IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA87/2015

In the matter between:

SOUTH AFRICAN CORRECTIONAL SERVICES WORKERS UNION (SACOSWU)	**Appellant**
and	
POLICE AND PRISONS CIVIL RIGHTS UNION (POPCRU)	**First Respondent**
MINISTER OF CORRECTIONAL SERVICES	**Second Respondent**
LGP LEDWABA N.O.	**Third Respondent**
GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL	**Fourth Respondent**

Heard: **15 November 2016**

Delivered: **31 May 2017**

Summary: POPCRU concluded an agreement establishing representation thresholds with the Department of Correctional Services (DCS) for the acquisition of s 12, 13 and 15 organisational rights by minority trade unions in the workplace. Thereafter the DCS concluded a collective agreement with the appellant, SACOSWU, a minority union which had not attained the stipulated representativeness threshold, granting to the union stop order facilities for a limited period and the right to represent members in grievance and disciplinary proceedings. POPCRU referred a dispute concerning the interpretation and application of its collective agreement with the DCS to the

GPSSBC for conciliation and then arbitration. The arbitrator, relying on the decision in *Bader Bop* dismissed POPCRU's application. On review, the Labour Court found that the arbitrator's reliance on *Bader Bop* constituted an error of law in that in that matter no threshold agreement applied. Since the agreed threshold had not been achieved by SACOSWU, the Court found that the DCS was not entitled to conclude a collective agreement with SACOSWU. The award of the arbitrator was set aside and substituted with an order declaring the SACOSWU collective agreement invalid and setting it aside, with it declared that SACOSWU was not entitled to exercise organisational rights in the DCS or conclude a collective agreement with the DCS until the agreed representation threshold had been achieved.

On appeal: the decision of the Labour Court was set aside on the basis that s 20 provides that nothing in Part A of Chapter III, which must include a s 18(1) threshold agreement, precludes the conclusion of a collective agreement that regulates organisational rights. This accords with the recognition that minority unions are entitled to have access to the workplace so as to challenge the hegemony of majority unions, at least to represent their members. On the same basis, the deduction of trade union subscriptions for a limited period was permissible. The appeal was consequently upheld with costs.

Coram: Ndlovu, Coppin JJA *et* Savage AJA

JUDGMENT

SAVAGE AJA:

Introduction

[1] This appeal is concerned with whether an employer is precluded from according certain limited organisational rights to a minority union when it falls short of the representation threshold agreed between the employer and a majority trade union in the workplace in terms of s18(1) of the Labour Relations Act 66 of 1995 (LRA). In a dispute concerning the interpretation and application of the applicable threshold agreement, the third respondent (the arbitrator) found that the employer was entitled by virtue of s20 to enter into a

collective agreement with a minority union in spite of a representation threshold having been agreed in terms of s18(1). On review, the Labour Court (Snyman AJ) set aside the arbitration award on the basis that the threshold agreement was binding on the employer and the s20 agreement with the minority union was declared invalid and unenforceable.

[2] At the outset of the hearing and without opposition, the appeal was reinstated in accordance with the Rules of this Court. This followed a limited delay having been condoned in the filing of the notice of appeal and the appeal record, the result of an error made in calculating the days within which to file these documents.

Background

[3] The Department of Correctional Services (DCS) is a party to two public sector bargaining councils, the Public Sector Coordinating Bargaining Council (PSCBC) and the General Public Service Sectoral Bargaining Council (GPSSBC), as well as its own central bargaining forum, the Department Bargaining Chamber (DBC), in which collective bargaining is conducted. Three collective agreements concluded in these structures are relevant for current purposes:

10.1 Resolution 7 of 2001 was concluded between the Police and Prisons Civil Rights Union (POPCRU), as the majority trade union, the trade union Democratic Nursing Organisation of South Africa (DENOSA) and the DCS to establish representation thresholds in the DBC. Paragraph 3 of this resolution provides that the threshold for admission of a single trade union as a party to the DBC is a minimum of 9000 members, or where unions act jointly, 4500 members each. The agreement binds the parties to it "*and all employees who are not members of a registered trade union admitted to the department council, as well as members of registered trade unions admitted to the council who are not parties to this agreement"*;

10.2 Resolution 1 of 2006 regulates disciplinary and grievance proceedings, including in the DCS. In terms of paragraph 7.1.3.3, only a recognised

trade union admitted to the DBC may represent employees in the workplace. This resolution binds the employer, employees who are members of the trade union parties to the agreement and employees who are not members of the trade union "*but who fall within the registered scope of the chambers"*; and

10.3 Resolution 3 of 2006 in which issues of recognition were agreed, including the implementation of a procedure manual which binds all employees in the DBC as a bargaining unit, whether or not employees are members of POPCRU as the majority trade union. This resolution regulates organisational rights, including the election of shop stewards and the deduction of subscriptions, with only trade unions admitted to the DBC entitled to exercise rights in terms of paragraph 5.2.1 of the procedure manual.

[4] The South Africa Correctional Services Workers Union (SACOSWU), which was registered as a trade union by the Registrar of Labour Relations on 31 August 2009, is a minority trade union in the DCS with approximately 1500 members. In late 2009, SACOSWU sought the DCS to allow it to represent its members in disciplinary and grievance proceedings and for its union subscription fees to be deducted by the DCS from SACOSWU's members for a limited period until Treasury was able to take over this function. When these demands were not acceded to, SACOSWU referred a complaint to the International Labour Organisation (ILO) and the Office of President of the Republic of South Africa on 25 March 2010.

[5] On 5 November 2010, the then National Commissioner of Correctional Services, Mr T S Moyane, informed SACOSWU in writing that it would be granted the right to represent members in internal disciplinary and grievance hearings and that the DCS would assist the union with deductions from its members until the union had finalised "*the process of Magnetic Tape with Treasury*" within six (6) months. This agreement constituted a collective agreement as defined in s213 of the LRA, concluded between SACOSWU, as a registered trade union, and the employer.

[6] Dissatisfied with the conclusion of this agreement, in that SACOSWU had not reached the 9000-membership threshold agreed for admission into the DBC, in May 2011, POPCRU referred a dispute concerning *"the interpretation or application of a collective agreement*" under s24(1) to the GPSSBC for conciliation. The relief sought was -

> '*that the status of SACOSWU as a trade union within the Department be declared null and void; that SACOSWU be declared not having the threshold to be granted organisational rights'*.

[7] The dispute was not resolved at conciliation and POPCRU referred a dispute concerning the "*interpretation and implementation of Resolution 3/2006*" to arbitration seeking "*that the status of SACOSWU within the Department be declared null and void*". SACOSWU was joined as a party to the arbitration proceedings in August 2011. By the date of arbitration, SACOSWU no longer required the DCS to deduct subscriptions on its behalf as the six-month period agreed had since elapsed.

[8] By agreement between the parties, a stated case was presented at arbitration with the relief sought by POPCRU being a determination that:

10.1 SACOSWU was not entitled to exercise any of the organisational rights provided in sections 12, 13, 14, 15 or 16 of the LRA in the workplace of the DCS, either in terms of Chapter III Part A of the LRA or *"outside"* the provisions thereof*;* and

10.2 the decision of the DCS to grant SACOSWU the rights mentioned in its letter of 5 November 2010 was invalid and unenforceable.

[9] POPCRU contended that the DCS had contravened the collective agreements to which it was bound in affording SACOSWU the rights that it had. The DCS submitted that there was nothing in law to prohibit the grant of such rights to SACOSWU in that it had not prevented the exercise of statutory organisational rights by representative trade unions. SACOSWU approached the matter on the basis that the collective agreement it had concluded with the DCS was one in terms of s20 of the LRA and that the organisational rights

granted to it were outside of the ambit of Part A of Chapter III of the LRA, but that Part A, in any event, did not preclude the conclusion of such an agreement with a minority union.

[10] The arbitrator, relying on the decision of the Constitutional Court in *NUMSA v Bader Bop (Pty) Ltd (Bader Bop),* [1] found that despite the collective agreements entered into between the DCS and POPCRU, s23(5) of the Constitution of the Republic of South Africa, 1996 and s20 of the LRA, entitled SACOSWU, as a minority and unrepresentative trade union, to engage in collective bargaining with the employer and conclude a collective agreement with the DCS.

[11] The arbitrator approached the matter on the basis that the LRA should not be interpreted to preclude non-representative unions from obtaining organisational rights, either by agreement with the employer or through industrial action, since the statute is capable of a broader interpretation that does not limit fundamental rights, and the broader interpretation should be preferred. SACOSWU was therefore found to be entitled to exercise any of the organisational rights provided in ss12 to 16 of the LRA in the workplace of DCS and that the collective agreement entered into between SACOSWU and the DCS was both valid and enforceable.

Judgment of the Labour Court

[12] Aggrieved with the decision of the arbitrator, and in an application to the Labour Court to review that decision, POPCRU sought an order -

14.1 declaring that the DCS and SACOSWU are not entitled to enter into a valid collective agreement in terms of which SACOSWU is granted any of the organisational rights provided for in sections 12 to 16 of the LRA;

14.2 setting aside the collective agreement concluded between the DCS and SACOSWU in terms of which SACOSWU is granted the organisational rights provided for in sections 12 to 16 of the LRA;

[1] 2003 (3) SA 513 (CC); (2003) 24 ILJ 305 (CC); 2003 (2) BCLR 182 (CC); [2003] 2 BLLR 103 (CC).

14.3 declaring that SACOSWU is not entitled to exercise any of the organisational rights provided in section 12 to 16 of the LRA in the workplace of the second respondent, either in terms of Chapter III, Part A of the LRA, or "outside" the provisions of thereof.

Alternatively,

14.4 that the dispute be referred back to the GPSSBC to be determined afresh by an arbitrator other than the third respondent.

[13] The Labour Court in its judgment (reported as *POPCRU v Ledwaba NO and others*)[2] distinguished the facts in this matter from those in *Bader Bop,* in which no threshold agreement existed*,* finding that the arbitrator's reliance on that decision was a fundamental error of law which rendered the arbitration award reviewable. The principle of majoritarianism was stated to permeate the collective bargaining provisions of the LRA, with s18 permitting thresholds of representativeness to be agreed for ss12, 13 and 15 organisational rights so as to regulate the admission of trade unions to the bargaining relationship and avoid a proliferation of small trade unions.

[14] The Labour Court found that the collective agreement entered into with SACOSWU in terms of s20 was "*entirely incompatible"* with the agreement entered into with POPCRU in terms of s18(1) and that the two agreements could not exist in conjunction with one another. This was so in that the agreement in terms of s18(1) established a representation threshold in order to be admitted to the DBC and that agreement was extended to non-parties and bound SACOSWU; further, that it was only on admission to the DBC that the rights sought by SACOSWU could be granted; the right to trade union representation in disciplinary proceedings was specifically limited to trade unions admitted to the DBC and had been extended to non-parties; the POPCRU collective agreements preceded that of SACOSWU and created an existing dispensation which must be upheld; that dispensation bound non-parties under s23(1)(d); and since POPCRU is a majority union, the agreements with it must receive priority given the principle of majoritarianism.

[2] [2013] 11 BLLR 1137 (LC).

The DCS, in concluding an agreement with SACOSWU, was found to have acted in breach of the collective agreement entered into with POPCRU, which agreement was binding on SACOSWU's members. Since SACOSWU as a minority and unrepresentative union was not entitled to conclude a collective agreement with the DCS in which it was granted the organisational rights it sought, the collective agreement entered into "*cannot be allowed to stand*" and was found by the Labour Court to be invalid and unenforceable.

[15] The arbitration award was consequently set aside and substituted with the following order:

> '*(1) The collective agreement concluded between SACOSWU and the Department of Correctional Services in terms of which SACOSWU was granted and afforded organisational rights is declared to be invalid and set aside.*
>
> *(2) SACOSWU is not entitled to exercise organisational rights in the Department of Correctional Services unless SACOSWU complies with the threshold of representativeness and is admitted to the Department Bargaining Council, as specified in resolution 7 of 2001 dated 8 November 2001, for as long as this resolution remains valid and binding.*
>
> *(3) SACOSWU is not entitled to conclude a collective agreement with the Department of Correctional Services on organisational rights in terms Section 20 for as long as the Procedure Manual as contained in resolution 3 of 2006 remains valid and binding.'*

Submissions on appeal

[16] Although wider relief was sought at arbitration, the parties agree that the dispute concerns the question whether the DCS was entitled to grant organisational rights to SACOSWU that can be the subject of a s18(1) collective agreement, namely, s12, s13 and s15 rights, when threshold agreements had been entered into between the DCS and POPCRU and other unions which were binding on non-parties under the provisions of s23(1)(d). Only s12 and s13 rights are in issue in this matter, with s15 rights (i.e.

pertaining to leave for trade union activities) not having been sought by SACOSWU.

SACOSWU's submissions

[17] It was contended for SACOSWU that s18 does not regulate the entire collective bargaining system, as the existence of s20 confirms, and that, in any, event trade unions, and not employees, exercise organisational rights, with a threshold agreement applying to trade unions and not employees. Despite the existence of the s18(1) threshold agreement entered into between the DCS and POPCRU, the DCS was not prevented from granting SACOSWU organisational rights since s20[3] is permissive and s18(1)[4] means no more than that, on reaching an agreed threshold a union is automatically entitled to ss 12, 13 and 15 organisational rights without being required to bargain for them. An employer is therefore not obliged to deny such rights to a minority union that has bargained for, or engaged in industrial action to obtain them. If an agreement regulating organisational rights was rendered impermissible by a s18 threshold agreement, no purpose would be served by s20. Since the LRA can and must be read to avoid the limitation of fundamental rights,[5] nothing prevented the DCS from granting organisational rights to the union if it chose to do so. *Bader Bop* confirms that the principle of majoritarianism may not seek to eliminate minority unions or undermine voluntarism.

[18] Reliance was placed on *Transnet SOC Ltd v National Transport Movement (Transnet)*[6] in which a union, not party to a threshold agreement and not bound by it, was entitled to strike in support of a demand for organisational rights. While a minority union cannot strike over an issue regulated by a collective agreement, the reference by the Labour Court to s65(3)(a), it was submitted, was wrong in that the s18 threshold agreement could not regulate

[3] Section 20 reads: "*Nothing in this Part precludes the conclusion of a collective agreement that regulates organisational rights*."
[4] Section 18(1) reads: "*An employer and a registered trade union whose members are a majority of the employees employed by that employer in a workplace, or the parties to a bargaining council, may conclude a collective agreement establishing thresholds of representativeness required in respect of one or more of the organisational rights referred to in sections 12, 13 and 15."*
[5] At para 46.
[6] [2014] 1 BLLR 98 (LC).

the issue in dispute between the DCS and SACOSWU. In any event, it was submitted that s14(4)(a) entitles a trade union representative to represent members in grievance and disciplinary proceedings and a s18(1) agreement did not apply to s14. Issue was also taken with the competence of the Labour Court to set aside the collective agreement between the DCS and SACOSWU in a review application under s145 when the arbitrator was required, in a s24(2) dispute, to decide whether SACOSWU was entitled to exercise organisational rights with no order was sought in terms of s158(1)(a)(iv) or s158(1)(h).

POPCRU's submissions

[19] POPCRU opposed the appeal on the basis that the DCS was not entitled to disregard a valid threshold agreement and conclude a collective agreement with SACOSWU as a minority union which has not achieved the agreed threshold. This was so in that s18(1) reflected a legislative policy choice in favour of majoritarianism, with s20 meaning no more than that, generally speaking, employers and unions are entitled to conclude collective agreements regulating the detail of organisational rights even if the union is not representative and without necessarily resorting to the procedure in s21(1).[7] To permit the DCS to enter into a collective agreement with SACOSWU, as a minority union which has not achieved the threshold, would render s18 nugatory and would fly in the face of the principle of majoritarianism, which is accorded primacy in the LRA. Furthermore, it was contended that constitutional rights are not necessarily best served by an interpretation of the LRA which permits a watering down of the principle of majoritarianism, since employee rights are best served by fewer but stronger unions.

[20] It was submitted that the decision in *Bader Bop,* which concerned the lawfulness of a strike, was distinguishable in that no threshold agreement had been entered into in that matter. Since the threshold agreement in the present matter was binding and had been extended to employees of the employer

[7] A procedure that permits a registered trade union to notify the employer in writing that it seeks to exercise organisational rights in a workplace.

who were not members of POPCRU, such members were also bound by the agreement. It followed, so the argument went, that SACOSWU as a minority union was prevented from bargaining over ss12, 13 and 15 rights and that the union's members would also have been precluded from strike action by virtue of s65(3)(a).

[21] Issue was also taken with the reliance placed by SACOSWU on s14 for the first time in this appeal, since the union neither qualifies as a majority union for purposes of s14, nor may it refer a dispute concerning organisational rights, referred to in the provision, to arbitration or adjudication. It was argued that *Transnet* is distinguishable in that it concerned the question whether a strike was unprotected, in that it sought to compel the employer to breach a collective agreement binding on it when non-union members were not bound by terms of the collective agreement.

Discussion

[22] On 19 February 1996, South Africa ratified both ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise [8] and Convention No. 98 on the Right to Organise and Collective Bargaining.[9] The ratification of these conventions accords with the s18 right of freedom of association in our Constitution, and the right to fair labour practices in s23, which includes the right of employees to form and join trade unions, to strike and the right of trade unions, employers and employers' organisations to bargain collectively.[10]

[23] The ILO relies on two supervisory bodies to implement the two Conventions: the Committee of Experts on the Application of Conventions and Recommendations and the Committee on Freedom of Association (CFA). These bodies take the view that the majoritarian system is compatible with

[8] No. 87 (1948) ratified by South Africa on 19 February 1996.
[9] No. 98 (1949) ratified by South Africa on 19 February 1996.
[10] Section 23(1) to (5) of the Constitution. The LRA is the national legislation contemplated in s 23(5) to regulate and promote orderly collective bargaining at sectoral level, with Chapter III of the Act concerned with collective bargaining.

freedom of association,[11] provided that minority unions are not prevented from functioning, from making representations on behalf of their members, and representing members in individual grievance disputes.[12] The CFA recognises that while it is generally to the advantage of workers and employers to avoid the proliferation of competing unions, a monopoly imposed by law is at variance with the principle of freedom of association,[13] with workers entitled to belong to other unions.[14] A distinction in levels of representation should, the CFA has found, therefore not result in the most representative being granted privileges which extend beyond that of priority in representation, nor should they deprive minority unions of the essential means for defending the occupational interests of their members, organising their administration and activities and formulating their programmes.[15] Furthermore, minority trade unions, who are denied the right to negotiate collectively, should be permitted to perform their activities so as at least to speak on behalf of their members and represent them in the case of an individual claim or grievance.[16]

[24] The legislative choice made in favour of majoritarianism and against the proliferation of trade unions in the workplace is evident in Part A of Chapter III of the LRA. While s11 defines a "*representative trade union*" for purposes of the Part as "*a registered trade union, or two or more registered trade unions acting jointly, that are sufficiently representative of the employees employed by an employer in a workplace",* s18(1) permits a trade union whose members are either a majority, or are parties to a bargaining council, to establish representativeness thresholds for the enjoyment of ss12, 13 and 15 organisational rights.[17]

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[11] Cohen, Tamara "Limiting Organisational Rights of Minority Unions: *Popcru v Ledwaba* 2013 11 BLLR 1137 (LC) 2014" [2014] PER 60; Vol 17(5) with reference to Gernogon, Odero and Guido 2000 www.ilo.org.

[12] ILO *Freedom of Association: Digest of Decisions and Principles (ILO Geneva 2006) 5th ed* at para 829 (*Digest)*.

[13] *Digest (op cit)* at para 320. See 1996 *Digest* at para. 288; and 338th Report, Case No. 2348, para 995).

[14] *Digest (op cit)* at para 358; See 1996 *Digest* at para 312.

[15] *Digest (op cit)* at para 346. See 1996 *Digest* at para 309; 332nd Report, Case No. 2216, at para 908; and 337th Report, Case No. 2334 at para. 1219.

[16] *Digest (op cit)* at paras 359 and para 975. See 1996 *Digest* at para. 313; 336th Report, Case No. 2153, at para 168 and 300th Report, Case No. 1741, at para 55.

[17] Section 18(1) reads:

[25] However, also in Part A, is s20 which provides that:

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

[26] *Bader Bop* was concerned with the right to strike in support of a minority union's demand for the recognition of shop stewards and the right to represent its members in disciplinary and grievance proceedings, in circumstances where no threshold agreement existed. In that matter, the Court rejected as "*inappropriate"* a narrow reading of section 20 in -

> '…*an Act committed to freedom of association and the promotion of orderly collective bargaining, which requires that employers and unions should have freedom to conclude agreements on all matters of mutual interest'.*[18]

[27] While recognising that the rights conferred by Part A of Chapter III may be regulated by the collective agreements contemplated by section 21,[19] the Court stated that s20 serves as –

> '…*express confirmation of the internationally recognised rights of minority unions to seek to gain access to the workplace, the recognition of their shop-*

'An employer and a registered trade union whose members are a majority of the employees employed by that employer in a workplace, or the parties to a bargaining council, may conclude a collective agreement establishing a threshold of representativeness required in respect of one or more of the organisational rights referred to in sections 12, 13 and 15.'

This is provided that such thresholds in terms of s 18(2) '…a*re applied equally to any registered trade union seeking any of the organisational rights referred to in that subsection'.*

[18] *Bader Bop (op cit)* at para 41.

[19] A registered trade union may in terms of s 21(1) *"notify an employer in writing that it seeks to exercise one or more of the rights conferred by this Part in a workplace."* In considering a dispute, a commissioner is required –

'(i) to minimise the proliferation of trade union representation in a single workplace and, where possible, to encourage a system of a representative trade union in a workplace; and

(ii) to minimise the financial and administrative burden of requiring an employer to grant organisational rights to more than one registered trade union.'

Section 21(8)(b) also requires consideration as to the nature of the workplace, the rights that the union seeks to exercise, the sector and the organisational history and composition of the workplace. Subsections 21(8A) – (8D) were inserted, with effect from 1 January 2015, into the provision. S 21(8C) permits a commissioner to grant ss 12, 13 or 15 rights to a registered trade union, or two or more unions acting jointly, where thresholds of representativeness established by a collective agreement in terms of s 18 are not met, if all parties to the collective agreement have been given an opportunity to participate in the arbitration proceedings; and the trade union(s) represent a significant interest, or a substantial number of employees in the workplace.

stewards as well as other organisational facilities through the techniques of collective bargaining.'[20]

[28] The Court there also found that -

'…*a majoritarian system can operate fairly only in accordance with certain conditions. It must allow minority unions to co-exist, to organise members, to represent members in relation to individual grievances and to seek to challenge majority unions.*'[21]

[29] In *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others* (*AMCU*),[22] in a challenge to the constitutionality of s23(1)(d),[23] the Constitutional Court recognised majoritarianism as both a premise of and recurrent theme throughout the LRA.[24] Reference was made to *Kem-Lin Fashions CC v Brunton*[25] in which it was stated that the LRA reflected a policy choice that –

'…*the will of the majority should prevail over that of the minority. This is good for orderly collective bargaining as well as for the democratisation of the workplace and sectors. A situation where the minority dictates to the majority is, quite obviously, untenable. But also a proliferation of trade unions in one workplace or in a sector should be discouraged. There are various provisions in the Act which support the legislative policy choice of majoritarianism*.' [26]

[30] Yet, the Court in *AMCU* recognised that while the extension of collective agreements to non-parties under section 23(1)(d) gives enhanced power within a workplace to a majority union for powerful reasons that enhance

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[20] *Bader Bop (op cit)* at para 41.
[21] At para 52.
[22] (2017) 38 ILJ 831 (CC)
[23] Section 23(1)(d) provides that a collective agreement binds "*employees who are not members of the registered trade union or trade unions party to the agreement if- (i) the employees are identified in the agreement; (ii) the agreement expressly binds the employees; and (iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace*."
[24] At para 43.
[25] 2001 22 ILJ 109 (LAC).
[26] *A*t para 19. See too *Specialty Stores v SA Commercial Catering & Allied Workers Union* (1997) 18 *ILJ* 992 (LC); [1997] 8 BLLR 1099 (LC); and *SA Commercial Catering & Allied Workers Union v Speciality Stores Ltd* (1998) 19 *ILJ* 557 (LAC); [1998] JOL 2102 (LAC); [1998] 4 BLLR 352 (LAC).

employees' bargaining power through a single representative bargaining agent,[27] majoritarianism is not *"an implement of oppression" and* –

> *'…does not entirely suppress minority unions. Its provisions give ample scope for minority unions to organise within the workforce – and to canvass support to challenge the hegemony of established unions*'.[28]

[31] Part A of Chapter III expressly confers enforceable organisational rights on certain unions – unions that are either sufficiently representative (sections 12, 13 and 15) or majority unions (sections 14 and 16). These are enforceable rights and the mechanism for their enforcement is also provided for in Part A.[29] There is however nothing in Part A of Chapter III –

> '…*which expressly states that unions which admit that they do not meet the requisite threshold membership levels are prevented from using the ordinary processes of collective bargaining and industrial action to persuade employers to grant them organisational facilities such as access to the workplace, stop-order facilities and recognition of shop stewards. These are matters which are clearly of mutual "mutual interest" to employers and unions and as such matters capable of forming the subject matter of collective agreements*…'.[30]

[32] In finding the POPCRU threshold agreement in terms of s18(1) incompatible with the SACOSWU agreement, the Labour Court approached the matter on the basis that the threshold agreed by POPCRU and the DCS closed the door on any access to the workplace by SACOSWU, as a minority trade union. S18(1) provides that:

> '*An employer and a registered trade union whose members are a majority of the employees employed by that employer in a workplace, or the parties to a bargaining council, may conclude a collective agreement establishing thresholds of representativeness required in respect of one or more of the organisational rights referred to in sections 12, 13 and 15.'*

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[27] At para 44.
[28] At para 55.
[29] *Bader Bop* at para 40. A 'collective agreement' is in terms of s 213 a written agreement concerning the terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions and one or more employers or registered employers' organisations.
[30] Ibid.

[33] It follows that the agreed threshold which may be the subject of a s18(1) agreement has the effect of giving meaning to what constitutes "*sufficiently representative"*, as provided in s11, in order for a union to be conferred ss12, 13 and 15 organisational rights in a workplace. Where a union has achieved the threshold agreed by way of a s18(1) agreement, ss12, 13 and 15 rights will then as a matter of right be conferred on the union. However, as was made clear in *Bader Bop,* there is nothing in Part A of Chapter III which expressly states that unions which do not meet the required threshold are prevented from using the ordinary processes of, as is relevant for current purposes, collective bargaining to persuade the employer to grant such rights to the minority union.

[34] Furthermore, since s20 provides that "*nothing"* in Part A precludes the conclusion of an agreement regulating organisational rights, on a plain reading of the provision "*nothing"* appears to me to mean nothing in the Part, including a s18(1) agreement. To find differently would amount to a narrow reading of s20, which *Bader Bop* found to be "*inappropriate"*. This means that even where a s18(1) agreement exists, this does not preclude the conclusion of a s20 collective agreement between an employer and a minority union which has bargained for the rights contained in that agreement. Were s18(1) to be interpreted so as to bar the conclusion of such an agreement under s20, this would, as was cautioned in both *Bader Bop* and *AMCU*, serve to disregard the "*internationally recognised rights of minority unions to seek to gain access to the workplace",*[31] to organise within the workforce or to canvass support to challenge the hegemony of established unions.[32]

[35] There is therefore merit in SACOSWU's contention that the minimum threshold agreed in a s18(1) agreement to obtain ss12, 13 or 15 organisational rights, establishes a minimum, which, once reached, permits the rights to be conferred by the employer on such a union with no need to bargain for them. Having regard to s20, and despite a s18(1) agreement having been concluded, a minority trade union is not barred from seeking to

[31] *Bader Bop* at para 64.
[32] At para 55.

be granted ss12, 13 or 15 organisational rights and to conclude a collective agreement with the employer in order to record the grant of any such rights.

[36] While s 23(1) provides that a collective agreement is binding on the parties to it, a threshold agreed by an employer obliges the employer to confer ss12, 13 and s15 rights upon a union which had achieved the threshold agreed in the s18(1) agreement. It does not bar the employer from bargaining collectively with a minority union which seeks to have any organisational rights conferred on it, nor does the existence of a s18(1) agreement oblige the employer to deprive a minority union of any such organisational rights.

[37] That this is so is starkly highlighted by the issue of representation of members of minority unions in individual disciplinary or grievance proceedings. Since a majoritarian system can only operate fairly where a minority union is allowed to co-exist, including "…*to represent members in relation to individual grievances"*,[33] to deny an employee a choice and impose on him or her representation by a majority union, of which that employee is not a member, is conceivably contrary to and in breach of the employee's constitutional rights to freedom of association and to join a trade union and the right in s23(1) to fair labour practices.

[38] An employer may determine whether it wants to bargain with a minority union, the extent to which it will do so and whether it will conclude a collective agreement with the minority union. This includes bargaining collectively on the grant of any organisational rights to that union. The LRA does not prohibit the bargaining with a minority union on such matters, nor does the employer breach an existing s18(1) collective threshold agreement in doing so. This is so, in that, the effect of the s18(1) threshold which has been agreed to, is to oblige the employer to confer ss12, 13 and 15 rights upon unions that had achieved that threshold, but not to constrain the employer's entitlement to bargain with those unions that have not.

[39] It is so that the employer's election to bargain with the minority union in such circumstances may have consequence for the relationship with the majority

[33] *AMCU* at para 52.

union, and that such consequence may play out either in the course of the collective bargaining relationship, or through the exercise of other legal remedies. However, since the threshold agreement does not provide a bar to the conclusion of a s20 collective agreement with the minority union regarding ss12, 13 or 15 organisational rights, the existence of the threshold does not distinguish the matter from *Bader Bop.* This is so given the recognition that minority unions are entitled to co-exist, to organise members, to represent members in relation to individual grievances and to seek to challenge majority unions.'[34]

[40] It follows that the Labour Court erred in approaching the matter on the basis that s18 seeks to avoid the proliferation of minority trade unions in a workplace, through regulating the admission of trade unions to the bargaining relationship and that the provision would serve no purpose if s20 was permitted to override it. The admission of trade unions to the bargaining relationship at different levels involves the exercise of power as between the parties and the balancing of competing constitutional and other legal rights and obligations. An agreed threshold does not firmly bar a minority trade union from having access to the workplace. This is so given the recognition that the majoritarian system is compatible with the right to freedom of association, provided that minority unions are not prevented from functioning, making representations on behalf of their members, and representing members in individual grievance disputes. It follows that the s18(1) agreement was correctly interpreted by the arbitrator to permit the conclusion of the agreement with SACOSWU allowing the union s12 rights, in order to serve members' interests by representing employees in disciplinary and grievance proceedings.[35] Having found this to be so, it is not necessary to deal with

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[34] At para 52.

[35] Section 12 reads:

"*(1) Any office-bearer or official of a representative trade union is entitled to enter the employer's premises in order to recruit members or communicate with members, or otherwise serve members' interests.*

(2) A representative trade union is entitled to hold meetings with employees outside their working hours at the employer's premises.

(3) The members of a representative trade union are entitled to vote at the employer's premises in any election or ballot contemplated in that trade union's constitution.

(4) The rights conferred by this section are subject to any conditions as to time and place that are reasonable and necessary to safeguard life or property or to prevent the undue disruption of work.'

SACOSWU's contention that s14 provided a right to such representation, save to state that the union's reliance on that provision was misplaced in the circumstances of this matter.

[41] Turning to the s13 right, to have subscriptions deducted for a limited period only, [36] by the time the matter came before the Labour Court the limited period, for which the deduction of union subscriptions had been sought, had elapsed. Nevertheless, the parties agreed that the issue was not moot insofar as the principle involved remained at stake.

[42] The deduction of subscriptions is pivotal to the continued operation of a trade union. This includes a minority trade union, which when subscriptions are deducted, is placed in a position in which it may co-exist within the majoritarian system.[37] The ILO has recognised the deduction of trade union subscriptions by employers as a matter which should be dealt with through collective bargaining between employers and trade unions.[38]

[43] SACOSWU sought the deduction by DCS of subscriptions from its members by the DCS for a limited period only. For the reasons stated previously, the DCS was not prevented from acceding to that request by virtue of the s18(1) agreement and permitting such subscriptions for the limited period sought, in accordance with the applicable international standards. To have refused such request would have unduly restricted the SACOSWU's right of access, as a minority union, to the workplace. The determination of the arbitrator in that regard cannot be faulted.

[44] Turning to remedy, it fell to the arbitrator, in the interpretation of the s18(1) agreement, to determine whether that agreement barred the conclusion of an agreement with SACOSWU to exercise the rights sought by it, namely the right to represent its members in grievance and disciplinary proceedings and

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[36] Section 13(1) states:
"(1) Any employee who is a member of a representative trade union may authorise the employer in writing to deduct subscriptions or levies payable to that trade union from the employee's wages.'
The remaining sub-sections concern the authorisation, timing and deduction of monies and the remittance provided thereafter.
[37] *AMCU* at para 52.
[38] Para 481 Digest P100; See the 1996 *Digest*, para. 326; 300th Report, Case No. 1744, para. 99; and 323rd Report, Case No. 2043, para. 502.

the right to have subscriptions deducted for a limited period. The material before the arbitrator was insufficient to warrant a conclusion that SACOSWU was entitled to exercise wider s12 to s16 organisational rights in the workplace. As much was conceded by counsel for both parties and to this extent only the arbitration award falls to be substituted with an appropriate order.

[45] For all of the above reasons, the appeal must succeed. There is no reason in law or fairness why the costs of the appeal, including the costs of two counsel, should not follow the outcome.

Order

[46] In the result, an order is made as follows:

1. The appeal is upheld with costs, including the costs of two counsel.

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

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

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

2. There is no order as to costs.'

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Savage AJA

Coppin JA agrees. Sadly, Ndlovu JA passed away before the finalisation of this judgment.

APPEARANCES:

FOR THE APPELLANT:	J G Grogan & L Voultsos
	Instructed by Neville Borman & Botha
FOR THE FIRST RESPONDENT:	C E Watt-Pringle SC & N Dandadzi
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