcobo No* 2014 (1) SA 32 (CC) para 31 (hereafter *FAWU*).
548 *FAWU* para 31.

unions organisational rights despite there being a threshold. This can be argued to be a progressive shift in the current state of affairs. Additionally, this can be argued to be a significant threat to larger unions, as sufficiently representative unions and minority unions are granted a larger platform to challenge them. Therefore, it has made a significant dent in the majoritarian principle, although authors are far from persuaded that the conflict is over.

It is clear that the courts still hold the majoritarian principle in high esteem. However, it is clear that the application of this principle is becoming more and more complicated to the extent that it is time to embrace the current policy shift. Even though majority union thresholds and collective agreements enjoy preference, the *LRA* contains provisions such as section 20 and section 21, which allow smaller unions to obtain organisational rights. This is necessary so as not to deprive them of their freedom of association. Further, interpreting certain term such as the workplace has proved to assist in preventing unfair implications. Moreover, the courts have gone to the extent of establishing that those that are not parties to a dispute cannot be bound by an agreement that is not even in existence yet. However, this is still not enough because the courts seem to have made divergent findings on the applicability of such agreements within the context of sections 23 and 32. One finding has a total disregard for the laws that govern the binding nature of the agreements, the other clarifies that there are two different types of agreements and that one cannot be another. Hence, there is still much to be done to settle the issue of interpretation.

It is also worth noting that now it is not only affected unions that can challenge the majoritarian principle, as seen in *Free Market Foundation*. Even though the applicant in *Free Market Foundation* did not succeed, contending for the need for the review of ministerial extensions could mean that there is more to consider in the future. The Marikana massacre is, among others, a product of inter-union rivalry and a neglect of the interests of workers. A union abuses the majoritarian principle where it overlooks the interests of its members and the repercussions are inescapable. Accordingly, such disparities have laid the foundation for a change in the labour law legal system.

Chapter 5 The legislative framework of majoritarianism in Germany

5.1 Introduction

Chapter Four has indicated significant developments within the context of majoritarianism in the South African context. It is evident from the previous discussion that there is a move towards accommodating minority unions. The purpose of this chapter is to discuss the legal framework of trade unions and majoritarianism in Germany. The drafters of the South African *Labour Relations Act*[549] "drew heavily" on the German labour law practices.[550] Given this primacy, this chapter will discuss the governance of trade union solidarity and freedom of association by giving a brief background of how unions struggled to achieve freedom of association, and further also the constitutional and legislative provisions regarding trade unions, freedom of association and collective agreements. It will also be indicated that the system of collective agreements has gone through considerable developments from having multiple agreements in the workplace to having a bargaining unity, representing the principle of majoritarianism.

Moreover, as the German model is a dual system,[551] worker participation and co-determination under the influence of the works council will be discussed to illustrate that Germany has an extensive approach that esteems employers to be stakeholders within a company. In essence this chapter aims to compare the South African and German positions in order draw similarities and to identify relevant aspects that may be of assistance to South Africa. Accordingly, it will be important to consider the German approach to majoritarianism within its labour law framework. This vital for the purposes of establishing a better understanding of majoritarianism and/or how best it may be developed.

549 The *Labour Relations Act* 56 of 1995 (hereafter the *LRA*).
550 Raju and Stilwell 2007 *Mousaion* 6.
551 Addison *et al 2014 Economic and Industrial Democracy* 3.

5.2 A brief overview of the German legal system

5.2.1 Civil system

Civil law (which falls under private law) is considered a source of labour law.[552] One of the principles of the civil system comprises freedom of contract, which requires no interference from the state regarding the choices and rights available to a person.[553] This principle is based on individual autonomy which assumes that the bargaining power between contracting parties is equal.[554] However, this is far from true and because employers have more bargaining power, the law and the government have to intervene.[555] Due to this labour law now contains aspects of both public and private law and is essentially considered a distinct branch of law.[556]

5.2.2 The role of the Specialised Labour Courts (Arbeitsgerichte)

The establishment and hierarchy of courts are premised on nature of issues brought before them.[557] The labour courts rank third in the hierarchy of courts.[558] Moreover, the labour courts are a product of union pressure that was exerted on the state to establish a feasible platform for resolving labour disputes.[559] The courts contain three levels that handle issues on employment, working conditions, collective agreements and worker participation.[560] The three levels comprise, the Local Labour Courts, Regional Labour Courts and the Federal Labour Court and are overseen by the *Labour Courts Act*.[561] The Local Labour Courts are the lower courts that oversee matters of facts and law, which may be taken to the regional Labour Courts for appeal.[562] The Federal Labour Court on the other hand, is the highest and final court of appeal and only considers matters pertaining to points of law.[563] Each level commences its proceedings "with a mandatory

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552 Foster and Sule *German Legal System and Laws* 158.
553 Foster and Sule *German Legal System and Laws* 412.
554 Foster and Sule *German Legal System and Laws* 412.
555 Foster and Sule *German Legal System and Laws* 412.
556 Foster and Sule *German Legal System and Laws* 158 and 412.
557 Foster and Sule *German Legal System and Laws* 81.
558 Foster and Sule *German Legal System and Laws* 82.
559 Foster and Sule *German Legal System and Laws* 88.
560 Foster and Sule *German Legal System and Laws* 88; Anon 2016 http://www.howtogermany.com.
561 Foster and Sule *German Legal System and Laws* 88; Jung 2001 http://www.ilo.org; the *Labour Courts Act* of 1953 (hereafter the *LCA*).
562 Foster and Sule *German Legal System and Laws* 88.
563 Foster and Sule *German Legal System and Laws* 88.

conciliation hearing".[564] What is significant about the courts is that the presiding officers are taken from the ranks of both employees and employers.[565] Therefore, this assists in ensuring that there is a balance in the consideration of interests.

5.2.3 Labour legislation

The *Basic Law of the Federal Republic of Germany* is the Constitution of Germany that provides for basic individual rights including labour rights.[566] As in the case of the South African Constitution, the *Basic Law* is the supreme law that binds all authorities of state.[567] Further, the *Basic Law* places a duty on the legislature to enact laws for the purposes of governing labour relations. Some of the statutes relevant to collective labour relations include the *Act on Collective Bargaining Unity* of 2014 *Collective Agreements* of 1969 and the *Works Constitution Act* 1988 which are discussed below.[568] The labour courts have the duty to interpret these Acts.[569]

5.3 Trade unions and freedom of association

The earliest trade unions in Germany can be traced back to the nineteenth century.[570] Many such organisations were established with the help of the German Revolution of 1848.[571] This eventually led to the barring of workers' organisations, especially after the revolution failed.[572] Nevertheless, this ban was gradually lifted, with the help of the *Industrial Code*,[573] and led to the development of various trade unions.[574] The trade union socialist movement that eventually emerged was aimed at destroying the capitalist system.[575] The movement focused on worker solidarity, and this strategy led to the failure

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564 International Comparative Legal Guides 2016 http://www.iclg.co.uk.
565 Kohl *Freedom of Association, Employees' Rights and Social Dialogue* 14; Jung 2001 http://www.ilo.org.
566 The *Basic Law of the Federal Republic of Germany* of 1949 (this is the German Constitution (Grundgesetz)), (hereafter the *Basic Law*).
567 Article 1 of the *Basic Law*.
568 The *Act on Collective Bargaining Unity* of 2014; the *Collective Agreements* of 1969; and the *Works Constitution Act* 1988; see 5.4 on collective bargaining and 5.5 on worker participation.
569 Jung 2001 http://www.ilo.org.
570 Weber 2013 http://www.labre.nl; Marquardt 2006 http://www.ilo.org: An escalation of worker exploitation, especially of women and children, led to the establishment of workers' organisations.
571 Marquardt 2006 http://www.ilo.org; Pienaar 1993 *TSAR* 237: In the course of the revolution debates arose as to whether there was a need to entrench freedom of association in the Constitution.
572 Marquardt 2006 http://www.ilo.org; Weiss and Schmidt *Labour Law and Industrial Relations in Germany* 163: Any attempt to exercise freedom of association led criminalisation.
573 The *Industrial Code* of 1869.
574 Marquardt 2006 http://www.ilo.org.
575 Weiss 2005 *Law, Democracy and Development* 158-159.

of certain laws, such as the *Anti-Socialist Act*,[576] to proscribe union-organised labour.[577] Trade union activity increased after World War I to the extent that freedom of association was finally recognised in the *Reich Constitution* of 1919 (Weimar Constitution)[578] and the *Collective Agreements Ordinance* of 1918[579] created a platform for them to conclude collective agreements.[580] The General German Trade Union Confederation then emerged in 1919 as an organisation representing free trade unions.[581] However, the Nazi regime eventually quashed trade unions and introduced the "German Labour Front" which required all workers and employers to join.[582] Following World War II there was the move to establish "powerful, political and ideological neutral united trade unions" for the purposes of solidarity.[583]

Currently, the *Basic Law of the Federal Republic of Germany*[584] guarantees the right to freedom of association. This is encapsulated in article 9(3) which provides every individual in any occupation and profession for the right to create an association for the purposes of protecting and bettering conditions of employment.[585] This includes individual, as well as collective freedom of association.[586] The scope of freedom of association extends to the right not to associate.[587] Further, the provision stipulates that any limitation on this right is to be invalidated.[588] In *Commission v Germany*,[589] the court held that freedom of association encompasses all constitutionally protected collective labour rights.[590] These include the rights to form, join or not to join an association, as well as the rights to strike and to lockout.[591] However, what is lacking under the German

576 The *Anti-Socialist Act* of 1878; Marquardt 2006 http://www.ilo.org.
577 Weiss 2013 *Law, Democracy and Development* 159.
578 The *Reich Constitution* of 1919 (*Weimar Constitution*); Weiss and Schmidt *Labour Law and Industrial Relations in Germany* 163.
579 The *Collective Agreements Ordinance* of 1918.
580 Marquardt 2006 http://www.ilo.org.
581 Weber 2013 http://www.labre.nl; Pienaar 1993 *TSAR* 237: However, not all communities were granted freedom of association; Weiss and Schmidt *Labour Law and Industrial Relations in Germany* 163: To this extent, the right was only established in principle
582 Weber 2013 http://www.labre.nl.
583 Weber 2013 http://www.labre.nl.
584 Article 9(3) of the *Basic Law of the Federal Republic of Germany* of 1949 (this is the German Constitution (*Grundgesetz*)), (hereafter the *Basic Law*).
585 Article 9(3) of the *Basic Law*.
586 Weiss 2004 *Managerial Law* 73.
587 Weiss 2004 *Managerial Law* 73; Vettori 2005 *SA Merc LJ* 296.
588 Article 9(3) of the *Basic Law*; Marquardt 2006 http://www.ilo.org.
589 *Commission v Germany* (1987) Case 178/84.
590 Velyvyte 2015 *Human Rights Law Review* 88.
591 Foster and Sule *German Legal System and Laws* 259.

framework is the protection of members from victimisation as seen in the South African position.[592] Therefore, the summation would be that anyone can easily discriminate against persons on the basis of exercising their freedom of association.

The substance of the German labour and employment law is largely determined by trade unions and employer organisations.[593] They achieve this through the right to bargain and to conclude collective agreements. There is no statutory union recognition procedure;[594] however, trade unions have to have sufficient members or to strike in order to prove that they are competent enough to bargain collectively.[595] Similar to the South African position, there is no definition of what 'sufficient members' entails. Unions are expected to conduct their activities within the scope of constitutional and legislative constraints.[596] Moreover, trade unions can institute legal action for the infringement of freedom of association[597] or be sued in terms of section 10 of the *LCA*.[598] Further, just like in South Africa, unions Germany are required to operate independently from state interference.[599] The German Federation of Trade Unions is the most important association of trade unions that avows to be politically or ideologically neutral and covers employees with different views and beliefs.[600]

5.4 Collective bargaining

5.4.1 General principles of collective agreements

The labour law of Germany demonstrates an exceptional and fairly steady collective bargaining system at industrial or sectoral level.[601] The *Collective Agreements Act* regulates collective bargaining.[602] The main purpose of the *CAA* is to identify bargaining parties: unions, employers, employer associations.[603] This includes the establishment of

592 Kohl *Freedom of Association, Employees' Rights and Social Dialogue* 22.
593 Thusing 1998 *IICLR* 47.
594 Burgess and Symon 2013 *Economic and Industrial Democracy* 5.
595 Burgess and Symon 2013 *Economic and Industrial Democracy* 5.
596 Thusing 1998 *IICLR* 47.
597 Krause 2012 *CLLPJ* 771.
598 Section 10 of the *LCA*.
599 Thusing 1998 *IICLR* 47.
600 Weiss 2004 *Managerial Law* 74; Delbard 2011 *Society and Business Review* 266.
601 Weiss 2004 *Managerial Law* 79; Helfen 2011 *Economic and Industrial Democracy* 1; Doerflinger and Pulignano 2015 *Economic and Industrial Democracy* 5; Jung 2001 http://www.ilo.org; Felbermayr, Hauptmann and Schmerer 2014 *Scandinavian Journal of Economics* 825.
602 Article 2(1) of the *Collective Agreements Act* of 1969 (hereafter the *CAA*).
603 Burgess and Symon 2013 *Economic and Industrial Democracy* 5.

who may conclude collective agreements, as well as the binding nature and the legal effect of the agreements.[604] In terms of article 2(1) of the *CAA*, unions may conclude an agreement either with one employer or an association of employers.[605] Unlike in the South African position, German collective agreements only bind and apply to parties involved.[606] It all boils down the underpinning of freedom of association. Nevertheless, it is a norm that employers extend their agreement even to non-parties.[607] However, it also implies that employers are not obliged to extend the agreements[608] and this could lead to a restricted coverage of application.[609] Furthermore, it also entails that employees are remunerated differently.[610]

Similar to the South African model, in terms of central bargaining**,** a collective bargaining committee can vote for the Minister of Labour and Social Affairs to extend an agreement.[611] This is necessary for uniformity and a broader coverage. However, unlike South Africa, the minister can only extend an agreement after consideration of public interest.[612] Such ministerial discretion is subject to review and this is what the applicant advocated for in *Free Market Foundation v Minister of Labour*.[613] The problem is that within the German context, there is no clarity as to what public interest entails.[614] Hence, it can be argued that this would be of no significant help if South Africa were to adopt the criteria of public interest. At least fifty per cent of employees should be covered by the agreement.[615] The aim of extending collective agreements is to buttress collective

604 Foster and Sule *German Legal System and Laws* 593.
605 Article 2(1) of the *CAA*; Thusing 1998 *IICLR* 47; Burgess and Symon 2013 *Economic and Industrial Democracy* 5; Jung 2001 http://www.ilo.org; Weiss 2006 *Managerial Law* 285: collective agreements establish minimum conditions that govern individual contracts of employment.
606 Thusing 1998 *IICLR* 47; Felbermayr, Hauptmann and Schmerer 2014 *Scandinavian Journal of Economics* 825.
607 Thusing 1998 *IICLR* 47; Jung 2001 http://www.ilo.org; Helfen 2011 *Economic and Industrial Democracy* 1; Felbermayr, Hauptmann and Schmerer 2014 *Scandinavian Journal of Economics* 825.
608 Grimshaw, Bosch and Rubery 2014 *BJIR* 475.
609 Weiss 2006 *Managerial Law* 278.
610 Fitzenberger *et al* 2013 *ILRReview* 171: This is applicable in the name of a right of freedom not to associate. Where the agreement covers more employees, those not covered by it can earn more, and vice versa.
611 Calitz 2015 *SA Merc LJ* 21: This committee comprises three representatives from each party (i.e. trade unions and employers), of which four must agree.
612 Calitz 2015 *SA Merc LJ* 21.
613 Calitz 2015 *SA Merc LJ* 27; See 4.7 footnote 514 for the court argument on public interest in *Free Market Foundation v Minister of Labour* 2016 37 ILJ 1638 (GP).
614 Calitz 2015 *SA Merc LJ* 21.
615 Calitz 2015 *SA Merc LJ* 21.

bargaining and democratic goals.[616] Therefore, this is in line with the principle of majoritarianism.

5.4.2 Majoritarianism and the bargaining unity

Previously, trade unions were allowed to have multiple collective agreements in a sector which could apply to different categories of employees.[617] However, in intra-industry bargaining co-ordination this led to competing unions.[618] Therefore, the judiciary affirmed that the workplace should be governed by one collective agreement: a bargaining unity ("One business, one collective agreement").[619] This was a model of upholding majoritarianism. The rationale was based on the need for "legal certainty and clarity"[620] and to protect the fundamental scope of collective bargaining over the interests of individuals.[621] The problem with the bargaining unity system was that it caused a stir in the "regulatory framework and collective self-regulation".[622] Smaller unions were overlooked in order for the will of the majority to prevail. Inevitably, this caused unions to compete for members and some issues of mutual interests were sometimes neglected.[623]

The aforementioned problems of the bargaining unity caused the Federal Labour Court of Germany to abolish it in 2010.[624] The court relied on the literal wording of the *CAA* that a collective agreement binds only parties to it.[625] The court interpretation was that various unions could conclude agreements that would be applicable only to them, in the workplace.[626] Moreover, the court held that there was no prevailing principle that allowed a single collective agreement to superimpose others.[627] The court emphasised that, "free choice" allowed bargaining parties to express the content of their agreements, thus reinforcing freedom of association.[628] This is far-fetched from the South African position

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616 Barnard *EU Employment Law* 711.
617 Burgess and Symon 2013 *Economic and Industrial Democracy* 5.
618 Burgess and Symon 2013 *Economic and Industrial Democracy* 5.
619 Burgess and Symon 2013 *Economic and Industrial Democracy* 1 and 5; Zimmermann 2015 http://www.mondaq.com.
620 *BAG judgment* 2010 para 26.
621 Burgess and Symon 2013 *Economic and Industrial Democracy* 6.
622 Burgess and Symon 2013 *Economic and Industrial Democracy* 1.
623 Burgess and Symon 2013 *Economic and Industrial Democracy* 6.
624 *BAG, judgment of 7 July 2010 – 4 AZR* 549/08 (hereafter *BAG judgment* 2010) ('BAG' stands for '*Bundesarbeitsgericht*' which is German for 'Federal Labour Court of Germany').
625 Burgess and Symon 2013 *Economic and Industrial Democracy* 6.
626 *BAG judgment* 2010 para 21.
627 *BAG judgment* 2010 paras 21 and 25.
628 *BAG judgment* 2010 para 22.

that upholds a similar stance with regard to the bargaining unity. Following the decision on the abolition of the bargaining unity, there was an overwhelming fear that a fragmentation of collective bargaining would ensue.[629] This caused stirs of concern regarding the shift in "the applicability of collective agreements", as well as freedom of association.[630] Further, there was an increase in industrial action.[631] Therefore, there was a need for legislative intervention.

The legislature enacted the *Act on Collective Bargaining Unity* in 2015.[632] The *CBU* amends the *CAA* by adding section 4a to it. Section 4a now provides that the collective agreement by a majority union (that has the majority of members at the time of conclusion) will prevail within the workplace.[633] This amendment, to a certain extent, brings into force the bargaining unity and hence majoritarianism. However, this new model of majoritarianism is more flexible because it affords minority unions the right to give the employer their views, which can then be considered before the final collective agreement is concluded.[634] This could assist in preventing union rivalry and allowing for co-ordination as the interests of all unions are considered.[635] If the minority rights are infringed at all, they have recourse to institute legal proceedings.[636] Moreover, the amendment allows for minority unions to sign corresponding agreements with the employer.[637] Hence, the current changes allow smaller unions to express their interests and those of their members. It can be argued that allowing minority unions the mechanisms provided, empowers them and ensures that their demands are met and heard.

5.5 Worker participation and co-determination

The workplace forum framework of South African is modelled after the works council system and co-determination.[638] The works councils are a platform for worker

629 Burgess and Symon 2013 *Economic and Industrial Democracy* 12.
630 Burgess and Symon 2013 *Economic and Industrial Democracy* 7.
631 Weber 2013 year http://www.labre.nl.
632 The Act on *Collective Bargaining Unity* of 2014 (hereafter the *CBU*).
633 Section 4a of the *CAA*: This is so particularly where the agreement has colliding provisions.
634 Kromannreumert 2015 https://en.kromannreumert.com.
635 Kromannreumert 2015 https://en.kromannreumert.com.
636 Kromannreumert 2015 https://en.kromannreumert.com.
637 Zimmermann 2015 http://www.mondaq.com.
638 Botha 2015 *PER / PELJ* 1813.

participation[639] at firm level[640] and are governed by the *Works Constitutions Acts.*[641] Section 2(1) of the *WCA* requires the works council and the employer to work together and co-operate with trade unions, as well as respect collective agreements[642] under the essential construct of "mutual trust".[643] In order to protect the integrity of the works council[644] works councils are legally independent of trade unions.[645] Nevertheless, trade unions can have representatives in the electoral boards[646] and delegates that play an advisory role.[647] Moreover, the collective agreement between union and employers, overrides those of the works councils so as to prevent competition.[648] Further, in terms of section 77(3) of the *WCA*, agreements by the works council cannot contain issues such as pay and other conditions that have been or are customarily covered by collective agreements.[649]

Works councils have rights of co-determination.[650] This is a concept that has been established to grant employees the opportunity to be part of corporate decision making.[651] This occurs at managerial level[652] in which workers are treated as vital stakeholders.[653] The issues works councils have to consider, particularly with co-determination, are more

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639 Botha 2015 *PER / PELJ* 1815.
640 Barnard EU *Employment Law* 686.
641 The *Works Constitution Act* 1972 (hereafter the WCA); Foster and Sule *German Legal System and Laws* 283.
642 Brändle and Heinbach 2014 *Review of Economics* 162; Wagner and Lillie 2014 *JCMS* 412; Marquardt *et al* 2006 http://www.ilo.org.
643 Section 2(1) of the *WCA*; See also sections 77(2) and 74*;* Foster and Sule *German Legal System and Laws* 597: Works councils cannot strike where there is a dispute; rather they can institute legal proceedings
644 Du Toit 2000 *ILJ* 1548.
645 Foster and Sule *German Legal System and Laws* 597.
646 Du Toit 2000 *ILJ* 1548; Delbard 2011 *Society and Business Review* 266: Trade unions are considered as significant social partners.
647 Section 46(1) of the *WCA*; Section 31 of the *WCA*: Trade unions can only attend works council meetings if invited.
648 Du Toit 2000 *ILJ* 1549: This, to a certain extent protects collective agreements and demarcates the rights and obligations of the aforementioned parties. However, there is no such statutory framework in the *LRA*.
649 Section 77(3) of the *WCA*; Du Toit 2000 *ILJ* 1549: This entails that, the works council is prohibited from considering even issues that have not yet been considered or agreed upon in collective bargaining.
650 Barnard *EU Employment Law* 686: Foster and Sule German *Legal System and Laws* 597: Works councils also have the right to obtaining company information.
651 Muswaka 2014 *Mediterranean Journal of Social Sciences* 143: The concept of co-determination simply entails "employee consultation and participation in company decisions".
652 Davis and Le Roux 2012 *Acta Juridica* 316: Germany, co-determination has had a vital bearing on the regulation of executive compensation packages: national legislation, which provides for corporate governance requires labour representation on the boards of directors. See also Botha 2015 *PER / PELJ* 1815.
653 Muswaka 2014 *Mediterranean Journal of Social Sciences* 143.

extensive than those considered in the workplace forums of South Africa.[654] They decide on matters such as working conditions and social factors.[655] Consequently, this furthers equality and democracy in the political and socio-economic spheres.[656] What is important to note here is that majoritarianism does not prevail within the framework of works councils and co-determination, as employees do not need to wait on trade unions initiate the process of worker participation.

5.6 Conclusion

The emergence of trade unions in Germany stems from the need to fight repressive governments such as the Nazi regime and to protect vulnerable workers. This is similar to the South African context and exhibits a relentless move towards the realisation of freedom of association. The German Revolution of 1848 is proof of this. The banning of the trade union movements on various occasions through legislative means indicates the struggle that workers have had to face, even in Germany. However, the current Basic Law has provided for protection of freedom of association even to the extent of allowing the right not to be part of an association.

Narrowing this down to trade union activities, trade unions can bargain collectively at industrial level. Further, there is no legislative framework to indicate union recognition. However, indications through collective agreements establish that Germany follows the principle of majoritarianism. Majority union agreements can be extended by the employer or by the minister. However, in terms of concluding collective agreements the Germany collective labour law has gone through various developments. It has to be admitted that the oscillation from a multiple collective agreement system within the workplace to a collective bargaining unity principle has proved to be a challenge. A collective pluralism of agreements seems to be a fair approach in allowing all unions to be bound by their own agreements. However, the conflicts it caused made it appear like the bargaining unity would be a better solution. This proved to infringe freedom of association. The current system introduced through the *CBU* can be argued to bring some form of balance between majority unions and minority unions. The *CBU* upholds majoritarianism, but also

654 Hepple "Comparing Employee Involvement" 90; Botha 2015 *PER / PELJ* 1831.
655 Article 87 of the *WCA*; Foster and Sule *German Legal System and Laws* 597: Co-determination issues include: working hours, modes of remuneration, accidents, vacations, illness benefits, *inter alia.*
656 Muswaka 2014 *Mediterranean Journal of Social Sciences* 143.

gives a voice to smaller unions which has some significant influence on the outcome of the final collective agreement. Further, it empowers smaller unions with the evoking of judicial assistance. Accordingly, such developments are important in considering the route that South Africa can take, amid the calls for more flexibility of majoritarianism.

The German collective labour law also provides for a framework of worker participation and co-determination through works councils. In terms of works councils, trade unions are involved as advisors. This is significant because it gives a clear indication that trade unions in Germany have a limited influence in the activities of workers on an employee participation level. Co-determination allows employees to be stakeholders and have a say in the decision making process of the managerial issues. This allows for motivation of workers and the advancement of interests in a comprehensive manner. Therefore, it can be concluded that the current developments of the German labour law provide for a significant and broader perspective of trade unions and the principle of majoritarianism.

Chapter 6 Conclusions and recommendations

6.1 Introduction

The previous chapters have illustrated that majoritarianism is a fundamental principle in labour relations, particularly within the framework of trade unions. The majoritarian principle allows for order to thrive in the workplace and ensures all that workers are covered by its benefits. However, the principle has come under criticism for the possible infringement of freedom of association of workers and smaller trade unions. This chapter suggests some recommendations that may be feasible for the development of the South African labour relations pertaining to the demarcation of majoritarianism. The chapter discusses the options of: invoking international assistance through the *International Labour Organisation*; revoking certain sections; drawing from the current German developments; considering the issue of democracy; and initiating dialogues that may consider the interests of smaller unions. Finally, the chapter concludes by highlighting the vital aspects identified in all the previous chapters and by giving a final deduction on the principle of majoritarianism.

6.2 Recommendations

6.2.1 Approaching the International Labour Organisation (ILO)

The *ILO* recognises and upholds the protection of the rights of minority unions. Kruger and Tshoose[657] suggest that minority unions may approach the *ILO* on the premise that the *LRA* endorses a "majority trade union monopoly" which is contrary to international standards of freedom of association.[658]

6.2.2 Repealing section 18

Section 18 of the *LRA* is the heart of majoritarianism. Esitang and Van Eck[659] recommend scrapping section 18 of the *LRA* off. Minority unions can request the Constitutional Court to declare the section unconstitutional for irrationally contravening their freedom of

657 Kruger and Tshoose 2013 *PER/PELJ* 316 / 487.
658 Kruger and Tshoose 2013 *PER/PELJ* 316 / 487.
659 Esitang and Van Eck 2016 *ILJ* 777.

association.[660] However, it can be argued that this might be too drastic and lead to the downfall of majoritarianism. What could be needed is proper regulation of the section through further amendments to prevent the setting of unreasonable thresholds. Additionally, smaller unions can obtain a declaratory order against the threshold agreement, from the labour court all the way up to the constitutional court.[661]

6.2.3 A multi-union democracy

In line with the South African model of democracy the legislature should allow for a multi-unionism that truly embodies a pluralistic democracy in order to efficiently realise worker interests.[662] This would effect a considerable equilibrium that asserts the rights of the majority but also to protect those of the minority.[663]

6.2.4 Adopting the German model of majoritarianism

The German labour law system is based on "a co-ordinated market economy" and "social solidarity", bolstered "by the collective power of unions and works councils".[664] Having been influenced by the German context in the past, South Africa can also draw considerable factors from the current developments on majoritarianism in Germany. South Africa should consider adopting a more flexible majoritarian model where collective agreements only bind parties to them. Further, it would be of great significance to adopt a framework that allows for smaller unions to conclude corresponding collective agreements, voicing their concerns and evoking judicial assistance where their rights are infringed.[665]

6.2.5 Broadening the scope of worker participation within the workplace forum framework

The German model of worker participation is perceived to be the "first and most highly developed" version.[666] South Africa should completely remove majoritarianism from workplace forums and allow trade unions to only be involved as advisors as it is seen in

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660 Kruger and Tshoose 2013 *PER/PELJ* 316 / 487.
661 Kruger and Tshoose 2013 *PER/PELJ* 317 / 487.
662 Esitang and Van Eck 'Big Kids on the Block' 1-19
663 Malan 2010 *TSAR* 427-440; Kruger and Tshoose 2013 *PER/PELJ* 311 / 487.
664 Wagner and Lillie 2014 *JCMS* 404.
665 See 5.3 on Collective bargaing, collective agreements and the bargaining unity.
666 Biasi 2014 *IJCLLI* 461; Botha 2015 *PER / PELJ* 1815.

the German position.[667] Workers should be given a broader scope of engaging in managerial decisions, hence treating them as important stakeholders.[668] There is no point in having trade unions initiate worker participation if they are unwilling to do so. Further, the danger is also that a union that would be interested in initiating such forums, would only do it for the sake of the interests of its members and neglect those of all workers.[669]

6.2.6 Social dialogues

Minority unions have no standing at the National Economic Development and Labour Council (NEDLAC).[670] However, a platform of social dialogue similar to NEDLAC, can be initiated where government would engage with smaller unions.[671] It is suggested that this should be entirely separate from, and not encroach on, the activities of the NEDLAC.

6.3 Conclusions

This dissertation, as highlighted in chapter one, investigates the demarcation of majoritarianism within the South African and German labour law context. It has unpacked the degree to which South Africa limits the scope of majoritarianism within the labour relations framework. Moreover, has determined the means by which South Africa may learn from the model of majoritarianism within the German context. The issue identified in chapter one is that South Africa currently promotes majority trade unions to the detriment of the minority. Chapter two has established the constitutional and legislative framework within which trade unions operate within the South African context. What has been highlighted in the chapter is that the *Constitution of South Africa* promotes democracy and protects labour rights of employees, trade unions as well as employers in terms of section 23. These parties are afforded the right to freedom of association, the right to organise and collective bargaining, among others. The constitutional framework of trade unions draws significant influence from international instruments to give further definition and depth to these rights: in particular, the *International Labour Organisation*

667 See 5.4 on worker participation and co-determination.
668 See 5.4 on worker participation and co-determination.
669 Botha 2015 *PER/PELJ* 1831.
670 Kruger and Tshoose 2013 *PER/PELJ* 318 / 487.
671 Kruger and Tshoose 2013 *PER/PELJ* 318 / 487.

Conventions on *Freedom of Association and Protection of the Right to Organise* and the *Right to Organise and Collective Bargaining*.

Trade unions perform a vital function. They exert their political and economic power to represent employees and protect their interests within the workplace. However, previously, they were mostly suppressed through political and legislative means. Currently, the *LRA* gives effect to constitutionally and internationally entrenched labour rights. The *LRA* provides for *orderly*[672] collective bargaining, freedom of association and forbids discrimination based on this. However, the *LRA* requires that unions be registered for the purposes of legitimacy. Further, the *LRA* entrenches a system of organisational rights, collective agreements and workplace forums which, in chapter three, are referred to as incentives that confer the responsibility to majority unions. Sufficiently represented unions obtain only a handful of organisational rights, while those that represent the majority have access to all of them. Minority unions are inherently not afforded any because of lack of sufficient representivity. Organisational rights assist a trade union to gain ground within the workplace. However, the *LRA* empowers majority unions to set thresholds that establish the standard of obtaining organisational rights based on representivity. Therefore, this indicates that there is a discrepancy in this system based on majoritarianism, when compared to the constitutional canvas that grants the rights to all unions without the need for representivity.

Majoritarianism gives preference to the wishes of majority trade unions. It is not only supported by international law, through the committees of the *ILO*, but it is also firmly entrenched in the *LRA*. The main reason for this is to allow and protect orderly collective bargaining. Majoritarianism is designed to operate within a voluntary and self-governed collective bargaining system where neither the state nor the courts may interfere. Collective bargaining allows unions and employers to negotiate matters of mutual interest. The aim is to come to a consensus through collective agreements that govern various aspects of the employment relationship. Such agreements bind not only parties to them, but also non-parties. This can happen automatically or through ministerial extensions. Further, workplace forums, intended to allow worker participation without much union involvement, can only be initiated by majority unions. This has not been

672 This is the writer's own emphasis.

successful because larger unions have been reluctant to allow such forums to be established hence undermining worker participation.

The *LRA* nevertheless entrenches some mechanisms that allow smaller unions to obtain organisational rights. Smaller unions can strike, conclude collective agreements in terms of section 20 of the *LRA*, have a commissioner compel employers to grant them organisational rights, or in terms of the recent *LRA* amendments, have the commissioner overlook majority thresholds. However, all these are subject to majority union thresholds and collective agreements. The *ILO* committees emphasise that the majoritarian principle should not infringe on the rights of smaller unions. Nonetheless, the framework of the *LRA* majoritarianism does not give enough room for other unions to exercise their constitutional rights and does not truly uphold the model of the constitutional democracy that allows for multi-parties. The fact that the *LRA* has been amended is clear evidence that the framework requires an extensive evaluation and revision. However, chapter four illustrates that the courts still largely support majoritarianism, especially regarding collective agreements.[673] They have held that majoritarianism is not unconstitutional. [674] The courts have rightfully held that unions cannot use majoritarianism to bind non-parties to a dispute.[675] However, the courts have at times erred in their interpretation and application of legislative provisions of collective agreements in support for majoritarianism.[676] Further, it is becoming increasingly evident that trade unions are diverging from their core role, which is to protect the interests of employees.[677] The issues of Marikana and inter-union rivalry are a relevant illustration of this union deviation.[678] The result is that employees become displaced and even join rival unions or take matters into their own hands, which in the course of it all causes violent strikes that cost lives.[679] Therefore, this reveals that there are serious disparities prevalent in majoritarianism, that cannot be ignored.

South Africa has incorporated various German principles, such as workplace forums, within its laws. Hence, the developments seen under the German model of

673 See the court discussions in 4.3 to 4.6.
674 See 3.7 on the implications of majoritarian collective agreements.
675 See 4.4 on minority unions as parties to a dispute.
676 See 4.5 on extension of collective agreements to employees in the workplace.
677 See 4.8 on Inter-union rivalry and the deteriorating role of trade unions.
678 See 4.8 on Inter-union rivalry and the deteriorating role of trade unions.
679 See 4.8 on Inter-union rivalry and the deteriorating role of trade unions.

majoritarianism are of great importance at this point. Germany has experimented, and has gone back and forth, with majoritarianism and multi-unionism. The legislature and the courts have become aware that following a strict model of either majoritarianism or multi-unionism does is not practical nor feasible. Accordingly, the legislature has adopted a model of majoritarianism flexible enough to accommodate minority unions. This can be entrenched within the trade union structure of South Africa. Further, there is need for a re-modification of workplace forums in South Africa. Again, the legislature needs to pay particular attention to how work councils and co-determination operate in Germany. These aspects are not left to the determination of majority unions. What is needed now is an advancement towards seriously considering workers' interests. The developments in Germany are indispensable for the recommendations for the current South African demarcation on majoritarianism. Further, the *ILO* and the Constitutional Court may provide remedies, and social dialogues can arouse much needed discussion to pave a way forward in espousing practicable change. Therefore, the summation from all this is that, majoritarianism is vital. However, it is not an absolute right and has to be reconsidered. This does not entail renouncing it, but transforming it to ensure that it does not cause unfair and adverse results.

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